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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

**PLANNED PARENTHOOD OF IDAHO, INC.)
and GLENN H. WEYHRICH, M.D.,)**

Plaintiffs,)

vs.)

**LAWRENCE WASDEN, Attorney General)
of the State of Idaho, and GREG BOWER,)
Ada County Prosecuting Attorney,)**

Defendants.)

CASE NO:

COMPLAINT

I. PRELIMINARY STATEMENT

1. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 to protect their rights and the rights of their minor patients from the Idaho Legislature's attempt to circumvent the prior ruling of this Court and violate those rights with the enactment of 2005 House Bill No. 351. See 2005 Idaho House Bill No. 351, amending Chapter 6, Title 18 of the Idaho Code sections 18-602, 18-604, 18-605, 18-609A, and 18-614 (A copy of the Act is attached as Exhibit A).

2. In particular, the Act contains two provisions that are virtually identical to provisions this Court already held were unconstitutional: (1) a requirement that a physician notify a parent after a minor has an abortion in a medical emergency situation; and (2) a requirement that a report be made to law enforcement if a minor who seeks a waiver of the parental consent requirement has engaged in criminal activity, which in Idaho includes all minors who engage in sexual activity. See Planned Parenthood of Idaho, Inc. v. Lance, No. 00-0353, slip op. (D. Idaho Dec. 20, 2001) (Williams, J.) (attached as Exhibit B). For all of the reasons identified by this Court, these provisions violate minors' rights. In addition, the Act is unconstitutional for reasons not yet addressed by this Court.

3. If it goes into effect, the Act will cause immediate and irreparable harm to the young women of Idaho seeking abortions.

4. In addition to temporary, preliminary, and permanent injunctive relief and a declaration that the Act is unconstitutional, Plaintiffs seek an immediate declaration that the Act, pursuant to Article III, section 22 of the Idaho Constitution, does not take effect until sixty days after the Idaho Legislature adjourns for the 2005 session because the Act does not contain a declaration of emergency.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this District pursuant to 28 U.S.C § 1391(b) because Plaintiffs and Defendants reside in the District of Idaho.

III. THE PARTIES

7. Plaintiff Planned Parenthood of Idaho, Inc. (“Planned Parenthood”) is a not-for-profit corporation organized under the laws of Idaho with health centers in Boise and Twin Falls. Planned Parenthood provides medical and educational services to women and men. Planned Parenthood provides a full range of reproductive and gynecological healthcare services, including pregnancy diagnosis and counseling, contraceptive counseling, provision of all methods of birth control, HIV/AIDS testing and counseling, treatment of minor sexually transmitted infections and uncomplicated urinary tract infections, and cancer screening. Planned Parenthood does not perform abortion services, but provides its patients with referrals to providers of those services. Planned Parenthood sues on behalf of itself and its minor patients.

8. Plaintiff Glenn H. Weyhrich, M.D., is a physician licensed to practice medicine in the State of Idaho, and is a board-certified obstetrician and gynecologist. He currently works part-time at a private ob/gyn practice in Boise. Dr. Weyhrich provides an array of medical services, including abortions through the sixteenth week of pregnancy as measured from the first day of the woman’s last menstrual period (“LMP”). Dr. Weyhrich sues on his behalf and on behalf of his minor patients seeking abortions.

9. Defendant Lawrence Wasden is the Attorney General of the State of Idaho. He is the chief legal officer for the state and is charged by law with enforcement of the Act,

supervision of all county attorneys and defense of the constitutionality of the laws of Idaho. Defendant Wasden, whose office is in Boise, is sued in his official capacity, as are his agents and successors in office.

10. Defendant Greg Bower is the Ada County Prosecuting Attorney. He is charged by law with enforcement of the Act. He is sued in his official capacity, as are his agents and successors in office.

IV. STATUTORY FRAMEWORK

A. History of the Act

11. In 2000, the Idaho Legislature enacted a requirement that prior to obtaining an abortion, a minor must obtain the consent of a parent or a court order waiving the consent requirement (*i.e.*, a “judicial bypass”). See 2000 Idaho Senate Bill No. 1299, amending Chapter 6, Title 18 of the Idaho Code to add new sections 18-609A and 18-614 and adopted by the Idaho Legislature in February 2000 (A copy of the 2000 Act is attached as Exhibit C). Plaintiffs brought an action in this Court seeking declaratory and injunctive relief against enforcement of the 2000 Act. Portions of the 2000 Act were preliminarily enjoined by an order of this Court dated September 1, 2000.

