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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.,	CIV 05-148-S-EJL
Plaintiffs,	**CASE NO:**
vs.	**COMPLAINT**
LAWRENCE WASDEN, Attorney General of the State of Idaho, and GREG BOWER, Ada County Prosecuting Attorney,	
Defendants.	

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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 had 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 18, 2005.

Respectfully submitted,

Alan Herzfeld
Cooperating Counsel for American Civil Liberties Union of Idaho Foundation

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JS 44 (Rev. 11/04)

CIVIL COVER SHEET CIV 05-148-S-EJL

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Planned Parenthood of Idaho, Inc. and Glenn H. Weyhrich, M.D.

(b) County of Residence of First Listed Plaintiff Ada
(EXCEPT IN U.S. PLAINTIFF CASES)

See Attachment A for complete list of Plaintiffs' attorneys.

(c) Attorney's (Firm Name, Address, and Telephone Number)

DEFENDANTS

See Attachment A.

05 APR 18 AM 11:25

CLERK, DAVID S. BURKE
DEPUTY

County of Residence of First Listed Defendant Ada
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

CIV 05-148-S-EJL

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☒ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 1983 and U.S. Const. amend. XIV

Brief description of cause:
Constitutional challenge to 2005 Idaho House Bill No. 351

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE Mikel H. Williams DOCKET NUMBER CIV 00-0353

DATE 4/18/05

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ATTACHMENT A – PARTIES AND PLAINTIFFS' ATTORNEYS

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

Plaintiffs,

v.

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

Defendants.

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Attorneys for Plaintiffs

ATTACHMENT B – RELATED CASE STATEMENT

The instant case is a related case to Planned Parenthood of Idaho, Inc. v. Lance, (Docket No. 00-0353-S), a case that was tried before Magistrate Judge Williams. The parties are the same: The plaintiffs in this case are Planned Parenthood of Idaho, Inc. and Glenn H. Weyhrich, M.D., the same plaintiffs as in Lance, and the defendants are the Attorney General of the State of Idaho and the Ada County Prosecuting Attorney, again the same defendants as in Lance.

Moreover, the case presents issues nearly if not identical to those addressed in Lance. Lance challenged the constitutionality of Idaho's parental consent for abortion law. See Planned Parenthood of Idaho, Inc. v. Lance, No. 00-0353, slip op. (D. Idaho Dec. 20, 2001) (Williams, J.). The Idaho Legislature has once again passed a parental consent law. See 2005 Idaho House Bill No. 351, amending Chapter 6, Title 18 of the Idaho Code sections 18-602, 18-604, 18-609A and 18-614. This most recent enactment, which is the subject of this challenge, contains virtually identical versions of two of the provisions that Judge Williams held were unconstitutional. Therefore, for purposes of judicial economy, the instant case should also be heard by Judge Williams as a related case. The legal issues are the same and the evidence, should there be any need for an evidentiary hearing, will also be substantially similar to that presented at trial to Judge Williams.

HOUSE BILL NO. 351

View Bill Status
View Bill Text
View Statement of Purpose / Fiscal Impact

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.
This sentence is marked with bold and underline to show added text.
~~This sentence is marked with strikethrough and italic, indicating text to be removed.~~

Bill Status

H0351.....by WAYS AND MEANS
ABORTION - Amends existing law to revise the parental consent law for abortion for minors if 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.

03/16 House intro - 1st rdg - to printing
03/17 Rpt prt - to Health/Wel
03/21 Rpt out - rec d/p - to 2nd rdg
03/22 2nd rdg - to 3rd rdg
Rls susp - PASSED - 50-18-2
AYES -- Anderson, Andrus, Barraclough, Barrett, Bastian, Bayer, Bedke, Bell, Bilbao, Block, Bolz, Bradford, Cannon, Chadderdon, Clark, Collins, Crow, Deal, Denney, Edmunson(Barker), Ellsworth, Eskridge, Field(18), Field(23), Garrett, Hart, Harwood, Henderson, Lake, Loertscher, Mathews, McGeachin, McKague, Moyle, Nielsen, Nonini, Raybould, Ring, Roberts, Rydalch, Sali, Schaefer, Shepherd(8), Shirley, Smylie, Snodgrass, Stevenson, Wills, Wood, Mr. Speaker
NAYS -- Boe, Henbest, Jaquet, Jones, Kemp, LeFavour, Martinez, Miller, Mitchell, Pasley-Stuart, Pence, Ringo, Rusche, Sayler, Shepherd(2), Skippen, Smith(30), Trail
Absent and excused -- Black, Smith(24)
Floor Sponsor - Sali
Title apvd - to Senate
03/22 Senate intro - 1st rdg - to St Aff
03/25 Rpt out - rec d/p - to 2nd rdg
03/29 2nd rdg - to 3rd rdg
Rls susp - PASSED - 23-12-0
AYES -- Andreason, Brandt, Bunderson, Burtenshaw, Cameron, Compton, Corder, Darrington, Davis, Fulcher, Geddes, Goedde, Hill, Jorgenson, Little, Lodge, Marley, McGee, McKenzie, Pearce, Richardson, Sweet, Williams
NAYS -- Broadsword, Burkett, Coiner, Gannon, Kelly, Keough, Langhorst, Malepeai, Schroeder, Stegner, Stennett, Werk
Absent and excused -- None
Floor Sponsor - McKenzie
Title apvd - to House
03/30 To enrol
03/31 Rpt enrol - Sp signed - Pres signed
04/04 To Governor

EXHIBIT A

Bill Text

]]]] LEGISLATURE OF THE STATE OF IDAHO]]]]
Fifty-eighth Legislature First Regular Session - 2005

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 351

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO ABORTION; AMENDING SECTION 18-602, IDAHO CODE, TO PROVIDE FURTHER STATUTORY LEGISLATIVE INTENT; AMENDING SECTION 18-604, IDAHO CODE, TO REVISE DEFINITIONS; AMENDING SECTION 18-605, IDAHO CODE, TO PROVIDE FELONY CRIMINAL PENALTIES TO EVERY PERSON NOT LICENSED OR CERTIFIED TO PROVIDE HEALTH CARE IN IDAHO WHO KNOWINGLY, EXCEPT AS PERMITTED BY LAW, PROVIDES, SUPPLIES OR ADMINISTERS ANY MEDICINE, DRUG OR SUBSTANCES TO ANY WOMAN OR USES OR EMPLOYS ANY INSTRUMENT OR OTHER MEANS WHATEVER UPON ANY THEN-PREGNANT WOMAN WITH INTENT TO CAUSE OR PERFORM AN ABORTION; AMENDING SECTION 18-609A, IDAHO CODE, TO REVISE PROCEDURES FOR REQUIRED CONSENT FOR ABORTIONS FOR MINORS; AMENDING SECTION 18-614, IDAHO CODE, TO REVISE DEFENSES TO PROSECUTION FOR PHYSICIANS FOR CAUSING OR PERFORMING AN ABORTION UPON A MINOR; PROVIDING LEGISLATIVE FINDINGS AND INTENT; PROVIDING SEVERABILITY; AND PROVIDING A CONTINGENT EFFECTIVE DATE.

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

SECTION 1. That Section 18-602, Idaho Code, be, and the same is hereby amended to read as follows:

18-602. LEGISLATIVE FINDINGS AND INTENT. (1) The legislature finds:
(a) That children have a special place in society that the law should reflect;
(b) That minors too often lack maturity and make choices that do not include consideration of both immediate and long-term consequences;
(c) That the medical, emotional and psychological consequences of abortion and childbirth are serious and can be lasting, particularly when the patient is immature;
(d) That the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of bearing a child or of having an abortion are not necessarily related;
(e) That parents, when aware that their daughter is pregnant or has had an abortion are in the best position to ensure that she receives adequate medical attention during her pregnancy or after her abortion;
(f) That except in rare cases, parents possess knowledge regarding their child which is essential for a physician to exercise the best medical judgment for that child;
(g) That when a minor is faced with the difficulties of an unplanned pregnancy, the best interests of the minor are always served when there is careful consideration of the rights of parents in rearing their child and the unique counsel and nurturing environment that parents can provide;
(h) That informed consent is always necessary for making mature health care decisions.
(2) It is the intent of the legislature in enacting section 18-609A, Idaho Code, to further the following important and compelling state interests recognized by the United States supreme court in:

(a) Protecting minors against their own immaturity;
(b) Preserving the integrity of the family unit;
(c) Defending the authority of parents to direct the rearing of children who are members of their household;
(d) Providing a pregnant minor with the advice and support of a parent during a decisional period;
(e) Providing for proper medical treatment and aftercare when the life or physical health of the pregnant minor is at serious risk in the rare instance of a sudden and unexpected medical emergency.

(3) It is the intent of the legislature of the state of Idaho to enact provisions in this chapter, amending chapter 6, title 18, Idaho Code, that are constitutional. Since the pronouncement of Roe v. Wade, the task of crafting statutes that regulate in a way that is meaningful and yet do not offend the constitution as interpreted by the courts has become extremely difficult. The inability for a state like Idaho to obtain timely review of legislation through the level of the United States supreme court, increases the difficulty of our circumstances. Under those circumstances it is the intent of the Idaho legislature that all of our statutes be interpreted in a constitutional manner and in a manner that will protect the state's interest in protecting our unborn children and their mothers to the fullest extent permissible under the United States constitution and the constitution of the state of Idaho.

SECTION 2. That Section 18-604, Idaho Code, be, and the same is hereby amended to read as follows:

18-604. DEFINITIONS. As used in this act:
(1) "Abortion" means the intentional termination of human pregnancy for purposes other than delivery of a viable birth.
(2) "Cause or perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage upon a woman or minor known to be pregnant.
(3) "Emancipated" means any minor who has been married or is in active military service.
(4) "First trimester of pregnancy" means the first thirteen (13) weeks of a pregnancy.
(~~3~~5) "Hospital" means an acute care, general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.
(~~4~~6) "Informed consent" means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of each fact pertinent to making the decision. Facts pertinent to making the decision shall include, but not be limited to:
(a) A description of any proposed treatment or procedure;
(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to future reproductive health; and
(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.
The physician must provide the information in terms which can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.
(7) "Medical emergency" means a condition which, on the basis of the

physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(8) "Minor" means a woman less than eighteen (18) years of age.

(9) "Parent" means one (1) parent of the unemancipated minor, or a guardian appointed pursuant to chapter 5, title 15, Idaho Code, if the minor has one.

(~~5~~10) "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(~~6~~11) "Second trimester of pregnancy" means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty-fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18-608, Idaho Code, in which case the same shall be conclusive and unrebuttable in all civil or criminal proceedings.

(~~7~~12) "Third trimester of pregnancy" means that portion of a pregnancy from and after the point in time when the fetus becomes viable.

(~~8~~13) Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid.

SECTION 3. That Section 18-605, Idaho Code, be, and the same is hereby amended to read as follows:

18-605. UNLAWFUL ABORTIONS -- PROCUREMENT OF -- PENALTY. (1) Every person not licensed or certified to provide health care in Idaho who knowingly, except as permitted by this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than two (2) and not more than five (5) years.

(2) Any person licensed or certified to provide health care pursuant to title 54, Idaho Code, and who, except as permitted by the provisions of this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent to cause or perform an abortion shall:

(a) For the first violation, be subject to professional discipline and be assessed a civil penalty of not less than one thousand dollars ($1,000), payable to the board granting such person's license or certification;

(b) For the second violation, have their license or certification to practice suspended for a period of not less than six (6) months and be assessed a civil penalty of not less than two thousand five hundred dollars ($2,500), payable to the board granting such person's license or certification; and

(c) For each subsequent violation, have their license or certification to practice revoked and be assessed a civil penalty of not less than five thousand dollars ($5,000), payable to the board granting such person's license or certification.

(3) Any person who is licensed or certified to provide health care pursuant to title 54, Idaho Code, and who knowingly violates the provisions of this

chapter is guilty of a felony punishable as set forth in subsection (1) of this section, separate from and in addition to the administrative penalties set forth in subsection (2) of this section.

SECTION 4. That Section 18-609A, Idaho Code, be, and the same is hereby amended to read as follows:

18-609A. CONSENT REQUIRED FOR ABORTIONS FOR MINORS.

(1) (a) No person shall ~~knowingly~~ cause or perform an abortion upon a

minor unless:

(i) The attending physician has secured the written informed consent of the minor and the written informed consent of the minor's parent; or

(ii) The minor is emancipated and the attending physician has received written proof of emancipation and the minor's written informed consent; or

(iii) The minor has been granted the right of self-consent to the abortion by court order pursuant to paragraph (b) of this subsection and the attending physician has received the minor's written informed consent; or

(iv) A court has found that the causing or performing of the abortion, despite the absence of informed consent of a parent, is in the best interests of the minor and the court has issued an order, pursuant to paragraph (b)(iv)2. of this subsection, granting permission for the causing or performing of the abortion, and the minor is having the abortion willingly, pursuant to paragraph (f) of this subsection; or

(v) A medical emergency exists for the minor so urgent that there is insufficient time for the physician to obtain the informed consent of a parent or a court order and the attending physician certifies such in the pregnant minor's medical records. In so certifying, the attending physician must include the factual circumstances supporting his professional judgment that a medical emergency existed and the grounds for the determination that there was insufficient time to obtain the informed consent of a parent or a court order. Immediately after an abortion pursuant to this paragraph, the physician shall, with due diligence, attempt to provide a parent of an unemancipated minor actual notification of the medical emergency. If the parent cannot be immediately contacted for such actual notification, the physician shall, with due diligence, attempt to provide actual notification to a parent for an eight (8) hour period following the causing or performing of the abortion and shall, until a parent receives such notification, ensure that the minor's postabortion medical needs are met. Notwithstanding the above, a physician shall, within twenty-four (24) hours of causing or performing an abortion pursuant to this paragraph, provide actual notification of the medical emergency by:

1. Conferring with a parent or agent designated by the parent, and providing any additional information needed for the minor's proper care, and, as soon as practicable thereafter, securing the parent's written acknowledgement of receipt of such notification and information; or

2. Providing such actual notification in written form, addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent with written acknowledgement of such receipt by the

parent returned to the physician; or

3. Providing such actual notification in written form and mailing it by certified mail, addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee so that a postal employee can only deliver the notice to the authorized addressee.

