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U.S. COURTS
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

GLENN H. WEYHRICH, M.D., DUANE ST.
CLAIR, M.D., and PLANNED PARENTHOOD
OF IDAHO, INC.,

Plaintiffs,

vs.

ALAN G. LANCE, Attorney General of the
State of Idaho, and GREG BOWER, Ada
County Prosecuting Attorney, in their official
capacities, and their successors in office,

Defendants.

CW 98-0117-S-800
CASE NO:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the
above-named Defendants, their employees, agents, and successors in office, and in support
thereof state the following:

PRELIMINARY STATEMENT

1. This action, arising under the United States Constitution and 42 U.S.C. § 1983, challenges the constitutionality of Idaho House Bill 576 (to be codified at Idaho Code § 18-613) (hereinafter the Act). The Act took effect on March 16, 1998, when Governor Batt signed the Act into law. A copy of the Act is attached as Exhibit A.

2. Plaintiffs seek declaratory and injunctive relief against the Act, which bans what the legislature calls "partial-birth abortion," makes the performance of such abortions a felony punishable by not less than two-years imprisonment and/or a fine, and subjects persons who perform such abortions to civil liability. The statutory definition of a "partial-birth abortion" is so broad and imprecise as to encompass the safest and most common abortion procedures. The ban applies at all stages of pregnancy, without an exception to preserve the pregnant woman's health, and with an inadequate exception to preserve her life. The Act serves no legitimate state interest.

3. Because the Act has both the purpose and the effect of imposing an undue burden on the right of a woman to choose abortion prior to fetal viability; because its vague provisions fail to give physicians fair warning of which surgical procedures are prohibited; and because it does not adequately protect the lives and health of pregnant women, the Act violates the rights of Plaintiffs and their patients to privacy and due process guaranteed under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4). Plaintiffs' prayer for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rule 57 of the Federal Rules of Civil Procedure.

5. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

6. Plaintiff Glenn H. Weyhrich, M.D., is a physician licensed to practice in the State of Idaho and a board-certified obstetrician and gynecologist. He maintains a private ob/gyn practice in Boise. As part of this practice, Dr. Weyhrich performs abortions in the first and second trimesters of pregnancy. When performing abortions, Dr. Weyhrich uses surgical procedures that may fall within the proscriptions of the Act. Because Dr. Weyhrich reasonably fears criminal prosecution, loss of his license, and civil liability, he seeks declaratory and injunctive relief on his own behalf and on behalf of his patients.

7. Plaintiff Duane St. Clair, M.D., is a physician licensed to practice medicine in the State of Idaho and a board-certified obstetrician and gynecologist. Dr. St. Clair maintains a private ob/gyn practice in Boise. He typically performs abortions through the first trimester and, on occasion, for patients with maternal health problems or fetal abnormalities, at any time before viability. When performing abortions, Dr. St. Clair uses surgical procedures that may fall within the proscriptions of the Act. Because Dr. St. Clair reasonably fears criminal prosecution, loss of license, and civil liability, he seeks declaratory and injunctive relief on his own behalf and on behalf of his patients.

8. Plaintiff Planned Parenthood of Idaho ("PPI") is a private organization located in Boise. PPI provides high-quality, affordable family planning and reproductive health services, including gynecological and pelvic examinations, Pap smears and laboratory tests, contraceptive consultations and services, vasectomies, screening for and treatment of sexually transmitted diseases, pregnancy testing and counseling, and counseling and referrals for abortions. For its

patients who seek abortions, PPI makes referral to Idaho physicians who offer the service. All of the in-state referrals PPI makes for these abortions are to providers who perform procedures that may fall within the proscriptions of the Act. PPI reasonably fears criminal liability under the Act as an accessory. PPI sues on its own behalf and on behalf of its patients.

9. Defendant Alan G. Lance is the Attorney General of the State of Idaho. In that capacity he has supervisory authority over the enforcement of Idaho criminal law, including the Act. See Idaho Code § 67-1401. Defendant Lance is sued in his official capacity, as are his successors.