12. In response to Plaintiffs’ lawsuit and this Court’s order, the Idaho legislature amended the law. See 2001 Idaho House Bill No. 340, amending Chapter 6, Title 18 of the Idaho Code, Sections 18-605, 18-609A and 18-614 and adopted by the Idaho Legislature in March 2001 (A copy of the 2001 Act is attached as Exhibit D). While the 2001 Act altered some of Plaintiffs’ original claims, it did not cure the constitutional defects in the statute and some of the new provisions added other constitutional problems. Plaintiffs amended their complaint and

sought a new preliminary injunction. This Court continued its injunction against one provision of the law and enjoined a new provision.

13. On September 4 through 7, 2001, this Court conducted a trial, and on December 20, 2001, it ruled. See Ex. B. This Court held four of the law's restrictions unconstitutional, ruled that those restrictions were severable, and upheld the remainder of the law. Three of the enjoined provisions related to the judicial bypass procedure: (1) a provision restricting where a minor could file her bypass petition; (2) a provision giving a minor only two days from denial of a bypass petition to file an appeal; and (3) a requirement that the judge hearing the bypass petition report criminal activity, which in Idaho includes all minors who engage in sexual activity. The fourth enjoined provision was required that a physician notify a parent after a minor had an abortion in a medical emergency situation.

14. Both parties appealed this Court's ruling and on appeal, a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit ruled that the entire Idaho law was unconstitutional because it did not contain an adequate medical emergency exception. See Planned Parenthood of Idaho v. Wasden, 376 F.3d 908 (9th Cir. 2004). The Ninth Circuit did not reach any of the other issues raised on appeal; having held the entire statute unconstitutional for lack of an adequate medical emergency exception, it was not necessary to do so.

15. Defendants sought rehearing and rehearing *en banc*. The panel voted unanimously to deny that request, and no judge of the full circuit court requested a vote on whether to rehear the case *en banc*. Defendants then petitioned for certiorari, and that petition was denied on March 28, 2005.

B. The Act

16. In response to those rulings, the Legislature enacted the Act, which provides in relevant part that:

No person shall cause or perform an abortion upon a minor unless . . . [t]he attending physician has secured the written informed consent of the minor and the written informed consent of the minor’s parent.

Idaho Code § 18-609A(1)(a). The parental consent requirement is waived if the minor is emancipated and the attending physician has received written proof of emancipation; the minor is found by a court to be mature, of sound mind and having sufficient intellectual capacity to consent to the abortion for herself (as described in Idaho Code § 18-609A(1)(b)); or a court has found that causing or performing the abortion, despite the absence of consent by a parent, is in the best interests of the minor and issued an order granting permission for the abortion (as described in Idaho Code § 18-609A(1)(b)). Idaho Code § 18-609A(1)(a)(ii) – (iv). The Act also waives the parental consent requirement before an abortion when there is a medical emergency; however, the physician must immediately notify a parent after the procedure, or in certain circumstances, file a petition pursuant to Idaho Code § 16-1605. Idaho Code § 18-609A(1)(a)(v).

1. Post-Emergency Parental Notice

17. The Act requires that “immediately” after an abortion performed in the case of medical emergency, the physician must “attempt to provide a parent of an unemancipated minor actual notification of the medical emergency.” Idaho Code § 18-609A(1)(a)(v). If a parent cannot be “immediately contacted” for actual notification, the physician must “with due diligence, attempt to provide actual notification to a parent for an eight (8) hour period” following the abortion. *Id.* Notwithstanding those requirements, a physician who performs an

abortion on a minor in the case of medical emergency must provide actual notification to a parent within twenty-four hours of the procedure by one of several means set forth in the Act. See id.

18. If the physician:

reasonably believes that the minor is or will be homeless or abandoned so that the parents cannot be readily found or that the minor has suffered or will suffer abuse or neglect such that the minor's safety would be jeopardized if a parent were notified that the abortion was caused or performed, or reasonably believes that the best interests of the child require that notification to a parent that the abortion was caused or performed must be withheld,

he or she must file a petition pursuant to section 16-1605, Idaho Code. Idaho Code § 18-609A(1)(a)(v). The physician's duty to notify a parent is relieved only "[u]pon adjudication that the minor comes within the purview of chapter 16, title 16, Idaho code or upon a finding that the best interests of the child require that a parent not be notified." Id.