For the purposes of this section, "actual notification" includes, but is not limited to, a statement that an abortion was caused or performed, a description of the factual circumstances supporting the physician's judgment that the medical emergency existed and a statement of the grounds for the determination that there was insufficient time to obtain the informed consent of a parent or a court order.

If the physician causing or performing such abortion 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 ~~physical~~ 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, the physician shall, in lieu of notifying a parent as required above, ~~make a report to a law enforcement agency pursuant to section 16-1619, Idaho Code, and a petition shall be filed pursuant to section 16-1605, Idaho Code, which petition shall include a reference to this code section~~ file a petition pursuant to section 16-1605, Idaho Code. Upon adjudication that the minor comes within the purview of chapter 16, title 16, Idaho Code, ~~either on the basis of homelessness or abandonment such that no parent can be found, or on the basis of abuse or neglect such that the minor's physical safety would be in jeopardy if a parent were notified that the abortion was performed, the court shall, as a part of the decree, also~~ or upon a finding that the best interests of the child require that a parent not be notified, the court shall, in a manner which will protect the confidentiality of the minor, order that the physician's duty to so notify a parent is relieved. In any other event, unless the court enters a finding that the best interests of the child require withholding notice to a parent, the court shall order that a parent receive actual notification of the medical emergency and the causing or performing of the abortion.

(b) A proceeding for the right of a minor to self-consent to an abortion pursuant to paragraph (a)(iii) of this subsection or for a court order pursuant to paragraph (a)(iv) of this subsection, may be adjudicated by a court as follows:

(i) The petition shall be filed in the county where the minor resides or ~~the county where the abortion is caused or performed. A minor shall have the legal capacity to make and prosecute a petition and appeal as set out herein. A guardian ad litem may assist the minor in preparing her petition and other documents filed pursuant to this section and may seek appointment as set forth below. A guardian ad litem, whether prospective or appointed, must be an attorney properly licensed in this state. The court shall ensure that the minor is given assistance in filing the petition if the minor so desires a guardian ad litem but no qualified guardian ad litem is available~~ is present. For the limited purposes required to give effect to this paragraph, a minor shall have the legal capacity to make and prose-

cute a petition and appeal as set out herein. The minor shall be notified that if she has no attorney one will be appointed to assist her in preparing her petition and other documents filed pursuant to this section and represent her interests before the court. A guardian ad litem shall 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. 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.

(ii) The petition shall set forth:

1. The initials of the minor;
2. The age of the minor;
3. The name and address of each parent, guardian, or, if the minor's parents are deceased or the minor is abandoned and no guardian has been appointed, the name and address of any other person standing in loco parentis of the minor;
4. That the minor has been fully informed of the risks and consequences of the abortion procedure to be performed;

5. A claim that the minor is mature, of sound mind and has sufficient intellectual capacity to consent to the abortion for herself; and

6. A claim that, if the court does not grant the minor the right to self-consent to the abortion, the court should find that causing or performing the abortion, despite the absence of the consent of a parent, is in the best interest of the minor and give judicial consent to the abortion~~, and~~

~~7. If so desired by the minor, a request that the court appoint a guardian ad litem, or, alternatively, if no guardian ad litem is requested, that the court should consider whether appointment of a guardian ad litem for the minor is appropriate.~~

~~The petition shall be signed by the minor and, if she has received assistance from a prospective guardian ad litem in preparing the petition, by the guardian ad litem~~.

(iii) A hearing on the merits of the petition shall be held as soon as practicable but in no event later than five (5) days from the filing of the petition. The petition shall be heard by a district judge on the record in a closed session of the court. The court shall appoint a qualified guardian ad litem for the minor if one ~~is requested in the petition. If no qualified guardian ad litem is available, the court may appoint some other person to act in the capacity of a guardian ad litem, who shall act to fulfill the purposes of this section and protect the confidentiality and other rights of the minor~~ has not been appointed and shall appoint an attorney for the minor if she has no attorney but desires one.

At the hearing, the court shall, after establishing the identity of the minor, hear the report of the guardian ad litem and other evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature of the abortion procedure to be performed and the reasonably foreseeable complications and risks to the minor from such procedure, including those related to future childbearing; the available alternatives to the abortion; whether her sexual relations were forced or otherwise in violation of Idaho law other than section 18-6101 1., Idaho Code; the relationship between the minor and her parents; and any other evidence that the court may

find relevant in determining whether the minor should be granted the right to self-consent to the abortion or whether the court's consent to causing or performing of the abortion, despite the absence of consent of a parent, is in the best interests of the minor.

(iv) The order shall be entered as soon as practicable, but in no event later than ~~five (5)~~ three (3) days after the conclusion of the hearing. The court shall ensure that the order is served upon the minor immediately after its entry. If, by clear and convincing evidence, the court finds the allegations of the petition to be true and sufficient to establish good cause, the court shall:

1. Find the minor sufficiently mature to decide whether to have the abortion and grant the petition and give the minor the right of self-consent to the abortion, setting forth the grounds for so finding; or

2. Find the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding.

If the court does not find the allegations of the petition to be true or if good cause does not appear from the evidence heard, the court shall deny the petition, setting forth the grounds on which the petition is denied.

If, in ~~hearing the petition, the court~~ investigating the circumstances of the minor, the guardian ad litem becomes aware of allega-

tions which, if true, would constitute a violation of any section of title 18, Idaho Code, ~~by a person other than the petitioner~~ except section 18-6101 1., Idaho Code, or would bring ~~a child~~ the minor within the purview of chapter 16, title 16, Idaho Code, ~~the court shall order, upon entry of final judgment in the proceeding under this subsection, that an appropriate investigation be initiated or an appropriate information, complaint or petition be filed. Such allegations shall be forwarded by the court with due consideration for the confidentiality of the proceedings under this section~~ on grounds other than a violation of 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. If, but for the requirements for proof as set forth in this section, the minor would have been privileged to withhold information given or evidence produced by her, the answers given or evidence produced and any information directly or indirectly derived from her answers may not be used against the minor in any manner in a criminal case, except that she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing or failing to produce, evidence as required by the court.

(c) A notice of appeal from an order issued under the provisions of this subsection shall be filed within ~~two (2) days from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected as soon as practicable, but in no event later than five (5) days from the filing of notice of appeal. Because time may be of the essence regarding the performance of the abortion, appeals pursuant to this subsection shall receive expedited appellate review~~ five (5) days from service upon the minor and shall be given expedited consideration and decided as soon as practicable, but in no event more than five (5) days after filing the notice of appeal.

(d) ~~Except for the time for filing a notice of appeal, a court may enlarge the times set forth pursuant to this subsection upon request of the minor or upon good cause appearing, with due consideration for the expedited nature of these proceedings~~ Weekends and holidays shall not be counted in calculating the time limits required by this section.

(e) No filing, appeal or other fees shall be charged for cases or appeals brought pursuant to this section.

(f) If a minor desires an abortion, then she shall be orally informed of, and, if possible, sign the written consent required by this act, in the same manner as an adult person. No abortion shall be caused or performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to court order if the abortion is necessary to preserve the life of the minor.

(g) All records contained in court files of judicial proceedings arising under the provisions of this subsection, and subsection (3) of this section, shall be confidential and exempt from disclosure pursuant to section 9-340G, Idaho Code. Dockets and other court records shall be maintained and court proceedings undertaken so that the names of the parties to actions brought pursuant to this section will not be disclosed to the public.

(2) The administrative director of the courts shall compile statistics for each county for each calendar year, accessible to the public, including:

(a) The total number of petitions filed pursuant to paragraph (b) of subsection (1) of this section; and

(b) The number of such petitions filed where a guardian ad litem was requested and the number where a guardian ad litem or other person acting in such capacity was appointed; and

(c) The number of petitions where counsel appeared for the minor without court appointment; and

(d) The number of petitions where counsel was requested by the minor and number where counsel was appointed by the court; and

(e) The number of such petitions for which the right to self-consent was granted; and

(~~d~~f) The number of such petitions for which the court granted its informed consent; and

(~~e~~g) The number of such petitions which were denied; and

(h) The number of such petitions which were withdrawn by the minor; and

(~~f~~i) For categories described in paragraphs (c), (~~d~~f) and (~~e~~g) of this subsection, the number of appeals taken from the court's order in each category; and

(~~g~~j) For each of the categories set out in paragraph (~~f~~i) of this subsection, the number of cases for which the district court's order was affirmed and the number of cases for which the district court's order was reversed; and

(k) The county of residence of the minor for each petition; and

(l) The time between the filing of the petition and hearing of each petition; and

(m) The time between the hearing and the decision by the court for each petition; and

(n) The time between the decision and filing a notice of appeal for each case, if any; and

(o) The time of extension granted by the court in each case, if any.

(3) In addition to any other cause of action arising from statute or otherwise, any person injured by the causing or performing of an abortion on a minor in violation of any of the requirements of paragraph (a) of subsection

(1) of this section, 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.

(4) Statistical records.

(a) The vital statistics unit of the department of health and welfare shall, in addition to other information required pursuant to section 39-261, Idaho Code, require the complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include, at a minimum, the following:

(i) Whether the abortion was performed following the physician's receipt of:

1. The written informed consent of a parent and the minor; or

2. The written informed consent of an emancipated minor for herself; or

3. The written informed consent of a minor for herself pursuant to a court order granting the minor the right to self-consent; or

4. The written informed consent of a court pursuant to an order which includes a finding that the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor; or

5. The professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order.

(ii) If the abortion was performed due to a medical emergency and without consent from a parent or court order, the diagnosis upon which the attending physician determined that the abortion was immediately necessary due to a medical emergency.

(b) The knowing failure of the attending physician to perform any one (1) or more of the acts required under this subsection is grounds for discipline pursuant to section 54-1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars ($100) for each month or portion thereof that each such failure continues, pay-

able to the center for vital statistics and health policy, but such failure shall not constitute a criminal act.

~~(5) As used in this section:~~

~~(a) "Cause or perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage upon a minor known to be pregnant.~~

~~(b) "Emancipated" means any minor who has been married or is in active military service.~~

~~(c) (i) "Medical emergency" means a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:~~

~~1. To prevent her death; or~~

~~2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.~~

~~(ii) The term "medical emergency" does not include:~~

~~1. Any physical condition that would be expected to occur in normal pregnancies of women of similar age, physical condition and gestation; or~~

~~2. Any condition that is predominantly psychological or psychiatric in nature.~~

~~(d) "Minor" means a woman less than eighteen (18) years of age.~~

~~(e) "Parent" means one (1) parent of the unemancipated minor, or a guardian appointed pursuant to chapter 5, title 15, Idaho Code, if the minor has one.~~

SECTION 5. That Section 18-614, Idaho Code, be, and the same is hereby amended to read as follows:

18-614. DEFENSES TO PROSECUTION. (1) No physician shall be subject to criminal or administrative liability for causing or performing an abortion upon a minor in violation of any provision of subsection (1)(a) of section 18-609A, Idaho Code, ~~if prior to causing or performing the abortion the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that~~ where the woman seeking the abortion represented that she was not a minor and on that basis the physician causing or performing the abortion did not secure the consent of a parent and where none of the circumstances in paragraph (ii), (iii), (iv) or (v) of subsection (1)(a) of section 18-609A, Idaho Code, exist, if prior to causing or performing the abortion and, after reaching a reasonable conclusion that the woman seeking abortion was not then a minor, the physician obtains either positive identification indicating that the woman seeking the abortion was not then a minor or other documentary evidence from which a reasonable person, after observing the physical appearance of the woman seeking the abortion, would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor and if the physician retained, at the time of receiving the identification or evidence, a legible photocopy of such identification or evidence in the physician's office file for the woman. This defense is an affirmative defense that shall be raised by the defendant and is not an element of any crime or administrative violation that must be proved by the state.

(2) ~~If, due to a medical emergency as defined in subsection (5) of section 18-609A, Idaho Code, there was insufficient time for the physician to confirm that the woman, due to her age, did not then come within the provisions of subsection (1) of section 18-609A, Idaho Code, the physician shall not be subject to criminal or administrative liability for performing the abortion in violation of subsection (1)(a)(v) of section 18-609A, Idaho Code, if, as soon as possible but in no event longer than twenty-four (24) hours~~

~~after performing the abortion, the physician obtained positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor and if the physician retained, at the time of receiving the evidence, a legible photocopy of such evidence in the physician's office file for the woman~~ No physician shall be subject to criminal or administrative liability for causing or performing an abortion upon a minor in violation of subsection (1)(a) of section 18-609A, Idaho Code, where the physician causing or performing the abortion did secure the consent of a person whom he reasonably believed to be a parent of the minor seeking the abortion, but where the person from whom the consent was secured was not, in fact, a parent of the minor, and where none of the circumstances in paragraph (ii), (iii), (iv) or (v) of subsection (1)(a) of section 18-609A, Idaho Code, exist, if prior to causing or performing the abortion and after reaching a reasonable conclusion that the person purporting to be a parent of the minor was a parent of the minor, the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that the person purporting to be the parent, was in fact, a parent of the minor seeking the abortion and if the physician retained, at the time of receiving the identification or evidence, a legible photocopy of such identification or evidence in the physician's office file for the woman upon whom the abortion is caused or performed. This defense is an affirmative defense that shall be raised by the defendant and is not an element of any crime or administrative violation that must be proved by the state.

(3) If after performing an abortion under circumstances of a medical emergency as defined in subsection (5) of section 18-609A, Idaho Code, the physician, after reasonable inquiry, is unable to determine whether or not the woman is a minor, the physician shall not be subject to criminal, civil or administrative liability for taking any action that would have been required by subsection (1)(a)(v) of section 18-609A, Idaho Code, if the woman had been a minor at the time the abortion was caused or performed.