10. Defendant Greg Bower is the Ada County Prosecuting Attorney, with primary authority for the enforcement of Idaho criminal law in Ada County. See id. §§ 31-2227, 31-2604. Defendant Bower is sued in his official capacity, as are his successors.

BACKGROUND FACTS

The Act

11. The Act forbids any physician to "knowingly perform[] a partial-birth abortion." Idaho Code § 18-613(1). A "partial-birth abortion" is defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." Id. § 18-613(2)(a). "[V]aginally delivers a living fetus before killing the fetus" is defined to mean "deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion of the fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and which kills the fetus." Id. § 18-613(2)(b). The Act's prohibition on "partial-birth abortion" applies throughout pregnancy, regardless of fetal viability.

12. The Act provides a single limited exception to its sweeping prohibition. It allows only those "partial-birth abortions necessary to save the life of the mother when her life is

endangered by a physical disorder, illness or injury." Id. § 18-613(1). The Act criminally bans any abortion procedure that falls within the definition of "partial-birth abortion" even if it is necessary to preserve the woman's health, and even if it is necessary to save the woman's life because of a threat posed by something other than a physical disorder, illness, or injury. In addition, the exception applies only when a banned procedure is "necessary" to save the woman's life. Thus, if another procedure would save the woman's life, the Act requires that a physician employ it, even if it presents risks to her health and future fertility that are not posed by procedures made criminal by the Act.

13. Violation of the Act is a felony and subjects a physician to imprisonment for two to five years and/or a fine of up to \$5,000. Id. § 18-605. A physician convicted of a felony is also subject to discipline by the state board of medicine. Id. § 54-1814(1).

14. In addition to criminal penalties, the Act authorizes suits against a physician who performs a so-called "partial-birth abortion" for civil damages by both the "father of the aborted fetus, if married to the mother of the aborted fetus at the time of the abortion" and by the "maternal grandparents of the aborted fetus" if the mother is not at least eighteen. Id. § 18-613(3)(a). The plaintiff may seek "[m]oney damages for all mental and physical injuries suffered . . . as a result of the abortion" and "[m]oney damages equal to three (3) times the cost of performing the abortion procedure." Id. § 18-613(3)(b). The Act bars suit by the "father" and "maternal grandparents" only if they consented to the abortion or if the pregnancy resulted from the criminal conduct of the "father" or "maternal grandfather." Id. § 18-613(3)(a).

Abortions in Idaho

15. Abortion is one of the safest surgical procedures. Abortion has both a lower morbidity (non-fatal complication) rate and a lower mortality (death) rate than carrying a pregnancy through childbirth.

16. The rates of abortion-related morbidity and mortality increase, however, as the pregnancy advances. Accordingly, any delay in obtaining an abortion is harmful to the woman's health.

17. Most abortions performed in Idaho, as in the rest of the United States, are performed during the first trimester of pregnancy.

18. Abortions are performed for a wide range of deeply personal reasons. Many women seek abortion after the first trimester of pregnancy because a health problem may be caused or aggravated by the pregnancy; the fetus may be diagnosed with fatal or severe anomalies; the patient, for lack of resources, may have been unable to obtain health services at an earlier date; or the patient, because of irregular menstrual periods or other reasons, may not have recognized that she is pregnant until some weeks have passed.

19. While pregnancy presents health and life risks for all women, the risks are particularly significant for women with preexisting health conditions such as hypertension, heart disease, cancer, diabetes, and other physical and mental health disorders. Some women develop serious health problems because of their pregnancies, including gestational diabetes, preeclampsia, pregnancy-induced hypertension, and depression. Pregnancy presents particular health risks for young women.

20. Women unable to obtain an abortion in Idaho must travel to Salt Lake City, Portland, or Spokane for care. For some, the burdens of travel will delay the procedure, or be insurmountable, leaving the woman no choice but to carry to term.