19. Under Idaho law, the filing of petition pursuant to 16-1605 triggers an adjudicatory hearing and a possible investigation. Idaho Code §§ 16-1608, 16-1609. The petition must also be served on the minor's parents. Idaho Code §§ 16-1605, 16-1606.

2. Judicial Bypass

20. Subsection (1)(b) of Idaho Code § 18-609A purports to provide for a confidential proceeding by which a court may grant an order allowing a minor who is determined to have sufficient maturity to "self-consent" to the abortion or giving judicial consent to the abortion because it is in her best interests.

21. The Act requires that a guardian ad litem "be appointed to seek the best interests of the minor, investigate the circumstances of the minor and make a report to the court at the hearing which may be submitted into evidence." Idaho Code § 18-609A(1)(b)(i). The Act states that the "guardian ad litem shall not take any action that compromises the confidentiality of the

minor regarding her decision to obtain an abortion or the confidentiality of her decision to seek an order from the court.” Idaho Code § 18-609A(1)(b)(i). The Act does not specify what the guardian’s “investigat[ion]” entails or how an investigation shall proceed without compromising the minor’s confidentiality.

22. The Act provides that, at the bypass hearing, the court must hear the report of the guardian ad litem and other evidence related to, among other factors, “whether [the minor’s] sexual relations were forced or otherwise in violation of Idaho law other than section 18-6101 1., Idaho Code.” Idaho Code § 18-609(1)(b)(iii).

23. The Act further provides that “[i]f in investigating the circumstances of the minor, the guardian ad litem becomes aware of allegations which, if true, would constitute a violation of any section of title 18, Idaho Code, except section 18-6101 1., Idaho Code . . . such allegations shall be reported by the guardian ad litem to law enforcement or to the appropriate prosecuting attorney.” Idaho Code § 18-609A(1)(b)(iv).

24. Pursuant to Idaho law, “[a]ny unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be guilty of fornication.” Idaho Code § 18-6603.

25. In addition, the district court hearing the minor’s bypass decision must “ensure that the order [granting or denying the petition] is served upon the minor immediately after its entry.” Idaho Code § 18-609A(1)(b)(iv). A notice of appeal from an order issued in a bypass must be filed “within five (5) days from service upon the minor.” Idaho Code § 18-609A(1)(c).

3. Penalties

26. A physician who violates the Act is subject to professional discipline and civil penalties as well as criminal penalties of \$5000 and from two to five years in prison. See Idaho Code § 18-605.

27. The Act also imposes criminal penalties of \$5000 and up to five years in prison upon a physician's accomplices and accessories and any woman who "knowingly submits" to the abortion. See Idaho Code § 18-606.

28. The Act further provides that any person who is injured by the performing of an abortion on a minor in violation of the Act "shall have a private right of action to recover all damages sustained as a result of such violation, including reasonable attorney's fees if judgment is rendered in favor of the plaintiff." Idaho Code § 18-609A(3).

4. Effective Date

29. The Act states that it is to "be in full force and effect when the Attorney General of the State of Idaho drafts a proclamation indicating that the United States Supreme Court has denied a petition for certiorari in the case of Wasden v. Planned Parenthood of Idaho, Supreme Court Docket No. 04-703 and files the proclamation with the Secretary of State and the Secretary of State notifies the Idaho Code Commission of such action." House Bill No. 351, Section 8.

30. Article III, section 22 of the Idaho Constitution provides that "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." Idaho Const. art. III, § 22.

31. The Act, in its preamble or text, does not declare an emergency.

V. STATEMENT OF FACTS

32. According to the Idaho Department of Health and Welfare's Center for Vital Statistics and Health Policy, there were 829 induced abortions performed in the state of Idaho in 2002.

33. Abortions are only rarely performed in Idaho after the 16th week LMP. Of the abortions performed in 2002, only eleven were performed at 16 weeks LMP and greater, and of those eleven, only three were performed from 21 weeks LMP on. Generally, if a woman in Idaho is seeking to terminate her pregnancy after the 16th week LMP, she must travel to another state to obtain an abortion.