(4) For purposes of this section, "positive identification" means a lawfully issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military card, bearing the person's photograph and date of birth, the person's valid passport or a certified copy of the person's birth certificate.

SECTION 6. LEGISLATIVE FINDING AND INTENT. In enacting this legislation, the Legislature intends the following:

(1) The first changes to Section 18-609A(1)(a)(v), Idaho Code, are intended to address the concerns of the United States District Court for the District of Idaho that post-medical emergency notice would be withheld from parents of a minor who had been abused or neglected in the past, but would not be withheld in cases where a minor might be subject to future abuse or neglect. In enacting a separate generic grounds for a physician to withhold notice to a parent if the best interests of the child require, the Legislature intends to give the courts a vehicle to order that post-medical emergency notice be withheld in those circumstances where the United States or state constitutions would so dictate. This, in effect, implements a judicial bypass proceeding specifically for post-medical emergency notice. Removing the requirement that the Child Protective Act petition include a reference to Section 18-609A, Idaho Code, reference in the decree which might give notice that a minor is seeking an abortion requiring the court's Child Protective Act "protect the confidentiality of the minor" is designed to protect the confidentiality of the minor in a manner consistent with the United States and Idaho Constitutions and alleviate concerns expressed by the District Court.

(2) The Legislature finds that every abortion is a serious surgical procedure. Gwendolyn Drummer of Richmond, California (1972), Rita McDowell of Washington, D.C. (1975), Dawn Ravnell of New York (1990), Teresa Causey of Georgia (1988), Erica Richardson of Maryland (1989), Deborah Lozinski of New

Jersey (1985), Jane Roe of Manhattan (1988), Jane Roe #1 of Newark, New Jersey (1985), Patricia Chacon of California (1984), Beverly A. Moore of Tennessee (1975), Denise Mentoya of Texas (1988), Latachie Veal of Texas (1991), Laniece Dorsey of California (1986), Glenda Jean Fox of New York (1989), Sophie McCoy of New York (1990), Natalie Meyers of California (1972), Kathy Murphy of California (1973), Deana K. Bell of Illinois (1992), Christella Forte of Michigan (1986) and Jennifer Suddeth of California (1982), are all minors who died from complications from abortions performed in abortion clinics. When an abortion is required due to medical emergency the circumstances are much more serious making it imperative that a minor receive adequate postabortion medical care. The Legislature further finds that proper medical care under those circum-

stances will rarely, if ever, occur if a parent is not informed that their daughter has not only undergone a serious surgical procedure, but has also suffered a medical emergency so serious that it required the immediate abortion.

Indiana teenager Becky Bell, who died September 16, 1988, was pregnant at seventeen years of age. There is dispute about whether she had undergone an induced abortion or whether she had a miscarriage and whether she died from pneumonia unrelated to the abortion or from infection resulting from an illegal abortion. She was under the care of her parents at her home and was rushed to the hospital when her symptoms became acute. Irrespective of the circumstances and cause of her death, the Legislature finds that her parents were unable to provide care and timely transport to the hospital because they lacked knowledge about her pregnancy and the onset of her infection.

Kathy Denise Murphy was a high school student in Los Angeles who went to Inglewood Hospital for an abortion on August 29, 1973. The abortion was completed but she subsequently developed an infection that made her go to Centinela Valley Community Hospital to receive emergency care. Unfortunately, by that time the infection had ravaged her body. On September 8, 1973, the hospital contacted her mother to let her know that her daughter was gravely ill, but by the time her mother got to the hospital, Kathy was dead. Kathy had not told her mother about the abortion or her subsequent illness. (Los Angeles County Superior Court File #SWC 26793. State of California Death Certificate 73-148112). If for any reason the parents of a minor are not notified of the performance of an abortion upon their minor daughter due to a medical emergency, the presumption must be that the best interests of the minor require that the abortionist must provide medical care until a parent or some other person can care for the minor, and when required due to a medical emergency, it is imperative that a minor receive adequate postabortion medical care.

(3) The changes to Section 18-609A(1)(b)(i), Idaho Code, that require that a guardian ad litem be appointed in every case except where the minor refuses one, are intended to maintain the confidentiality of bypass proceedings while assisting the court with its determination. The guardian ad litem would be required to investigate the circumstances and history of the minor, albeit on an expedited time frame, and would at least have an opportunity to obtain important information about the minor, provide it to the court and do so in a manner that would protect the confidentiality of the minor.

(4) Existing code requires that when the court discovers information during the hearing which would indicate a violation of criminal law, that a report must be made to law enforcement or a prosecutor. It has been removed and the responsibility has now been shifted to the guardian ad litem. Statutory rape pursuant to section 18-6101 1., Idaho Code, has been exempted to remove the concern of the United States District Court that a chilling effect would be caused because every pregnant minor has been a victim of statutory rape. The Legislature intends to cover at least three circumstances: incest, forcible rape and sexual predators. In each of those circumstances a male would have great motivation to obtain an abortion for a minor to make the problem pregnancy go away and cover up his crime. Because the bypass proceedings are closed and totally confidential, there is no other mechanism to uncover these bad actors. In finding the reporting requirement by judges to be

unconstitutional, the District Court brought about a cruel result that minors seeking abortion would somehow be stripped of protection under the law when they are the victims of incest, forcible rape or sexual predators when such protection would be available for all other minors in all other circumstances.

(5) The requirement in Section 18-609A(1)(c), Idaho Code, that a notice of appeal be filed within two days of the issuance of the order has been

extended to five days from service of the court's order to address the concerns expressed by the District Court. The Legislature intends that this will give minors an adequate time to consider and make their appeal, but that they will likely do so with great haste in light of their desire to obtain the abortion they seek. Between the effective date of the original statute in 2000 and the end of 2004, there were no appeals and only one denied petition, fifteen petitions granted and six petitions withdrawn.

(6) The provisions of existing Section 18-609A(1)(d), Idaho Code, that allow a court to extend time limits set out in the section has been removed. All time frames require action "as soon as practicable." The time between filing of the petition and its hearing can be no more than three days. The time between hearing of the petition and decision by the court can be no more than three days. The time between issuance of the court's order and the filing of a notice of appeal by the minor is totally the decision of the minor and her counsel, the Legislature intends that such will happen quickly and, when combined with the other provisions of this Section, will occur within constitutionally acceptable time frames. The total time from filing of the petition to decision on appeal should be no more than eighteen days, not counting the time the minor takes to file a notice of appeal. In unusual circumstances where a court would find good cause to grant an extension, the total for all extensions cannot exceed three days so the total time from the filing of the petition to the decision on appeal cannot exceed twenty-one days, not including the time the minor takes to file a notice of appeal.

(7) In 2002, 2003 and 2004, all minors filing petitions appeared with their own counsel. In the event a minor does not have counsel, the court will now appoint one with the changes to Section 18-609A(1)(b)(iii), Idaho Code. The Legislature intends this will ensure that the minor has a guardian ad litem seeking her best interests and an attorney advocating for her before the court.

(8) It is legislative intent that the definition of medical emergency includes circumstances where acute symptoms requiring medical treatment appear suddenly and unexpectedly in a pregnant woman who has concurrently been diagnosed with:

(a) Chronic medical conditions of leukemia, Marfan's syndrome, Mitral Stenosis or pulmonary hypertension;

(b) Severe preeclampsia or HELLP syndrome;

(c) Ectopic or cornual pregnancy;

(d) Inevitable abortion;

(e) Premature rupture of "bag of waters" membrane which has resulted in an acute infection; or

(f) Pregnancy in spite of presence of IUD contraceptive device.

SECTION 7. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

SECTION 8. This act shall 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.

Statement of Purpose / Fiscal Impact

STATEMENT OF PURPOSE

RS 15151

In the three years following the enactment of Idaho's law requiring a parent's consent when minor seek an abortion, the number of abortions for minors fell by an average of thirty percent (30%). Planned Parenthood, the American Civil Liberties Union, and Dr. Glen Weyhrich challenged the law in Federal Court. In District Court the law was largely upheld, however, on appeal the Ninth (9th) Circuit Court of Appeals disagreed with the District Court and opined that Idaho's definition of "medical emergency" was constitutionally flawed and, therefore, none of the statute can be enforced. This bill addresses the concerns expressed by the Ninth (9th) Circuit Court of Appeals and the U.S. District Court for the state of Idaho.

With the amendments, a lawyer and guardian ad litem will be required for each minor who seeks to bypass a parent's consent by seeking a court order. About five such cases occur each year.

FISCAL NOTE

There is no impact to the general fund. There could be a possible property tax impact.

Contact
Name: Rep. Bill Sali
Rep. Lawerence Denney
Phone: (208) 332-1000

STATEMENT OF PURPOSE/FISCAL NOTE H 351

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD OF IDAHO, INC., and GLENN H. WEYHRICH, M.D., Plaintiffs, v. ALAN G. LANCE, Attorney General of the State of Idaho, and GREG BOWER, Ada County Prosecuting Attorney, Defendants.	CASE NO. CIV 00-0353-S-MHW **MEMORANDUM OPINION AND ORDER**

I.

INTRODUCTION.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and seek a declaratory judgment that certain statutes regulating abortions upon minors in Idaho are unconstitutional[1] (hereinafter "Idaho's parental consent law" or "Idaho's law"). Idaho's parental consent law became effective July 1, 2000.

[1] *See* Idaho Code § 18-601 *et seq.*; 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; 2001 Idaho House Bill No. 340, amending Chapter 6, Title 18 of the Idaho Code, §§ 18-605, 18-609A and 18-614 and adopted by the Idaho Legislature in March 2001.

EXHIBIT B

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Plaintiffs in this case are Planned Parenthood of Idaho, Inc. (hereinafter "Planned Parenthood") and Glenn H. Weyhrich, M.D. (hereinafter "Dr. Weyhrich"). Planned Parenthood is a not-for-profit organization located in Boise, Idaho, which provides medical and educational services to women and men. Planned Parenthood services include pregnancy diagnosis and counseling, contraceptive counseling, provision of all methods of birth control, HIV/AIDS testing, etc. Although Planned Parenthood does not perform abortion services, it does provide its patients with referrals to providers of those services.

Plaintiff Dr. Weyhrich is a physician licensed to practice medicine in the State of Idaho, and is a board-certified obstetrician and gynecologist who maintains a private ob/gyn practice in Boise. Dr. Weyhrich provides an array of medical services, including abortions. Among Dr. Weyhrich's patients seeking abortions are minors.[2]

II.

PROCEDURAL BACKGROUND.

On June 26, 2000, Plaintiffs filed their first motion for a preliminary injunction against the challenged statutes. Following a preliminary injunction hearing, this Court issued a Memorandum Opinion and Order enjoining Defendants from enforcing three limited portions of the challenged statutes. First, the Court enjoined the requirement that a woman seeking an abortion must present positive identification. This finding relied on the ground that a large fraction of Hispanic migrant workers will be unable to obtain the required identification in a timely manner. Second, the Court enjoined the penalty provision in so far as it would criminally

[2] The number of induced abortions performed in Idaho have steadily declined since a high of 2706 in 1981 to 801 in 2000. Abortion procedures for women under the age of eighteen compose 7% of the 2000 total, or 60 abortion procedures.

punish any physician for performing an abortion upon a minor as a result of a medical emergency. Third, the Court enjoined the venue provision for judicial bypass hearings on the ground that the provision would require a minor to file her petition in the judicial district where she then resides even though a court in a different judicial district might be more convenient.

In response, the Idaho legislature enacted certain amendments to the statutes in March 2001. First, the legislature eliminated the positive identification requirement as a prerequisite for performing an abortion. Under the earlier version of the law, a physician was required to secure positive identification of the patient's age before performing the abortion or be in violation of the Act. A physician may now perform an abortion upon a woman based on her representation that she was over the age of 18 or was otherwise an emancipated minor. If it turned out that this representation was not true, the physician could be liable to sanctions under the Act. However, the amended statute would allow the physician to avoid criminal and administrative liability if the physician obtains either positive identification or other documentary evidence from which a reasonable person could have concluded that the woman seeking the abortion was either an emancipated minor or over the age of eighteen. *See* Idaho Code § 18-614(1). Second, the legislature added the "knowingly" scienter requirement for any criminal punishment under the penalty provision . *See* Idaho Code § 18-605(3). Third, the legislature amended the venue provision in order to allow the minor to file her petition in either the county where she resides or the county where she chooses to have her abortion. *See* Idaho Code § 18-609A(1)(b)(i).

Subsequent to the amendments, Plaintiffs moved for preliminary injunction of the amended venue provision. Plaintiffs argued that the amended venue provision was more restrictive than the provision previously enjoined. The Court concluded that "minors need to

have considerable flexibility in seeking access to their state court system in a convenient manner" and granted Plaintiffs' motion for an injunction of the amended venue provision.

Plaintiffs continue to challenge the following portions of Idaho's parental consent law: (1) portions of the judicial bypass provision, Idaho Code §§ 18-609A(1)(a)(iv), 18-609A(1)(b)-(d); (2) portions of the medical emergency provision, Idaho Code §§ 18-609A(1)(a)(v), 18-609A(5)(c)(i); and (3) the provisions imposing penalties upon physicians and creating defenses thereto, Idaho Code §§ 18-605, 18-614. A trial was conducted in this matter commencing on September 4, 2001, and proceeding through September 7, 2001. The Court is now prepared to issue its Memorandum Opinion and Order.

III.

STANDARD OF REVIEW.

A. Undue Burden Test.

The United States Supreme Court has determined that the Fourteenth Amendment protects a woman's choice whether or not to terminate her pregnancy. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992). The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the health of the pregnant woman or the life of the unborn. *Id.* at 871, 875-76; *Roe v. Wade*, 410 U.S. 113, 162, 93 S. Ct. 705, 731, 35 L.Ed.2d 147 (1973). In fact, this interest "has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Casey*, 505 U.S. at 871. Because of its interest in the health of the pregnant woman and the potentiality of human life, "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.* at 873.