Abortion Procedures

21. Physicians may use the following methods to terminate a pregnancy: suction curettage; early medical abortion; dilation and evacuation ("D&E") (of which there are variations); induction (of which there are variations); hysterotomy; and hysterectomy.

22. The safest and most appropriate abortion procedure for any given woman depends on a range of factors, including the woman's health; any medical contraindications; the stage of pregnancy; the physician's skill; the woman's preferences; the woman's prior surgical history; whether the woman wants to preserve her future fertility; and whether it would be beneficial to remove the fetus intact to permit more complete genetic testing.

23. The vast majority of first-trimester abortions and some early second-trimester abortions are performed with suction curettage (sometimes called "D&C" or vacuum aspiration). In suction curettage, the physician first dilates the cervix and then inserts a suction cannula or syringe, and, with the use of negative suction, extracts the fetal and placental tissue. Particularly during the later weeks of the first trimester and into the early second trimester, suction curettage may result in a disarticulated fetus, with part of it being extracted through the vaginal canal while the remainder of the fetus, which may have a heart beat, remains in the uterus. The part of the fetus that remains in the uterus must be extracted by using additional suction or surgical instruments.

24. In a D&E procedure, the physician dilates the cervix, typically over three to thirty-six hours, with intracervical osmotic dilators called laminaria. The physician then removes

the fetus, using a combination of forceps, curettage, and suction. This typically results in disarticulation of the fetus. Typically, the calvarium (skull) is too large to pass through the cervix whole, and so must be compressed. The precise way in which physicians perform the D&E procedure varies by physician, and depends on the positioning of the fetus in the uterus and other considerations. When performing a D&E procedure, the physician usually does not know in advance at what point during the procedure the fetus will die. After the cervix has dilated, a D&E procedure takes approximately ten to thirty minutes.

25. The main alternative to a D&E procedure after the first trimester is the induction method of abortion, in which medications are used to induce preterm labor. The induced labor typically lasts in excess of twelve hours, after which the fetus is expelled. This induced labor entails all the pain, trauma, and potential complications of labor and delivery at full term. Induction methods may also be relatively or absolutely contraindicated for some women -- when, for example, the fetus is in a transverse position (lying crosswise in the uterus), the woman has an active pelvic infection, or the woman has previously had a classical (high-incision) cesarean section or other uterine surgery. Induction procedures must be performed in a hospital or hospital-level setting and are typically not performed before sixteen weeks after the onset of the last menstrual period.

26. Another alternative post-first-trimester abortion procedure is hysterotomy, which is, in essence, a cesarean section performed before term. It is more dangerous, however, than a cesarean section because the uterus is thicker than it is at term, and the incision causes more bleeding. Hysterotomy may cause uterine rupture in any future pregnancy, even before labor. To avoid a rupture during labor, a woman who has had a hysterotomy must have a cesarean section in any future delivery. A more extreme alternative procedure is hysterectomy, in which

the uterus is completely removed, precluding future childbearing. Hysterectomy and hysterotomy are major surgical procedures that, given alternative available abortion procedures, are medically justifiable only in rare circumstances.

27. D&E and induction are considered by the medical community to be safe methods of terminating a pregnancy after the first trimester.

28. D&E is the only post-first-trimester abortion procedure that need not be performed in a hospital or hospital-level setting.

29. For women for whom induction is contraindicated, D&E is the only safe abortion procedure after the first trimester of pregnancy that does not require major surgery.

The Effects of the Act on Women's Health and Access to Abortion

30. The term "partial-birth abortion" is not a medical term and does not describe any particular abortion procedure recognized in medicine. Rather, as defined in the Act, the safest and most common methods of abortion -- indeed all but hysterectomy and hysterotomy, which do not entail vaginal delivery -- constitute so-called "partial-birth abortions."

31. In the course of any D&E procedure, a physician "deliberately and intentionally deliver[s] into the vagina a living fetus, or a substantial portion of the fetus." In the course of a D&E, a part of the fetus may be vaginally delivered before the fetus dies and the procedure is complete.