34. Abortion is a very safe procedure, but delay in performing an abortion increases the risk to the woman seeking to obtain the abortion. The increase in risk becomes statistically significant when delay reaches one week. Delays of any length may be sufficient to prolong a woman's pregnancy into the second trimester, thereby significantly increasing the cost, inconvenience, and risk associated with the procedure.

A. Parental Consent

35. Of the Idaho residents who obtained abortions in 2002, approximately 9 percent of them were women under the age of 18. These figures do not include minors from other states who obtained abortions in Idaho to whom the Act also applies.

36. When a minor does not involve a parent in her decision to terminate her pregnancy, she generally has compelling reasons. Such reasons include fear of physical violence against the minor or other family members; of being forced to leave home; of being forced to carry an unwanted pregnancy to term; of other punishment of the minor; or of causing other

problems between the minor and one parent or both parents or between the minor's parents. In addition, parents may refuse consent for an abortion, thus vetoing the minor's decision.

37. Minors seeking judicial bypasses have concerns about their confidentiality being breached and fear that others, including but not limited to, their parents, will learn that they are sexually active and that they intend to or have had an abortion. Minors often live with their parents and have school, family, and work responsibilities that make protecting their confidentiality difficult.

38. Minors seeking bypasses will fear that if a third party is "investigating" the circumstances surrounding their decision to seek a bypass and have an abortion, it will breach their confidentiality.

39. In almost all cases when a minor seeks a judicial bypass, she has engaged in consensual sex. Most minors do not want to see their partners become the subject of a report to law enforcement or a criminal investigation. They will also be concerned that a report or investigation will result in others, including but not limited to their parents, learning of the abortion or their sexual activity.

B. Medical Emergency

40. There are urgent medical situations that necessitate an immediate abortion. In these situations, delay of a couple of weeks or even a few days could place the health – or even the life – of the woman in jeopardy.

41. Some minors needing emergency abortions, like other minors, have compelling reasons for not involving a parent in their decisions to have abortions and/or are sufficiently mature to make those decisions without parental involvement.

CLAIMS FOR RELIEF

COUNT I – RIGHT TO DUE PROCESS OF LAW

42. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶1-41 above as if set forth fully herein.

43. The Act violates the rights of Plaintiffs' patients to privacy as guaranteed by the Fourteenth Amendment to the United States Constitution in, including but not limited to, the following ways:

- a) by failing to provide a confidential judicial bypass alternative to parental consent; and
- b) by requiring parental notification in the case of a medical emergency.

COUNT II – RIGHT TO DUE PROCESS OF LAW

44. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶1-43 above as if set forth fully herein.

45. The Act violates the rights of Plaintiff providers to due process as guaranteed by the Fourteenth Amendment to the United States Constitution by containing vague and/or conflicting terms that fail to give clear notice of what conduct is prohibited and/or required.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Issue a declaratory judgment that 2005 Idaho House Bill No. 351, amending Chapter 6, Title 18 of the Idaho Code sections 18-602, 18-604, 18-605, 18-609A, and 18-614 and adopted by the Idaho Legislature in March 2005, violates the rights of Plaintiffs and their patients as protected by the Fourteenth Amendment to the United States Constitution and is therefore void and of no effect;

2. Issue temporary, preliminary, and permanent injunctive relief, without bond, restraining the enforcement, operation and execution of 2005 Idaho House Bill No. 351, amending Chapter 6, Title 18 of the Idaho Code sections 18-602, 18-604, 18-605, 18-609A, and 18-614 and adopted by the Idaho Legislature in March 2005, by enjoining Defendants, their agents, employees, appointees or successors from enforcing, threatening to enforce or otherwise applying the provisions of that Act;

3. Issue a declaratory judgment that 2005 Idaho House Bill No. 351, amending Chapter 6, Title 18 of the Idaho Code sections 18-602, 18-604, 18-605, 18-609A, and 18-614 and adopted by the Idaho Legislature in March 2005, does not take effect until sixty days from the end of the 2005 session of the Idaho Legislature;

4. Grant Plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

5. Grant such further relief as this Court deems just and proper.

Dated: April __, 2005.

Respectfully submitted,

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