Not every law which makes it more difficult to exercise a constitutionally protected right, however, is an infringement of that right. *Id.* Rather, states are generally granted "substantial flexibility in establishing the framework" within which a constitutionally protected right is exercised. *Id.* The Supreme Court has noted:

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874.

It is recognized that "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy." *Id.* Nevertheless, "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id.* at 876. A government regulation cannot be an unconstitutional "undue burden" simply because it makes a woman's choice regarding abortion more difficult. "[I]nconvenience, even severe inconvenience, is not an undue burden. Instead, a court's proper focus must be on the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions." *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999).

Nor is a statute unconstitutional simply because the challenged government regulation may have the effect of causing a number of women to personally and thoughtfully reconsider their decision to terminate a pregnancy. Rather, a challenged regulation is not unduly burdensome unless it overcomes the will of the woman such that she no longer has the ability to

exercise her right to choice and she is thereby prevented from having an abortion that she otherwise would have desired. "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. It is clear from *Casey* that there is no "undue burden" unless the challenged regulation has "a strong likelihood of *preventing* women from obtaining abortions rather than merely making abortions more difficult to obtain." *Karlin*, 188 F.3d at 482 (emphasis in original).

B. Large Fraction.

The Court in *Casey* explained that a state regulation unconstitutionally creates an undue burden only if "in a large fraction of the cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895. The large-fraction test from *Casey* was adopted by the 9th Circuit in *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999), amended by 193 F.3d 1042 (9th Cir. 1999).

In *Casey*, the Court first identified the class of women whose conduct would be impacted by the challenged regulation and determined the size of the identified class. *Casey*, 505 U.S. at 894-95. The Court then considered whether the challenged regulation would create a "substantial obstacle" to a large fraction of the women in the identified class. *Id.* If the answer is in the negative, the challenged regulation is not an undue burden and is not unconstitutional. *Id.* at 895.

In adopting *Casey*'s "large fraction" test, the Ninth Circuit Court of Appeals contrasted the evidentiary requirements necessary to succeed on a facial challenge under *Casey* and under *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987): "Under *Salerno*,

no factual showing of unconstitutional applications can render a law unconstitutional if it has any constitutional application. Under *Casey*, a factual showing of unconstitutional application in 'a large fraction of the cases' where the law applies can render a law unconstitutional, even if it has some constitutional applications." *Lawall*, 180 F.3d at 1025. Therefore, the Ninth Circuit Court of Appeals recognized the factual requirements placed upon plaintiffs when mounting a facial challenge under *Casey*.[3]

In the present case, Plaintiffs contend that the question is not whether a "large fraction" of affected women will be harmed or obstructed by the Idaho parental consent law's judicial bypass provisions or medical emergency provision. Rather, Plaintiffs insist that the issue is whether the health of *some* women will be harmed by the Idaho law. In support, Plaintiffs cite *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). In *Stenberg*, the Supreme Court specifically rejected the argument that the Nebraska ban on partial birth abortions should be upheld without a health exception because women need the procedure only rarely. *See* 530 U.S. at 933-34. The Court reasoned that "the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it," and struck down the law for failing to protect women's health. *Id.* at 934, 937-38.

Given that the *Stenberg* decision did not explicitly address whether a "large fraction" of women would be affected by the Nebraska statute at issue, this Court finds that Plaintiffs' interpretation of the *Stenberg* decision is excessively broad. In the introductory paragraph of

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[3] A petition for rehearing *en banc* was filed in *Lawall*, which was denied. In an opinion dissenting from the denial of the petition for rehearing, three circuit judges strongly criticized the decision to use the *Casey* standard for facial challenges to statutes regulating abortions as opposed to the standard articulated in *Salerno*.

Stenberg, the Supreme Court stated that it would "not revisit [the] legal principles" of *Casey* and *Roe*. *Id.* at 921. The Court continued its preliminary statement by reiterating the language of the undue burden test in *Casey*: "[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before viability" is unconstitutional. *Id.*; *quoting Casey*, 505 U.S. at 877. An "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.*

This Court further notes that the *Stenberg* Court's analysis and conclusion is consistent with the principles applied in *Casey*. In finding the Nebraska statute unconstitutional, the Supreme Court stated that "[a]ll those who perform abortion procedures using that method [D & E partial birth abortion procedures] must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision." *Id.* at 945-46. Accordingly, as it has done throughout the course of this litigation, this Court will apply the principles set forth in *Casey* and *Roe*. Specifically, the Court will endeavor to determine whether Idaho's parental consent law "operate[s] as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases in which [the consent law] is relevant." *Casey*, 505 U.S. at 895.

C. Effect Upon Minors.

"Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74, 96 S. Ct. 2831, 2843, 49 L.Ed.2d 788 (1976); *see also Bellotti v. Baird*, 443 U.S. 622, 633, 99 S. Ct. 3035, 3043, 61 L.Ed.2d 797 (1979) (hereinafter *Bellotti II*). "[O]ur cases show that although children

generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.'" *Bellotti II*, 443 U.S. at 635. The Court has long recognized that "the State has somewhat broader authority to regulate the activities of children than of adults." *Danforth*, 428 U.S. at 74. This is due to the fact that "the status of minors under the law is unique in many respects." *Bellotti II*, 443 U.S. at 633. There are three reasons why "the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. "The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors." *Id.* at 637. It is a cardinal rule that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither provide nor hinder." *Id.* (citation omitted).

Nevertheless, "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Id.* at 642. As a result, the Supreme Court has held that the unique consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Danforth*, 428 U.S. at 74; *see also Bellotti II*, 443 U.S. at 643. In order to avoid this problematic situation, a State must provide a judicial hearing whereby the

parental consent requirement (which might result in the potential for or the possibility of the arbitrary veto power) can be bypassed. *Bellotti II*, 443 U.S. at 643. In addition, the Court held that a State could not impose unduly burdensome restrictions on a minor's "initial access" to the judicial bypass procedure. *Id.* at 648. Any judicial bypass procedure adopted by a state must take "reasonable steps" to prevent the public from learning the identity of the minor, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 513, 110 S. Ct. 2972, 2980, 111 L.Ed.2d 405 (1990) (hereinafter *Akron II*), and insure that the proceedings are completed with sufficient expedition to allow for an abortion to be obtained in the event that the minor is granted a judicial bypass. *Bellotti II*, 443 U.S. at 644.

D. Statutory Interpretation.

Because this Court must construe and interpret the statutory provisions challenged in the instant case, a brief discussion of the standards governing statutory interpretation is appropriate. The United States Supreme Court has consistently held that, when a statute comes under constitutional scrutiny, there is a presumption of constitutionality. *See Akron II*, 497 U.S. at 514; *Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 493, 103 S. Ct. 2517, 2526, 76 L.Ed.2d 733 (1983); *Clements v. Fashings*, 457 U.S. 957, 963, 102 S. Ct. 2836, 2843, 73 L.Ed.2d 508 (1981). When enacting statutes, legislatures are ordinarily presumed to have acted constitutionally. *See Clements*, 457 U.S. at 963. As a result, the Court has noted that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S. at 514 (*quoting Ashcroft*, 462 U.S. at 493).

"It is reasonable to assume . . . that a state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute

consistently with constitutional requirements." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 441, 103 S. Ct. 2481, 2498, 76 L.Ed.2d 687 (1983) (hereinafter "*Akron I*"). "Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements." *Akron II*, 497 U.S. at 515. "[T]he federal courts, as a matter of federalism and comity, should not sustain a facial challenge to a state statute that has yet to be construed by state courts, when a reasonable construction exists which would eliminate the constitutional infirmity." *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 383 (4th Cir. 1998), *cert. denied*, 525 U.S. 1140, 119 S. Ct. 1031, 143 L.Ed.2d 40 (1999).

IV.

THE JUDICIAL BYPASS TO PARENTAL CONSENT.

A. Case Law.

The Supreme Court has held that if a state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, the state also must provide an alternative procedure under which authorization for the abortion can be obtained. *See Planned Parenthood v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999) (citing *Bellotti II*, 443 U.S. at 643). The waiver must be granted if the minor can convince the finder of fact either that she is mature enough to decide about an abortion on her own or that the proposed abortion would be in her best interest. *See Akron II*, 497 U.S. at 511; *Lawall*, 180 F.3d at 1027-28.

There is no dispute that a state may require that minors seeking abortion obtain parental consent, but to pass constitutional scrutiny, the minor must be given an alternative procedure ("bypass") by which she can obtain a waiver of the requirement. *See Bellotti II*, 443 U.S. at 649; *Casey*, 505 U.S. at 899 (reaffirming *Bellotti II*); *Lawall*, 180 F.3d at 1027, amended by 193 F.3d

1042 (9th Cir. 1999). In *Bellotti II*, the Supreme Court established the requirements for that bypass: The waiver must be granted if the minor can convince the finder of fact either that she is mature enough to decide about abortion on her own or that the proposed abortion would be in her best interests. *Bellotti II*, 443 U.S. at 643-44; *see also Akron II*, 497 U.S. at 511; *Lawall*, 180 F.3d at 1027-28. Furthermore, "[t]he proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644; *Lawall*, 180 F.3d at 1028.

B. The Idaho Parental Consent Law's Venue Restriction.

In September of 2000, this Court preliminarily enjoined the Idaho parental consent law's provision that required a minor seeking to waive the parental consent requirement to file her bypass provision in the judicial district where she lives. In response to the Court's injunction, the Idaho legislature amended the parental consent law's venue provision. Under the law that went into effect July 1, 2001, a minor seeking a waiver of the requirement of parental consent has a choice of two counties in which to file her judicial bypass petition – the county where she lives or the county where she is going to have the abortion. *See* Idaho Code § 18-609A(1)(b)(i).

As the Court noted in its June 29, 2001, Order, minors need to have considerable flexibility in seeking access to their state court system in a convenient manner. *See Indiana Planned Parenthood Affiliates Assoc. Inc. v. Pearson*, 716 F.2d 1127, 1142 (7th Cir. 1983). The June 29, 2001, Order also pointed to an identical venue restriction which was enjoined by a federal district court in Tennessee. *See* Order at 5 n.2 (citing *Memphis Planned Parenthood, Inc.*

v. Sundquist, 2 F.Supp.2d 997, 1005 (M.D. Tenn. 1997)).[4] Accordingly, the Court preliminarily enjoined the portion of Idaho Code § 18-609A(1)(b)(i) (as amended by 2001 Idaho House Bill No. 340), which states that "The petition shall be filed in the county where the minor resides or the county where the abortion is caused or performed."

A narrow venue restriction creates several problems for minors in Idaho. As Plaintiffs pointed out during the course of the trial, Idaho is a very large and rural state with only six abortion providers located in three counties.[5] Many counties have small populations and only one courthouse, located in the center of town along with all other offices of government. Also, Idaho's venue restriction will force those minors who cannot file at home to make three trips to the abortion provider's county: once to file the petition, a second time for the hearing, and a third time for the abortion. The Court concludes that the constitutionality of venue restrictions have to be analyzed as it would apply in the particular state in question. Each state's circumstances vary as to geography and population and courthouse locations; thus, a venue restriction that may not be an undue burden in a geographically small state with a large population could impose an undue burden in a geographically large state with a small population.

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[4] The district court decision was subsequently overruled by the Sixth Circuit in *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999). The Sixth Circuit noted that Tennessee's parental consent act permitted the minor seeking judicial bypass to petition "the juvenile court of any county of this state," whereas the rule at issue required the minor to file her petition in either the county in which she resides or the county in which the abortion is sought. In reversing the district court, the circuit court found that the trial court incorrectly assumed that the rule trumped the act. *Id.* at 484.

[5] At trial, plaintiffs presented two witnesses – Amy Lucid and Marisa Campagna – with extensive experience dealing with minors who seek judicial bypasses. These witnesses explained the obstacles that Idaho's venue restriction poses to minors. *See* Tr. 178:8-19; *see also* Tr. 159:17-19.

Given the burdens that Idaho's venue restriction imposes on minors needing to pursue a bypass, the Court finds that such a restriction is impermissible. In reaching this conclusion, the Court notes that Defendants have no legitimate state interest in restricting minors in this way. In fact, when the Court asked defense counsel to articulate the state interest in the venue restriction, counsel stated: "We have no interest." Tr. 409:23-410:5 (Hearn). Because the State has not advanced any interest in burdening minors in the ways that Plaintiffs have demonstrated, the venue restriction must be declared unconstitutional.

C. The Bypass Procedure's Time Frame.

Idaho's parental consent law also requires that a hearing be held no later than five days from the filing of the petition and that an order shall be entered no later than five days after the conclusion of the hearing. *See* Idaho Code § 18-609A(1)(b)(iii),(iv). However, Plaintiffs note that a court "may enlarge the times set forth pursuant to this subsection upon the request of the minor or upon other good cause appearing." *See* Idaho Code § 18-609A(1)(d). Plaintiffs assert that without a definition of "good cause" or a finite time limit in which a petition must be finally adjudged, the bypass procedure fails to guarantee expediency.

Defendants argue that Idaho's district courts are not only admonished that this proceeding will be expedited, but are mandated that a decision will be entered within ten days of the application. Defendants contend that this time frame is substantially less than the statute challenged in the case of *Akron II*, 497 U.S. 502, which was likely to result in up to a 22-day delay and was held constitutional. While Idaho's parental consent law does provide for an expansion of that time when good cause is shown, Defendants argue that any such decision will be based on the best interest of the minor.

In *Bellotti II*, 443 U.S. 622, the Supreme Court held that if a state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, the state also must provide an alternative procedure under which authorization for the abortion can be obtained. *See id.* at 643. In subsequent cases, the Court has repeatedly affirmed *Bellotti II*'s holding. *See Lambert v. Wicklund*, 520 U.S. 292, 295, 117 S. Ct. 1169, 1170, 137 L.Ed.2d 464 (1997); *Akron II*, 497 U.S. at 510; *Hodgson v. Minnesota*, 497 U.S. 417, 461, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990) (plurality opinion); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 491 n. 16, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983).