32. The induction method may also sometimes fall within the Act's proscription. During this procedure, the fetus may partially emerge while still living, but the umbilical cord may become entangled, precluding completion of the procedure. In such a circumstance, the physician must cut the umbilical cord -- which kills the fetus -- in order to complete the delivery. Similarly, during an induction, the fetus can partially emerge feet first, while still living, and the

calvarium (skull) become lodged at the cervix. The safest course of action would often be to collapse the skull to complete the delivery. In these circumstances, physicians could face prosecution under the Act. A physician beginning an induction can neither predict nor control whether these complications will occur.

33. Suction curettage procedures may also fall within the Act's proscription. In such procedures, the fetus may be partially extracted through the cervical os (opening) into the vaginal canal prior to fetal demise and completion of the procedure, thereby triggering the prohibitions of the Act.

34. The Act fails to give physicians fair warning as to what conduct is prohibited, and forces them to guess whether performing an accepted medical procedure falls within the Act's proscription.

35. Because of the Act's vagueness, prosecuting attorneys may differ widely over what conduct they believe is proscribed by the Act. The Act thus subjects physicians to arbitrary and discriminatory enforcement.

36. If the Act is allowed to take effect and physicians stop performing procedures potentially banned by the Act, access to abortions -- with the exception of hysterotomy and hysterectomy -- will be severely curtailed in Idaho. This will prevent some women from obtaining abortions altogether; delay some women who decide to go out of state to obtain an abortion, thereby increasing the medical risks of the procedure; and force some women to have riskier procedures (such as hysterotomy or hysterectomy), increasing the possibility of damage to their lives and health.

37. The Act's sole exception permits a physician to perform a "partial-birth abortion" when "necessary to save the life of the mother when her life is endangered by a physical disorder,

illness or injury." Idaho Code § 18-613(1). The Act does not permit a physician to perform a partial-birth abortion to protect a woman from damage to her health. Moreover, by its terms, the Act apparently excludes some life-threatening situations by enumerating others. In addition, even when a banned procedure would be lifesaving within the meaning of the Act, the physician may use it only if it is "necessary" to save the woman's life and thus only if no other -- albeit more dangerous -- procedure would save her life. The Act thus requires physicians to perform an alternative lifesaving procedure even if it would render the woman infertile, or increase her risk of infection, shock, bleeding, or other health consequences. The Act will force physicians in some circumstances to forgo using what may be the safest and most medically appropriate method of terminating a life-threatening pregnancy.

38. The inadequacy of the lifesaving exception is exacerbated by its failure to specify a standard for the finding that a "partial-birth abortion" is "necessary" to save the pregnant woman's life. Id. This failure leaves physicians at risk in relying on their own best medical judgment, and will thus chill their provision of lifesaving health care.

39. The Act's civil remedies provision exposes physicians to the risk of civil lawsuits if they fail to obtain consent to an abortion from the husbands of their patients and/or from their patients' parents (where the patient is under eighteen years of age). Id. § 18-613(3)(a). The provision is tantamount to a spousal and parental consent requirement for abortions. The Act thus gives third parties the power to exercise a veto over an impending abortion, placing a substantial obstacle in the path of women seeking abortions and preventing some women from obtaining an abortion.

40. Fear of disclosing their abortion decision to their husbands or parents, or the difficulty or impossibility of obtaining consent from these individuals, will deter some women

from seeking abortion services. In some cases, on information and belief, women seeking such consent will be subjected to physical or mental abuse by these individuals.

41. The Act contains no bypass or exception to these de facto third-party consent requirements. Even if it did, such an exception would not cure the constitutional infirmities created by these requirements.

Irreparable Harm/injunctive Relief

42. Plaintiffs and their patients will suffer irreparable harm from violations of their constitutional rights if the Act is not enjoined. Plaintiffs and their patients have no adequate remedy at law.

43. Enforcement of the Act will force physicians to provide constitutionally protected and medically necessary abortion services under threat of criminal prosecution and civil liability, chilling their provision of these services; subject physicians to the threat of arbitrary enforcement of the Act due to the vagueness of its proscriptions, further chilling their medical practice; prevent some women from receiving abortion services; force other women to delay obtaining abortions, thus increasing the medical risks to their life or health as well as costs; require some women to obtain medical care that is more dangerous and/or more likely to deprive them of the ability to bear children in the future; and compel physicians to abridge patient confidentiality in order to avoid potential civil liability, which threatened abridgment will itself prevent or deter some women from obtaining constitutionally protected abortion services.

FIRST CLAIM FOR RELIEF

44. Plaintiffs hereby incorporate by reference Paragraphs 1 through 43 above.

45. By failing to give adequate notice of the procedures it proscribes, and by permitting arbitrary enforcement, the Act is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF

46. Plaintiffs hereby incorporate by reference Paragraphs 1 through 45 above.

47. By prohibiting physicians from performing "partial-birth abortions," the Act has the purpose and effect of imposing an undue burden on women's right to choose abortion, in violation of their rights to privacy and liberty guaranteed by the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

THIRD CLAIM FOR RELIEF

48. Plaintiffs hereby incorporate by reference Paragraphs 1 through 47 above.

49. By prohibiting physicians from performing so-called "partial-birth abortions" where necessary to preserve the woman's health or where those banned procedures would be the most medically appropriate for the woman, and by limiting the circumstances under which a physician can perform a "partial-birth abortion" to preserve the woman's life, the Act violates the rights to privacy, life, and liberty guaranteed by the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

FOURTH CLAIM FOR RELIEF

50. Plaintiffs hereby incorporate by reference Paragraphs 1 through 49 above.

51. By forcing physicians to use abortion procedures that pose a greater risk of rendering women infertile, the Act violates the right of procreation guaranteed by the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

FIFTH CLAIM FOR RELIEF

52. Plaintiffs hereby incorporate by reference Paragraphs 1 through 51 above.

53. By forcing women seeking abortions to obtain procedures that are medically riskier, more intrusive, and more painful than those banned by the Act, the Act violates the right to bodily integrity guaranteed by the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

SIXTH CLAIM FOR RELIEF

54. Plaintiffs hereby incorporate by reference Paragraphs 1 through 53 above.

55. By endangering the health and lives of women, but not men, the Act violates the rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

SEVENTH CLAIM FOR RELIEF

56. Plaintiffs hereby incorporate by reference Paragraphs 1 through 55 above.

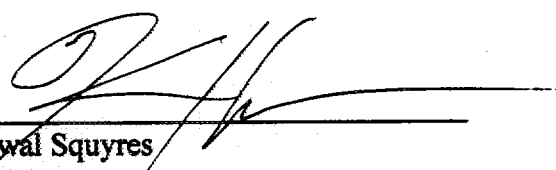
57. By leaving physicians little choice but to seek the consent of their patients' husbands and their parents (where the patient is a minor) to any abortion that could fall within the purview of the Act, the Act effectively imposes a spousal and parental consent requirement for abortions, in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs ask this Court:

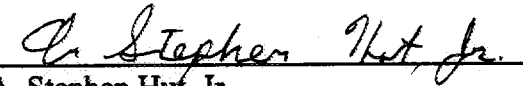
A. To issue a temporary restraining order, a preliminary injunction, and a permanent injunction restraining the Defendants, their employees, agents, and successors, and all others acting in concert or participation with them, from enforcing the challenged Act;

B. To enter judgment declaring the challenged Act to be in violation of the United States Constitution and 42 U.S.C. § 1983; and

C. To grant such other and further relief as this Court finds just and proper, including attorneys' fees and costs.



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Dated: March 17, 1998

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1
2 AN ACT
3 RELATING TO ABORTION; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDI-
4 TION OF A NEW SECTION 18-613, IDAHO CODE, TO PROHIBIT PARTIAL-BIRTH
5 ABORTIONS, TO PROVIDE AN EXCEPTION, TO PROVIDE DEFINITIONS, TO PROVIDE FOR
6 CIVIL ACTIONS, TO PROVIDE FOR A FACT-FINDING HEARING WITH THE STATE MEDI-
7 CAL BOARD AND TO PROVIDE LIMITED IMMUNITY TO THE PERSON UPON WHOM THE
ABORTION IS PERFORMED; AND DECLARING AN EMERGENCY.