For a judicial bypass provision to avoid fatal vagueness under *Bellotti II*, the trial court's review of a minor's application must be performed within specific, determinate time limits. "[A bypass provision] must assure that a resolution of the issue, and any appeals that may follow, will be completed with . . . sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644. As the Ninth Circuit has stated:

> Because time is such a critical factor, relating both to a woman's health and the exercise of her constitutional right to an abortion, we conclude that the . . . bypass procedure, which does not contain a time period within which the state district court must rule on a minor's petition and thus may delay her right to implement the bypass procedure, possibly indefinitely, does not sufficiently protect a pregnant minor's constitutional right to an abortion.

Glick v. McKay, 937 F.2d 434, 442 (9th Cir. 1991), *overruled on other grounds by Lambert*, 520 U.S. 292.

Idaho's parental consent law contains specific time frames which can only be expanded at the minor's request or for good cause. The fact that good cause may be found to continue a hearing for a short period of time under some remote set of circumstances does not render the

statute unconstitutional. Taken as a whole, the procedures for a judicial bypass provide an appropriate constitutional framework for expedited judicial resolution of any petitions. The Court trusts that a trial court will use discretion when and if it expands time periods for the bypass when good cause is shown. Accordingly, the Court finds that the time frame outlined for bypass proceedings in Idaho's parental consent law meets the *Bellotti II* expediency criterion.

D. The Two-Day Window to File an Appeal.

The Idaho law further requires that if a district court denies a minor's bypass petition, she must file a notice of appeal within two days. Idaho Code § 18-609A(1)(c). Her time runs without regard to whether she actually receives notice of the court's decision, which may occur any time during a five-day window. Therefore, if a minor is to appeal within two days of the district court's decision, she must learn of the decision, figure out how to appeal, and file a notice of appeal.

Although a few states' short appellate windows have been upheld, Plaintiffs note that those states' bypass procedures have procedural safeguards to help ensure that a minor does not lose her right to appeal. First, many states require the court to rule immediately at the end of the hearing. Second, other states' laws assure that the minor receives notice of the trial court's decision with enough time that she has an opportunity to effectuate an appeal.

In contrast, Idaho's parental consent law does not guarantee that the minor will have notice of the district court's denial in time to meet the two-day window. Under the governing rule, the district court is required to notify the minor of her right to appeal and of the two-day appellate window when it serves its decision. Idaho App. R. 44.1(a)(2). However, the time to appeal runs from the time the court issues its order; not from the time the minor receives the

court's service. The method of service provided under the Idaho rules – a mailing from the court, *see* Idaho App. R. 47 – may not only jeopardize her confidentiality,[6] but in all likelihood will not arrive in time to preserve her right to appeal.[7] Therefore, to effectuate an appeal, a minor would have to receive the mailed service from the court, understand the notice, and travel back to the court to "physically fil[e]" the notice of appeal – all within two days of the ruling.

Further, there is no justifiable state interest in restricting the minor in this way. When asked during oral argument about any state interest that supported this restriction, counsel for defendants replied that "the state interest is to get the expeditious appeal." Tr. 414:21-22. Although this interest is legitimate, the constitutional mandate of expedition is meant to ensure that the state gives the minor an effective opportunity to obtain an abortion. Thus, the Court finds that the two-day appellate window unconstitutionally denies minors of effective opportunities to seek a final resolution of their bypass petitions.[8]

E. The Right to Assistance Provisions.

Plaintiffs also argue that Idaho's parental consent law "does not require that a minor be advised at any point in the district court proceedings that she may have any sort of assistance whatsoever in seeking a bypass." Plaintiffs further contend that a minor is deprived of "an effective opportunity for an abortion to be obtained" if the court provides the minor with only a

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[6] The Court is assuming that, in almost all cases, the mailing of the bypass order from the district court will be sent to the minor's guardian ad litem to protect her confidentiality.

[7] The Court does not wish to cast unwarranted dispersion on the U.S. Postal Service, but it is almost inconceivable that a minor would receive the notice through the mail in two days.

[8] Even more onerous is the express direction in the statute that prohibits the trial court, even upon a showing of good cause, from expanding the time to file the appeal. Idaho Code § 18-609A(1)(d).

guardian ad litem instead of legal counsel. For the following reasons, the Court finds that Plaintiffs' contentions regarding these issues are simply unfounded.

The challenged portion of Idaho's judicial bypass provision regarding the assistance provided to a minor seeking a judicial bypass hearing provides as follows:

> (i) . . . . A minor shall have the legal capacity to make and prosecute a petition and appeal as set out herein. A guardian ad litem may assist the minor in preparing her petition and other documents filed pursuant to this section and may seek appointment as set forth below. A guardian ad litem, whether prospective or appointed, must be an attorney properly licensed in this state. The court shall ensure that the minor is given assistance in filing the petition if the minor desires a guardian ad litem but no guardian ad litem is available.
> * * *
>
> (iii) A hearing on the merits of the petition shall be held . . . . The court shall appoint a qualified guardian ad litem for the minor if one is requested in the petition. If no qualified guardian ad litem is available, the court may appoint some other person to act in the capacity of a guardian ad litem, who shall act to fulfill the purposes of this section and protect the confidentiality and other rights of the minor.

Idaho Code §§ 18-609A(1)(b)(i), (iii).

1. **Notice of the Availability of Assistance.**

The Idaho judiciary has adopted procedures ensuring that all minors are advised of the availability of guardians ad litem. Defendants' Exhibit 200 contains a packet generated by the Idaho Supreme Court and distributed to all district judges and court clerks for use during judicial bypass proceedings. Among other documents, the packet contains a brochure and a form petition for requesting a judicial bypass hearing. The packet cover letter states that the form is available on the Idaho Supreme Court's Website at <www2.state.id.us/judicial/manual.htm>. The packet cover letter also directs that "the brochure and the forms should be made available to the public

at each District Court Clerk's Office and Court Assistance Office."

The publicly available brochure is entitled "Consent for Abortions for Minors in Idaho" and contains a number of questions with corresponding answers. The second question in the brochure asks, "What should I do if I decide to seek permission from the court for an abortion?" The brochure answers this question by stating that a petition must be filed and explains what assistance is available:

> Once you are at the courthouse, you may state on the petition that you would like the court to appoint someone to help you. That person is called a guardian ad litem and should be a lawyer unless no lawyer is available. The guardian ad litem will help you prepare the papers and attend the hearing with you. You will not be charged a fee for filing the petition with the court and you will not have to pay the guardian ad litem.

The brochure expressly advises any minor who inquires that assistance is available through a guardian ad litem and that the assistance will be provided at no cost.

Even without this brochure, however, Defendants point out that all minors seeking a judicial bypass hearing will be required to acquire, read, and complete the judicial bypass petition, which is accompanied by an instruction sheet. The form and instructions are available directly from each District Court clerk's office and Court Assistance Office. For those minors who do not wish to visit either of these locations, the form and instructions are also available on the internet. *See* Exhibit 200, cover letter to packet. The first paragraph of the instruction sheet directly informs a minor who has received a form petition that she is entitled to assistance:

> The court must appoint an attorney or some other person to assist you in completing the necessary documents, preparing for the court hearing, and accompanying you to the court. The person the court appoints is called a guardian ad litem. You do not have to pay this person.

After reading the instruction sheet, the minor must then complete the actual petition form. On the second page of the petition, the minor must affirmatively state in paragraph 7 whether she requests, or does not request, a guardian ad litem. Even if the minor chooses not to request a guardian ad litem, paragraph 8 of the petition states that the court should nevertheless consider "whether it is appropriate to appoint a guardian ad litem" for the minor. In order to satisfy the request in paragraph 8, the court will be required to inquire of the minor regarding whether she is capable of proceeding alone or whether assistance should be appointed.

The Court finds that it would be highly unlikely that a minor seeking a judicial bypass in Idaho would not be informed that assistance is available. Although she *may* read about guardians ad litem in the publicly available brochure, she *will* read about guardians ad litem in the petition and accompanying instruction. She will also be required to state on the petition whether or not she wishes the court to appoint a guardian ad litem. In those cases where minors do not request a guardian ad litem, the court is required to consider whether it would nevertheless be appropriate to appoint assistance. Therefore, this particular challenge to Idaho's judicial bypass provision must fail in as far as it is based upon the alleged failure of the State to inform minors that assistance is available.

2. *Attorney* Guardian Ad Litem v. *Non-Attorney* Guardian Ad Litem

Although the judicial bypass provisions adopted by the Idaho legislature clearly states that the trial court should appoint an attorney as a guardian ad litem, it also recognizes that there may be circumstances when an attorney is not available. In fact, there are counties in Idaho where there are no practicing attorneys. Plaintiffs focus on the exception, when an attorney is not available for appointment, to assert that a non-attorney guardian ad litem will not act as an

"advocate" for minors during the judicial bypass proceedings. In response, Defendants point out that the Idaho parental consent statute involves the rights of minors. The fact that guardians ad litem would be required to act as they do in all other situations where they represent minors is particularly evident from the fact that the statute refers to the Idaho Child Protective Act in two separate provisions. *See* Idaho Code §§ 18-609A(1)(a)(v), 18-609A(1)(b)(iv). Consequently, guardians ad litem who assist minors with judicial bypass proceedings are required by Idaho law to act as a special advocate and to protect the minor's interests.

The Plaintiffs have also argued that the State should provide an attorney rather than a guardian ad litem because non-attorney guardians ad litem may lack the necessary skills to assist a minor with the judicial bypass proceedings. While the Plaintiffs did present testimony underscoring the assistance a lawyer can provide in a bypass proceeding, the Court is not convinced that a non-lawyer would not be able to guide a minor through the judicial bypass procedures in a competent manner. As stated earlier, a non-lawyer will be the exception rather than the rule. Also, this is not an adversary proceeding where an attorney's knowledge of the law and procedural rules could have a far greater impact on ultimate results of the hearing. The trial court is charged with determining "whether the minor should be granted the right to self-consent to the abortion or whether the court's consent to causing or performing of the abortion, despite consent of a parent, is in the best interest of the minor." Idaho Code § 18-609A(1)(b)(iii). The Supreme Court has acknowledged that it is unlikely that a state court "will treat a minor's choice of [complaint] forms without due care and understanding for her unrepresented status." *Akron II*, 497 U.S. at 517.

In sum, this Court concludes that Plaintiffs have failed to show that this portion of

Idaho's judicial bypass provision does not provide minors with an "effective opportunity for an abortion to be obtained" even if on some rare occasion, a non-lawyer, is appointed as the guardian ad litem.

F. The Requirement That a Judge Hearing a Bypass Petition Must Report Criminal Conduct to Law Enforcement.

Idaho's parental consent law requires a judge to report criminal conduct to law enforcement if he learns of such conduct while hearing a bypass petition. In particular, the statute states that:

> If, in hearing the petition, the court becomes aware of allegations which, if true, would constitute a violation of any section of title 18, Idaho Code, by a person other than the petitioner . . . the court shall order, upon entry of final judgment in the proceeding under this subsection, that an appropriate investigation be initiated or an appropriate information, complaint or petition be filed. Such allegations shall be forwarded by the court with due consideration for the confidentiality of the proceedings under this section. If, but for the requirements for proof as set forth in this section, the minor would have been privileged to withhold information given or evidence produced by her, the answers given or evidence produced and any information directly or indirectly derived from her answers may not be used against the minor in any manner in a criminal case, except that she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing or failing to produce, evidence as required by the court.

Idaho Code § 18-609A(1)(b)(iv).

Essentially, this provision requires the judge to report and law enforcement to investigate the sexual partner of every minor who seeks a judicial bypass. No one will be seeking a bypass unless she is under the age of eighteen, unmarried, and pregnant. And, in Idaho, it is a crime to have sexual intercourse with any female under the age of eighteen – regardless of the male's age and regardless of whether she consented to intercourse. *See* Idaho Code §§ 18-6101 (rape), 18-

6603 (fornication).

The Court finds that this reporting requirement violates the constitutional rights of minors by breaching their confidentiality. The Court also finds that requiring minors to identify their partner would create a severe chilling effect on the decision to seek an abortion in the first place, and is a constitutionally undue burden. The Court will address each point in turn.

To pass constitutional scrutiny, a judicial bypass proceeding "must assure that a resolution of the issue . . . will be completed with anonymity . . . ." *Bellotti II*, 443 U.S. at 644. Although the Idaho statute states that the court is to forward the allegations of criminal conduct to law enforcement "with due consideration for the confidentiality of the [bypass] proceedings," Idaho Code § 18-609A(1)(b)(iv), any such report will necessarily result in a breach of the minor's confidentiality.

The Court cannot contemplate how a prosecutor could investigate and proceed against a minor's sexual partner without him learning who reported him. The defendant is entitled to receive any documents and any exculpatory evidence in the state's possession, including the judge's report and/or the transcript of the bypass hearing. *See* Idaho R. Crim. P. 16 (mandatory disclosure of information to the defendant by the prosecution). An example highlights this point. If a minor is not able to identify with certainty which of two partners is the father, the trial court would be required to report both names to the authorities. In preparing a defense to a criminal charge, the defendant would be entitled to know of this fact and the identity of the minor seeking the abortion, to test her recollections, and the identity of the other partner.

Additionally, the minor's breach of confidentiality will not be limited to her partner and his defense counsel. Indeed, it would be impossible for the prosecutor to conduct an

investigation, or for her partner to prepare a defense, without talking with people close to him and the minor about their sexual behavior. If the defendant is a juvenile, his parents must receive notice of the information, complaint, or petition, which will "set forth plainly . . . the facts" surrounding the alleged crime. *See* Idaho Code §§ 20-510; 20-512; *cf.* Idaho Code § 16-1609 (requiring that a report from investigation under the Child Protective Act "shall be delivered to the court with copies to each of the parents or other legal custodian"). Furthermore, if a case goes to trial, the facts surrounding the alleged crime will become publicly available. In addition, it is highly unlikely that the minor's sexual partner could be tried and convicted without the testimony of the minor herself.

In challenges to parental involvement laws, courts have repeatedly held that to pass constitutional scrutiny, a minor must have a confidential bypass option that does not result in a report to another government agency. In *Hodgson v. Minnesota*, the Supreme Court considered Minnesota's parental notification law which gave a minor three options: (1) notify her parents; (2) tell her physician that she is a victim of abuse or neglect in which case the physician had to inform a local welfare or law enforcement agency within 24 hours; or (3) petition a court for a confidential bypass. *See* 497 U.S. at 426-27 & nn.7, 9. The Minnesota law survived constitutional scrutiny only because there was a separate and completely confidential bypass alternative – the minor could choose to seek a bypass and not trigger any reporting requirements. *Id.* at 461; *see also Manning v. Hunt*, 119 F.3d 254, 273 (4th Cir. 1997) (upholding North Carolina reporting requirement because "[m]ost important, as was the case in *Hodgson*, a minor who does not disclose the abuse can still receive judicial consent if she can prove that she is mature or that the abortion is in her best interests"). *Planned Parenthood, Sioux Falls Clinic v.*

Miller, 63 F.3d 1452 (8th Cir. 1995) (striking South Dakota's statute because there was no procedure where a minor could seek a confidential judicial bypass where the minor could elect not to disclose the identity of her partner). In these cases, although the statutes contained reporting requirements, the minor needed to retain the option to pursue a bypass confidentially. An Idaho minor, in contrast, has no such option.

In sum, a minor in Idaho has only two choices: (1) obtain the consent of a parent; or (2) petition a court for a bypass that will necessarily result in her partner being reported and her sexual behavior becoming the subject of a criminal investigation. Because any bypass will trigger an investigation, the Idaho minor has no confidential alternative to parental consent.[9] It is the minor's right to privacy that she is exercising in seeking a judicial bypass in the first place; doing so must not make information about her sexual behavior come to light. *See Akron II*, 497 U.S. at 513 (judicial bypass procedure of parental consent statute must take "reasonable steps to prevent the public from learning of the minor's identity"). Therefore, the Court finds that the requirement that a judge hearing a bypass petition must report criminal conduct to law enforcement is unconstitutional.

Aside from the confidentiality, the Court also concludes that Idaho's reporting requirement will have such a chilling effect on the minor's decision whether to even seek an abortion in the first place that it creates an undue burden and is therefore unconstitutional. In

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[9] During oral argument, Defendants stated that the judge hearing the bypass could not report the minor's name to law enforcement. Tr. 421:1-4 (Hearn). Further, Defendants asserted that the judge should not report her partner's name either. Tr. 421:14-16 (Hearn); *see also* Tr. 420:16-17 (Hearn). Later, Defendants admitted that the judge would not ask the name of the minor's partner but would be required to report the minor herself to law enforcement. *See* 424:18-425:10 (Hearn). Additionally, Defendants admitted that turning her name over for an investigation will result in a breach of her confidentiality. Tr. 422:20-423:9 (Hearn).

almost all cases where a pregnant minor seeks a judicial bypass, she has engaged in consensual sex. Tr. 175:12-55 (Lucid). In Massachusetts, minors seeking an abortion inquire about whether there are legal consequences for their partners if they pursue a judicial bypass. Tr. 173:22-174:24 (Lucid). Ms. Lucid also testified at trial that when minors learn there will be no legal consequences for their partners, they express relief. Tr. 175:2-11.

The Court finds that Idaho's reporting requirement will deter minors from seeking an abortion once they are aware of the potential criminal prosecution of their partners. *See Hodgson*, 497 U.S. at 460 (providing that if a statute requires a minor to report abuse in order to bypass parental involvement law, her "reluctance to report . . . makes the abuse exception less than effectual") (O'Connor, J., concurring). With a guaranteed report to law enforcement that starts an investigation that could lead to a conviction of her partner, an Idaho minor has no real effective opportunity to bypass the parental consent requirement and this portion of the statute is unconstitutional.[10]

V.

THE MEDICAL EMERGENCY PROVISIONS.

A. Definition of "Medical Emergency."

Plaintiffs first argue that the definition of "medical emergency" in Idaho Code § 18-

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[10] This does not mean that there is no effective means to protect a minor who has suffered from sexual abuse, such as rape or incest. First, the minor can report the matter to appropriate authorities. If the minor is reluctant to report the matter, Idaho Code § 16-1619 requires any physician, resident on a hospital staff, intern, nurse, school teacher, day care personnel, social worker, or other persons having reason to believe a minor has been abused, to report such matters within 24 hours to the Department of Health and Welfare or proper law enforcement authorities. This provision shifts the reporting requirement to third parties, as opposed to compelling the minor to identify her partner in what should be a confidential judicial bypass proceeding.

609A(5)(c)(i) is unconstitutionally narrow because it may be interpreted as to exclude conditions such as: preeclampsia, inevitable abortion, premature rupture of membranes, cornual pregnancy, ectopic pregnancy, HELLP Syndrome, IUD infections, leukemia complications, and Marfan Syndrome. In Plaintiffs' view, these conditions are excluded because they do not fit the terms "sudden," "unexpected" and "abnormal" as used in the medical emergency definition. Plaintiffs' witnesses suggested that the medical conditions listed above (1) may not be "sudden" because the condition may have a latent period where it progresses slowly over time, Tr. 43, 44, 117; (2) may not be "unexpected" because the condition may be anticipated and patients may have been advised that the condition may occur, Tr. 43-45, 112-13, 115-17, 121-22; and (3) may not be "abnormal" because the pregnancy may have been normal prior to the occurrence of the condition, Tr. 112, 115.

Defendants dispute Plaintiffs' restrictive interpretation of the terms "sudden," "unexpected" and "abnormal." Defendants contend, and the Court agrees, that the evidence admitted at trial reveals why the definitions suggested by the Plaintiffs are unreasonably restrictive and should be rejected. Dr. Earl Monte Crandall testified that the term "sudden" refers to the "moment of diagnosis" by a physician. Tr. 458, 461. Dr. Crandall also testified that the term "unexpected" does not refer to whether a physician "anticipates" complications but instead refers to the fact that a physician cannot predict "exactly when" an emergency is going to happen. Tr. 450, 473, 498-99. Dr. Crandall further testified that all medical emergencies are "abnormal" because they do not

generally occur during normal pregnancies. Tr. 473-74, 499.[11]

Moreover, Plaintiffs' own witnesses appeared to support Dr. Crandall's testimony. Dr. Mark D. Nichols apparently concurred in this interpretation when he testified that he does not know "precisely when the emergency is going to occur [or] what it was going to be." Tr. 137-38. Dr. Nichols further testified that he wished that he had a gauge that would tell him when a medical emergency is going to happen and what the medical emergency condition might be. Tr. 138. Dr. Nichols also testified that certain medical conditions are "unexpected" because he does not know whether they will or will not arise during pregnancy, even though there is some likelihood of the condition occurring. Tr. 139-40. Dr. Frederiksen concurred in this interpretation when she testified that

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[11] Dr. Crandall testified that the medical emergency statute was "sufficiently clear for the average physician in Idaho, the average gynecologist such as myself, to understand the wording of the bill and to know what we can and what we can't do." Tr. 446. In Dr. Crandall's view, "As a doctor, we're taught from the very beginning to think about things that could happen, possible complications, anticipate problems, but we can't predict exactly what is going to happen." Trial 449-50.

With respect to specific medical conditions, Dr. Crandall testified as follows: With an ectopic pregnancy, Dr. Crandall testified that he can anticipate a rupture "but we don't really expect it to happen." Tr. 456. Dr. Crandall also testified that an ectopic pregnancy could be slowly developing but that "our diagnosis in onset of symptoms is sudden." Tr. 458. Dr. Crandall further testified that he thought "it would have been an emergency at the time that the diagnosis was made." Trial 461. Dr. Crandall also testified that an ectopic pregnancy was "abnormal" because it is not expected to occur in a normal pregnancy and would not be expected in anyone. Trial 463-65.

For essentially the same reasons, Dr. Crandall believed that the following medical conditions also fell within the medical emergency definition: ruptured membranes, Tr. 465-74; cornual pregnancies, Tr. 474-79; HELLP Syndrome, Tr. 486-489; IUD infections, Tr. 489-93; leukemia complications, Tr. 493-96; Marfan Syndrome, Tr. 496-98; and preeclampsia, Tr. 480-86. Dr. Crandall testified that he could not think of any true medical emergencies in a pregnant woman that would not fall within the statutory definition of "medical emergency." Tr. 498. Dr. Crandall further testified that the term "unexpected" is well understood in the medical community and that most physicians would have the same definition for it. Tr. 518.

conditions which do not occur during an average pregnancy are "abnormal." Tr. 44. Dr. Frederiksen also testified that the term "abnormal" was broad enough to encompass all of the emergency conditions discussed at trial. Tr. 96.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3rd Cir. 1991), the Third Circuit Court of Appeals considered allegations that three life-threatening medical conditions were unconstitutionally excluded because they did not fit into the definition of "serious risk" as used in the medical emergency exception. *Id.* at 700. However, the Court of Appeals found the plaintiffs' interpretation to be "unduly restrictive" and concluded that the challenged term was subject to a constitutional interpretation which would include the three life-threatening medical conditions postulated by the plaintiffs.[12] *Id.* at 700-01. In reaching its conclusion, the Court of Appeals noted that statutes should be construed to sustain their constitutionality:

> Moreover, we read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury.

Id. at 700-01. After adopting a constitutional interpretation of the challenged term which included the postulated medical conditions, the Court of Appeals noted that any doubt about their

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[12] The postulated medical conditions included inevitable abortion, prematurely ruptured membrane, and preeclampsia. *See Casey*, 947 F.2d at 699-700. These are some of the same conditions postulated by Plaintiffs in the instant case.

conclusion was resolved by the Supreme Court's directive that "a court is not to strike down a law as unconstitutional on the basis of a 'worst-case analysis that may never occur'" when confronted with a facial challenge.[13] *Id.* at 701-02; *quoting Akron II*, 497 U.S. at 514.

When interpreting the Idaho medical emergency definition, the Court presumes that the Idaho legislature intended to act constitutionally by drafting a definition that would include all medical conditions that could lead to death or permanent injury. *See Akron II*, 497 U.S. at 514; *Clements*, 457 U.S. at 963; *Casey*, 947 F.2d at 700. Additionally, the terms "sudden," "unexpected" and "abnormal" should be interpreted in such a manner that would further the intentions of the Idaho legislature. *See Casey*, 947 F.2d at 700. These terms are readily susceptible to such an interpretation.

As this Court has already found, the challenged terms are readily susceptible to a constitutional interpretation and Plaintiffs' interpretation of the terms is unduly restrictive. *See* September 1, 2000, Memorandum Opinion and Order at 30. Accordingly, the Court will reject Plaintiffs' restrictive interpretation for a more reasonable interpretation, which would further the Idaho legislature's intention of adopting a constitutional definition that included all life-threatening medical conditions.

B. The Medical Emergency Definition's Susceptibility of a Constitutional Interpretation.

In the alternative, Plaintiffs argue that the terms "sudden," "unexpected" and "abnormal" are ambiguous and cause the medical emergency definition to be unconstitutionally vague. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to

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[13] The statutory analysis undertaken by the Third Circuit Court of Appeals was expressly affirmed by the United States Supreme Court in *Casey*, 505 U.S. at 880.

provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 2498, 147 L.Ed.2d 597 (2000); *see also Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996).

The Court will reject Plaintiffs' vagueness challenge for two reasons. First, the challenged terms are readily susceptible to a constitutional interpretation, as discussed *supra*. A reasonable and constitutional interpretation of the medical emergency definition will include all conditions that are life-threatening or that will result in permanent injury. Thus, the medical emergency definition will "not prohibit doctors from foregoing the Act's requirements when what are commonly perceived to be medical emergencies exist."[14] *Casey*, 947 F.2d at 702. Rather, physicians will be allowed to focus upon whether such a condition exists, which is "the type of 'judgment[] that physicians are obviously called upon to make routinely whenever surgery is considered.'" *Id.* (*quoting Doe v. Bolton*, 410 U.S. 179, 192, 93 S. Ct. 739, 748, 35 L.Ed.2d 201 (1973). As a result, this Court concludes that the medical emergency definition provides the fair warning required by the Due Process Clause and that the medical emergency definition is not void for vagueness. *See Casey*, 947 F.2d at 702.

Second, the Court will reject Plaintiffs' vagueness challenge because the evidence presented at trial reveals that the terms "sudden," "unexpected" and "abnormal" are words of common understanding and are readily understandable by people of ordinary intelligence. At trial, four different definitions of the term "emergency" and "emergent" were presented as

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[14] The Third Circuit Court of Appeals reached this conclusion "apart from the 'good faith clinical judgment' language" contained in the medical emergency definition considered in that case. *Casey*, 947 F.2d at 702.

included in four different medical dictionaries. All of these definitions included the terms "sudden" and "unexpected." The medical community would not use these terms if they were not understandable by physicians and others practicing medicine. Moreover, Dr. Frederiksen testified that the terms "sudden," "unexpected" and "abnormal" are words commonly used by physicians. Tr. 89-90. Further, Dr. Crandall testified that the medical dictionaries were authoritative. Tr. 443, 448, 457.

For the foregoing reasons, the Court concludes that the medical emergency definition is not unconstitutionally vague.