8 Be It Enacted by the Legislature of the State of Idaho:

9 SECTION 1. That Chapter 6, Title 18, Idaho Code, be, and the same is
10 hereby amended by the addition thereto of a NEW SECTION, to be
11 known and designated as Section 18-613, Idaho Code, and to read as follows:

12 18-613. PARTIAL-BIRTH ABORTIONS PROHIBITED. (1) Prohibited acts. Any phy-
13 sician who knowingly performs a partial-birth abortion and thereby kills a
14 human fetus shall be subject to the penalties imposed in section 18-605, Idaho
15 Code. This section shall not apply to partial-birth abortions necessary to
16 save the life of the mother when her life is endangered by a physical disor-
17 der, illness or injury.

18 (2) Definitions. As used in this section:

19 (a) "Partial-birth abortion" means an abortion in which the person per-
20 forming the abortion partially vaginally delivers a living fetus before
21 killing the fetus and completing the delivery.

22 (b) The phrase "vaginally delivers a living fetus before killing the
23 fetus" means deliberately and intentionally delivering into the vagina a
24 living fetus, or a substantial portion of the fetus, for the purpose of
25 performing a procedure the physician knows will kill the fetus, and which
26 kills the fetus.

27 (c) "Physician" has the same meaning provided in section 18-604, Idaho
28 Code. However, any individual who is not a physician or not otherwise
29 legally authorized by this state to perform abortions, but who neverthe-
30 less directly performs a partial-birth abortion, shall be subject to the
31 prohibitions described in this section.

32 (3) (a) Civil actions. The father of the aborted fetus, if married to
33 the mother of the aborted fetus at the time of the abortion; or the mater-
34 nal grandparents of the aborted fetus, if the mother is not at least eigh-
35 teen (18) years of age at the time of the abortion, may bring a civil
36 action against the defendant physician to obtain appropriate relief. Pro-
37 vided however, that a civil action by the plaintiff father is barred if
38 the pregnancy resulted from criminal conduct by the plaintiff father or he
39 consented to the abortion. Further, a civil action by the plaintiff
40 maternal grandparents is barred if the pregnancy is the result of criminal
41 conduct by a maternal grandparent or a maternal grandparent consented to
42 the abortion.

43 (b) As used in this section, "appropriate relief" shall include:

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1 (i) Money damages for all mental and physical injuries suffered by
2 the plaintiff as a result of the abortion performed in violation of
3 this section;

4 (ii) Money damages equal to three (3) times the cost of performing
5 the abortion procedure.

6 (4) (a) Hearing. A physician accused of violating this section may
7 request a hearing before the state board of medicine to determine whether
8 the mother's life was endangered by a physical disorder, illness or injury
9 and therefore whether performing the abortion was necessary to save the
10 mother's life.

11 (b) The findings of the board of medicine regarding the issues described
12 in subsection (4)(a) of this section are admissible at the criminal and
13 civil trials of the defendant physician. Upon a motion by the defendant
14 physician, the court shall delay the beginning of the criminal and civil
15 trials for not more than thirty (30) days to permit the hearing to take
16 place.

17 (5) Immunity. A woman upon whom a partial-birth abortion is performed
18 shall not be prosecuted for violations of this section, for conspiracy to vio-
19 late this section, or for violations of section 18-603, 18-605 or 18-606,
20 Idaho Code, in regard to the partial-birth abortion performed.

21 SECTION 2. An emergency existing hereafter, which emergency is hereby
22 declared to exist, this act shall be in full force and effect on and after its
23 passage and approval.