C. Post-Emergency Notification Requirements and Defenses.

Plaintiffs also challenge the post-emergency notification requirements found in Idaho Code § 18-609A(1)(a)(v). These notification requirements provide that "a physician shall, with due diligence, attempt to provide a parent of the unemancipated minor actual notification of the medical emergency." *Id.* If the physician does not "immediately contact[]" a parent, he must again attempt to provide actual notification with "due diligence" for eight hours following the abortion. *Id.* Then, notwithstanding whatever he accomplishes in those eight hours, he must provide actual notification within twenty-four hours. *See id.* The limited exception to these notification requirements provides that a minor's parent must be notified unless the physician "reasonably believes" that the minor is homeless or abandoned or "has suffered abuse or neglect such that [her] physical safety would be jeopardized if a parent were notified" and she is actually adjudged by a court to be homeless, abandoned, abused, or neglected. Idaho Code § 18-609A(1)(a)(v).

Notably, no other state's parental involvement law containing an emergency provision requires notice following an emergency abortion. While Idaho has a full page of post-procedure

requirements, the Pennsylvania statute upheld in *Casey* simply states that a doctor must get parental consent "[e]xcept in the case of a medical emergency." 18 Pa. Cons. Stat. Ann. § 3206(a). Like Pennsylvania, all other states allow a physician to proceed with treatment if he believes an abortion is necessary, without any requirements upon him following the procedure other than his ethical obligation to care for his patient.

1. Abused and Neglected Minors.

In *Hodgson*, the Supreme Court held that a two-parent notice statute, with an exception for reported cases of abuse and neglect, was unconstitutional absent a confidential alternative for these minors. 497 U.S. at 460-61. Emphasizing that "[t]he combination of the abused minor's reluctance to report sexual or physical abuse, with the likelihood that invoking the abuse exception for the purpose of avoiding notice will result in notice, makes the abuse exception less than effectual," the Court upheld the law only because there was a completely confidential bypass that allowed abused minors not to report. *Id.*; *see also Miller*, 63 F.3d at 1461, 1463 (holding one-parent notification law with exception only for reported cases of child abuse and neglect insufficient because reporting could result in notice to parents of minor's abortion and because minors are reluctant to declare abuse); *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 375-76 (4th Cir. 1998) (holding that exception to one-parent notification statute for only reported abuse and neglect might not satisfy *Hodgson* because of "the possibility that the provision's reporting requirement could indirectly result in notice to the abusive parent" and upholding the statute "because [it] include[d] a mandatory best interests bypass which allows an abused minor to bypass notice").

This Court finds that the "bypass" for abused and neglected minors will necessarily result in a breach of a minor's confidentiality, and therefore, lacks the effectiveness the Supreme Court demands. The Idaho law, in its treatment of abused and neglected minors, suffers from precisely

the defect identified in *Hodgson, Miller, and Camblos*: parental notification is only excused if the physician believes that notice would jeopardize the minor's physical safety. In such circumstances, the physician "shall . . . make a report to a law enforcement agency pursuant to section 16-1619, Idaho Code, and a petition shall be filed pursuant to section 16-605, Idaho Code, which petition shall include a reference to this code section." Idaho Code § 18-609A(1)(a)(v).

However, this report and petition will ultimately result in notice to the parent(s) because once the petition is filed, it will trigger an adjudicatory hearing, *see* Idaho Code § 16-1608, and a possible investigation, *see* Idaho Code § 16-1609. Further, the petition will be served on the minor's parents. *See* Idaho Code §§ 16-1605, 16-1606. Given that Idaho Code § 18-609A(1)(a)(v) requires that the petition include a reference to a code section entitled "Consent Required for Abortions for Minors," this service is effectively express notice that the minor had an abortion. Here, as in *Hodgson, Miller, and Camblos*, the purported "exception to notification for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents." *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring). The Idaho law provides no confidential alternative. Accordingly, the Court finds that the post-abortion procedures regarding abused and neglected minors set forth in Idaho Code Section 18-609A(1)(a)(v) are unconstitutional.

2. Minors Who Are Not Homeless or Abandoned or Have Not Been Abused or Neglected in the Past.

Under Idaho's parental consent law, except in those limited circumstances discussed *supra*, where the physician believes that "the minor has suffered abuse or neglect such that the minor's physical safety would be jeopardized," the minor has no option to avoid notification following an emergency procedure. *See* Idaho Code § 18-609A(1)(a)(v). Additionally, the law fails to provide an alternative to parental notice for those minors who have not suffered abuse in

the past, but who nonetheless might suffer abuse as a result of their parents learning of the abortion. Nor does it waive notice for those minors who have suffered or will suffer non-physical abuse. As the trial testimony revealed, minors are reluctant to report and a physician may not always be in a position to know whether a minor has suffered or will suffer abuse. *See* Tr. 47:7-17. Accordingly, a parental involvement law must allow the minor – regardless of the reasons she seeks to do so – to seek a waiver of the parental involvement requirement. *See Bellotti II*, 443 U.S. at 649.[15] For this additional reason, the fact that Idaho's parental consent law denies minors facing emergencies an opportunity to waive parental involvement, and to do so confidentially, the Court finds that the post-abortion procedures set forth in Idaho Code Section 18-609A(1)(a)(v) are unconstitutional.

VI.

PROVISIONS REGARDING PROHIBITED CONDUCT FOR PHYSICIANS.

This Court has recognized that a criminal statute may not impose an objective standard on a physician's performance of emergency abortions because such a standard chills his willingness to provide life or health-saving medical procedures. *See* Memorandum Decision and Order dated September 1, 2000. For this reason, this Court preliminarily enjoined the State from criminally prosecuting a physician who performs an abortion in a medical emergency situation.

During the course of the trial in this case, counsel for Plaintiffs orally requested clarification concerning the current status of the injunction as it applies to the criminal

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[15] Following *Bellotti*, no court in the country, looking to the merits, has upheld a parental involvement law that lacks a bypass. Further, laws that contained only an exception for abused minors have been held unconstitutional. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1463 (8th Cir. 1995) (striking down law that lacked a bypass for mature minors and minors for whom an abortion is in their best interests).

prosecution of a physician who performs an abortion as defined in Idaho Code §§ 18-609A(5)(c) and 18-609A(1)(a)(v). On September 11, 2001, this Court held that Idaho Code §§ 18-609A(5)(c) and 18-609A(1)(a)(v) will remain enjoined pending a determination of the case on the merits. The Court noted that Defendants had not moved to lift the preliminary injunction enjoining the above provisions. Further, the addition of Idaho Code § 18-614, which provides certain defenses to physicians performing abortions on minors, did not automatically lift the injunction.

Idaho Code § 18-609A(1)(a) provides that "[n]o person shall knowingly cause or perform an abortion upon a minor unless" he complies with the parental consent requirement. Under this provision, a subjective standard of liability seems to apply: to violate the statute a physician would have to *know* that the woman upon whom he was performing the abortion was a minor. Idaho Code § 18-605 contains three provisions which impose criminal and administrative penalties on individuals who perform unlawful abortion.

Subsection 1 of Idaho Code § 18-605 provides for felony penalties for persons performing illegal abortions who are not licensed or certified to provide health care and is not relevant to the issues now before this Court. Subsection 3 imposes felony penalties on persons who are licensed or certified to provide health care services, but requires that the individual "knowingly" violate the provisions of the statute, which ties back in to Idaho Code § 18-609A(1)(a).

Sections 18-609A and 18-605(3) provide the necessary "scienter" requirement that the Court had earlier found to be absent from these statutory provisions. As the Supreme Court has stated, a "knowingly" scienter requirement ameliorates any vagueness challenge. *See Boyce*

Motor Lines, Inc., v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed.2d 367 (1952); *see also United States v. Doyle*, 786 F.2d 1440, 1443 (9th Cir. 1986) ("This ['knowingly'] scienter requirement is sufficient to withstand any vagueness challenge.").

The Court will now discuss the affirmative defenses to criminal and administrative liability set forth in Idaho Code § 18-614(1), (2), and (3). Plaintiffs point out that Idaho Code § 18-614(1) provides that no physician can be subjected to criminal or administrative liability for performing an abortion on a woman, when her age may be in question, if the physician obtains either positive identification or other documentary evidence from which a "reasonable person" would have concluded that the woman seeking the abortion was either an emancipated minor or was an adult. Plaintiffs argue that this provision, when applied in a criminal setting, creates confusion with the "knowingly" provision of the other sections.

While this statute is not a model of clarity, combining tort concepts of a "reasonable person" with traditional criminal scienter requirements of acting "knowingly," the Court does not find that this disparity is sufficient to render the statutory scheme vague and unenforceable. The state will have the burden of proving beyond a reasonable doubt that the physician "knowingly" violated the parental consent law, and in this context performing an abortion on a minor that he may have thought was an adult.

Even if a physician chooses not to raise the affirmative defense described in Section 18-614(1), the state would still have the burden of proving that the physician "knowingly" performed the abortion on the woman knowing that she was a minor. Aside from relying on a failure of proof by the state that he "knowingly" performed the abortion on a minor, the physician can also raise the affirmative defense that he had obtained identification or documentary proof of

her age. Since this section only comes into play when raised by the physician as an affirmative defense, it must be considered in a somewhat different context than when a state eliminates "knowingly" as a scienter element when it is proving its case in chief. Since this section is only applicable if the physician decides to raise it as an affirmative defense, the Court does not find that the "reasonable person" standard, which would be used to evaluate the merits of the affirmative defense, renders the statutory scheme unconstitutional.

Concerning Idaho Code § 18-614(2), the Court notes that this subsection provides a physician with a defense to prosecution for performing an abortion in violation of the parental notification procedures outlined in Idaho Code § 18-609A(1)(a)(v). Consistent with this Court's determination *supra*, that the whole of Idaho Code § 18-609A(1)(a)(v) is unconstitutional, § 18-614(2) is rendered moot.

The last affirmative defense is found in Idaho Code § 18-614(3), which Plaintiffs argue could result in physicians notifying the parents of adult women, against their wishes, that they had an emergency abortion. Specifically, Idaho Code § 18-614(3) provides a defense to prosecution if, following an emergency abortion, "the physician, after reasonable inquiry, is unable to determine whether or not the woman is a minor," and he proceeds to notify the patient's parent(s), regardless of the patient's age. As with Idaho Code § 18-614(2), this subsection is also rendered moot by the Court's determination that the parental notification procedures outlined in Idaho Code § 18-609A(1)(a)(v) are unconstitutional.

The Court further finds that Idaho's parental consent law does not raise any constitutional concerns as far as it relates to administrative penalties. The administrative penalties contained in Idaho Code § 18-605(2) do not require that the State of Idaho prove that a medical care provider

"knowingly" violated the provisions of the parental consent statute. While Defendants refer to it as an "objective" standard, Plaintiffs prefer to call it a "strict liability" standard. In any event, the question is whether the state can set a lower standard of proof for administrative penalties than would be constitutionally required for criminal penalties. The short answer is yes.

As the Seventh Circuit found in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999):

> [T]he threat of potential financial liability under the [statute's] forfeiture provision is, we believe, qualitatively no different from the threat of civil liability under the [statute]. Because we have already concluded that the threat of financial liability under the section cannot be said to increase a physician's unwillingness to perform emergency abortions because the physician already faces the threat of financial liability at tort law for decisions to perform emergency abortions that are later adjudged to be medically unreasonable, it follows that the imposition of a monetary fine is likely to have no significant chilling effect on the performance of abortions in Wisconsin.

Id. at 467.

Likewise, this Court finds no constitutional violation or chilling effect because Idaho's administrative penalties set a different and lower standard than would apply to criminal prosecutions.

VII.

SEVERABILITY OF INDIVIDUAL PROVISIONS OF THE STATUTE.

It is well settled that the question of severability of a state statute is one of state law. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506, 105 S. Ct. 2794, 2803, 86 L.Ed.2d 394 (1985); *Ripplinger v. Collings*, 868 F.2d 1043, 1056 (9th Cir. 1989). The Idaho Supreme Court has stated that "when the unconstitutional portion of a statute is not integral or indispensable, it will recognize and give effect to a severability clause." *Simpson v. Cenarrusa*, 130 Idaho 609,

614, 944 P.2d 1372, 1377 (1997). The Idaho Supreme Court has also considered whether the elimination of the invalid or unconstitutional portion of a statute would render the remainder of the statute incapable of accomplishing the legislative purposes. *See Boundary Backpackers v. Boundary County*, 128 Idaho 371, 378, 913 P.2d 1141, 1148 (1996).

Defendants suggest that if any of the provisions of Idaho's parental consent law are declared unconstitutional, the remaining portions of the consent law should not be rendered incapable of accomplishing the legislative purposes. Defendants point out that the statute itself provides for the severability of any one or more of the provisions. That provision reads:

> 18-615. Severability. If any one (1) or more provision, section, subsection, sentence, clause, phrase, or word of this chapter or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this chapter shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed every section of this chapter and each provision, section, subsection, sentence, clause, phrase or word thereof irrespective of the fact that any one (1) or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

Idaho Code § 18-615. Based upon the express language of this severability clause, the elimination of any invalid portion of a statute would not render the remainder of the statute incapable of accomplishing the legislative purposes. Therefore, the sole issue to be decided is whether the challenged portions of Idaho's parental consent statute are "integral or indispensable." *Simpson v. Cenarrusa*, 130 Idaho 609, 614, 944 P.2d 1372, 1377 (1997). If they are not "integral or indispensable," they may be severed from the remaining statute. *See id.*

As discussed *infra* in the Court's Order, the Court finds that the unconstitutional provisions are not integral or indispensable to the other portions of Idaho's parental consent law and thus they may be severed from the remaining statute.

ORDER

Based upon the foregoing, the Court being fully advised in the premises, IT IS HEREBY ORDERED that the following provisions of Idaho's parental consent law, Idaho Code § 18-601 *et seq.*, are permanently enjoined:

(1) Idaho Code § 18-609A(1)(b)(i), the first sentence only, which states that a minor seeking a waiver of the requirement of parental consent must file her judicial bypass petition in "the county where the minor resides or the county where the abortion is caused or performed";

(2) Idaho Code § 18-609A(1)(c), which provides that if a district court denies a minor's bypass petition, she must file a notice of appeal within two (2) days from the date of issuance of the order. An appeal of a minor's bypass petition would therefore be governed by Idaho Appellate Rule 14;

(3) Idaho Code § 18-609A(1)(b)(iv), the final three sentences only, which require that if a judge learns of criminal conduct while hearing a bypass petition, the judge must report that activity to law enforcement;

(4) The post-abortion parental notification procedures set forth in Idaho Code Section 18-609A(1)(a)(v). Consistent with this Court's determination that such procedures are unconstitutional, the affirmative defenses outlined in Idaho Code § 18-614(2) and (3) are rendered moot.

Further, finding that the above-listed provisions are not integral or indispensable to the other portions of Idaho's parental consent law and thus they may be severed from the remaining statute, the Court will not permanently enjoin the whole of Idaho's parental consent law.

DATED this 20 day of December, 2001.

Mikel H. Williams

MIKEL H. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of _____, 2001, to the following:

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United States District Court

_____
by Deputy Clerk

Term

2000 Idaho Laws Ch. 7 (S.B. +1299+

IDAHO 2000 SESSION LAWS
SECOND REGULAR SESSION OF THE 55TH LEGISLATURE

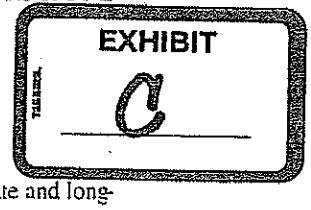
Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.
Vetoed provisions within tabular material are not displayed.

Ch. 7
S.B. No. +1299+
ABORTION RIGHTS

AN ACT RELATING TO ABORTION; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-601, IDAHO CODE, TO PROVIDE LEGISLATIVE FINDINGS AND INTENT; AMENDING SECTION 18-604, IDAHO CODE, TO PROVIDE A DEFINITION AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-608A, IDAHO CODE, TO MAKE IT UNLAWFUL FOR ANY PERSON OTHER THAN A PHYSICIAN TO CAUSE OR PERFORM AN ABORTION; AMENDING SECTION 18-609, IDAHO CODE, TO PROVIDE A REFERENCE TO ADULT PATIENTS, TO DELETE REQUIREMENTS FOR NOTICE TO PARENTS OF UNMARRIED PREGNANT PATIENTS UNDER EIGHTEEN YEARS OF AGE OR WHO ARE UNEMANCIPATED, TO DELETE LANGUAGE PROVIDING FOR SEVERABILITY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-609A, IDAHO CODE, TO REQUIRE CONSENT FOR ABORTIONS FOR MINORS, TO PROVIDE VARIOUS FORMS OF CONSENT, TO PROVIDE FOR ABORTION FOR MEDICAL EMERGENCIES, TO PROVIDE NOTICE TO PARENTS FOR ABORTIONS DUE TO MEDICAL EMERGENCIES, TO PROVIDE FOR REPORTS TO LAW ENFORCEMENT AGENCIES IF NOTICE TO PARENTS CANNOT BE MADE, TO PROVIDE PROCEDURES FOR A COURT TO GRANT A MINOR'S RIGHT TO SELF-CONSENT TO AN ABORTION, TO PROVIDE CONTENTS FOR PETITIONS TO THE COURT, TO PROVIDE FOR HEARINGS, TO PROVIDE FOR DECISIONS OF THE COURT, TO PROVIDE FOR APPEALS, TO PROVIDE THAT NO FEES MAY BE CHARGED, TO PROVIDE THAT A MINOR SHALL BE ORALLY INFORMED, TO PROVIDE THAT CERTAIN JUDICIAL RECORDS ARE EXEMPT FROM PUBLIC DISCLOSURE, TO PROVIDE THAT THE ADMINISTRATIVE DIRECTOR OF THE COURTS SHALL COMPILE STATISTICS, TO PROVIDE A PRIVATE RIGHT OF ACTION TO ANY PERSON INJURED BY AN ABORTION, TO REQUIRE REPORTING TO THE DEPARTMENT OF HEALTH AND WELFARE, TO PROVIDE THAT PHYSICIANS ARE SUBJECT TO PROFESSIONAL DISCIPLINE AND CIVIL PENALTIES AND TO PROVIDE DEFINITIONS; REPEALING SECTION 18-611, IDAHO CODE; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-614, IDAHO CODE, TO REQUIRE IDENTIFICATION AND AGE CONFIRMATION; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-615, IDAHO CODE, TO PROVIDE SEVERABILITY; AMENDING CHAPTER 3, TITLE 9, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 9-340G, IDAHO CODE, TO EXEMPT FROM PUBLIC DISCLOSURE RECORDS OF COURT PROCEEDINGS REGARDING JUDICIAL AUTHORIZATION OF ABORTION PROCEDURES FOR MINORS; AND PROVIDING AN EFFECTIVE DATE.

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

SECTION 1. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-601, Idaho Code, and to read as follows:



<< ID ST § 18-601 >>

18-601. LEGISLATIVE FINDINGS AND INTENT. (1) The legislature finds:
(a) That children have a special place in society that the law should reflect;
(b) That minors too often lack maturity and make choices that do not include consideration of both immediate and long-term consequences;
(c) That the medical, emotional and psychological consequences of abortion and childbirth are serious and can be lasting, particularly when the patient is immature;
(d) That the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of bearing a child

or of having an abortion are not necessarily related;
(e) That parents, when aware that their daughter is pregnant or has had an abortion are in the best position to ensure that she receives adequate medical attention during her pregnancy or after her abortion;
(f) That except in rare cases, parents possess knowledge regarding their child which is essential for a physician to exercise the best medical judgment for that child;
(g) That when a minor is faced with the difficulties of an unplanned pregnancy, the best interests of the minor are always served when there is careful consideration of the rights of parents in rearing their child and the unique counsel and nurturing environment that parents can provide;
(h) That informed consent is always necessary for making mature health care decisions.
(2) It is the intent of the legislature in enacting section 18-609A, Idaho Code, to further the following important and compelling state interests recognized by the United States supreme court in:
(a) Protecting minors against their own immaturity;
(b) Preserving the integrity of the family unit;
(c) Defending the authority of parents to direct the rearing of children who are members of their household;
(d) Providing a pregnant minor with the advice and support of a parent during a decisional period;
(e) Providing for proper medical treatment and aftercare when the life or physical health of the pregnant minor is at serious risk in the rare instance of a sudden and unexpected medical emergency.
SECTION 2. That Section 18-604, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18-604 >>

18-604. DEFINITIONS. As used in this act: <<+(+>>1<<-.->><<+)+>> "Abortion" means the intentional termination of human pregnancy for purposes other than delivery of a viable birth.
<<-2. "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.->>
<<+(2) "First trimester of pregnancy" means the first thirteen (13) weeks of a pregnancy.+>>
<<+(+>>3<<-.->><<+)+>> "Hospital" means an acute care, general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.
<<-4. "First trimester of pregnancy" means the first thirteen (13) weeks of a pregnancy.->>
<<+(4) "Informed consent" means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of each fact pertinent to making the decision. Facts pertinent to making the decision shall include, but not be limited to:+>>
<<+(a) A description of any proposed treatment or procedure;+>>
<<+(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to future reproductive health; and+>>
<<+(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.+>>
<<+The physician must provide the information in terms which can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.+>>
<<+(5) "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.+>>
<<-5.->><<+(6)+>> "Second trimester of pregnancy" means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty- fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18-608, <<+Idaho Code,+>> in which case the same shall be conclusive and unrebuttable in all civil or criminal proceedings.
<<-6.->><<+(7)+>> "Third trimester of pregnancy" means that portion of a pregnancy from and after the point in time when the fetus becomes viable.
<<-7.->><<+(8)+>> Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid.
SECTION 3. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-608A, Idaho Code, and to read as follows:

<< ID ST § 18-608A >>

18-608A. PERSONS AUTHORIZED TO PERFORM ABORTIONS. It is unlawful for any person other than a physician to cause or perform an abortion.
SECTION 4. That Section 18-609, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18-609 >>

18-609. PHYSICIANS AND HOSPITALS NOT TO INCUR CIVIL LIABILITY --CONSENT TO ABORTION -- NOTICE. <<+(1)+>> Any physician may perform an abortion not prohibited by this act and any hospital or other facility described in section 18-608, Idaho Code, may provide facilities for such procedures without, in the absence of negligence, incurring civil liability therefor to any person<<-,->> including<<+,+>> but not limited to<<+,+>> the pregnant patient and the prospective father of the fetus to have been born in the absence of abortion, if informed consent for such abortion has been duly given by the pregnant patient.

(2) In order to provide assistance in assuring that the consent to an abortion is truly informed consent, the director of the department of health and welfare shall publish, after consultation with interested parties, easily comprehended printed material to be made available at the expense of the physician, hospital or other facility providing the abortion, and which shall contain the following:

(a) Descriptions of the services available to assist a woman through a pregnancy, at childbirth and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal fetus, described at two (2) week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of a fetus during such stages of development. The description shall include information about physiological and anatomical characteristics, brain and heart function, and the presence of external members and internal organs during the applicable stages of development; and

(c) Descriptions of the abortion procedures used in current medical practices at the various stages of growth of the fetus and any reasonable foreseeable complications and risks to the mother, including those related to subsequent child bearing.

(3) No abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the department of health and welfare have been provided to the pregnant patient, if reasonably possible, at least twenty-four (24) hours before the performance of the abortion. If the materials are not available from the director of the department of health and welfare, no certification shall be required. The attending physician, or the attending physician's agent, shall provide any other information required under this act. In addition to providing the material, the attending physician may provide the pregnant patient with such other information which in the attending physician's judgment is relevant to the pregnant patient's decision as to whether to have the abortion or carry the pregnancy to term.

(4) If the attending physician reasonably determines that due to circumstances peculiar to a specific pregnant patient, disclosure of the material is likely to cause a severe and long lasting detrimental effect on the health of such pregnant patient, disclosure of the materials shall not be required. Within thirty (30) days after performing any abortion without certification and delivery of the materials, the attending physician, or the attending physician's agent, shall cause to be delivered to the director of the department of health and welfare, a report signed by the attending physician, preserving the patient's anonymity, which explains the specific circumstances that excused compliance with the duty to deliver the materials. The director of the department of health and welfare shall compile the information annually and report to the public the total number of abortions performed in the state where delivery of the materials was excused; provided that any information so reported shall not identify any physician or patient in any manner which would reveal their identities.

(5) If section 18-608(3), Idaho Code, applies to the abortion to be performed and the pregnant patient is <<+an adult and+>> for any reason unable to give a valid consent thereto, the requirement for that pregnant patient's consent shall be met as required by law for other medical or surgical procedures and shall be determined in consideration of the desires, interests and welfare of the pregnant patient.

<<-(6) In addition to the requirements of subsection (1) of this section, if the pregnant patient is unmarried and under eighteen (18) years of age or unemancipated, the physician shall provide notice, if possible, of the pending abortion to the parents or legal guardian of the pregnant patient at least twenty-four (24) hours prior to the performance of the abortion.->>

<<-(7) If any one or more the subsection or provisions of this section, or the application thereof to any person or circumstance, shall ever be held by any court of competent jursidiction to be invalid, the remaining provisions of this section and the application thereof to persons or circumstances other than those to which it is held to be invalid, shall not be affected thereby, it being the intention of the legislature to enact the remaining provisions of this section notwithstanding such invalidity.->>

SECTION 5. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-609A, Idaho Code, and to read as follows:

<< ID ST § 18-609A >>

18-609A. CONSENT REQUIRED FOR ABORTIONS FOR MINORS.

(1) (a) No person shall knowingly cause or perform an abortion upon a minor unless:
(i) The attending physician has secured the written informed consent of the minor and the written informed consent of the minor's parent; or
(ii) The minor is emancipated and the attending physician has received written proof of emancipation and the minor's written informed consent; or
(iii) The minor has been granted the right of self-consent to the abortion by court order pursuant to paragraph (b) of this subsection and the attending physician has received the minor's written informed consent; or
(iv) A court has found that the causing or performing of the abortion, despite the absence of informed consent of a parent, is in the best interests of the minor and the court has issued an order, pursuant to paragraph (b)(iv)2. of this subsection, granting permission for the causing or performing of the abortion, and the minor is having the abortion willingly, pursuant to paragraph (f) of this subsection; or
(v) A medical emergency exists for the minor so urgent that there is insufficient time for the physician to obtain the informed consent of a parent or a court order and the attending physician certifies such in the pregnant minor's medical records. In so certifying, the attending physician must include the factual circumstances supporting his professional judgment that a medical emergency existed and the grounds for the determination that there was insufficient time to obtain the informed consent of a parent or a court order. Immediately after an abortion pursuant to this paragraph, the physician shall, with due diligence, attempt to provide a parent of an unemancipated minor actual notification of the medical emergency. If the parent cannot be immediately contacted for such actual notification, the physician shall, with due diligence, attempt to provide actual notification to a parent for an eight (8) hour period following the causing or performing of the abortion and shall, until a parent receives such notification, ensure that the minor's postabortion medical needs are met. Notwithstanding the above, a physician shall, within twentyfour (24) hours of causing or performing an abortion pursuant to this paragraph, provide actual notification of the medical emergency by:
1. Conferring with a parent or agent designated by the parent, and providing any additional information needed for the minor's proper care, and, as soon as practicable thereafter, securing the parent's written acknowledgement of receipt of such notification and information; or
2. Providing such actual notification in written form, addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent with written acknowledgement of such receipt by the parent returned to the physician; or
3. Providing such actual notification in written form and mailing it by certified mail, addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee so that a postal employee can only deliver the notice to the authorized addressee.
For the purposes of this section, "actual notification" includes, but is not limited to, a statement that an abortion was caused or performed, a description of the factual circumstances supporting the physician's judgment that the medical emergency existed and a statement of the grounds for the determination that there was insufficient time to obtain the informed consent of a parent or a court order.
If the physician causing or performing such abortion reasonably believes that the minor is homeless or abandoned so that the parents cannot be readily found or that the minor has suffered abuse or neglect such that the minor's physical safety would be jeopardized if a parent were notified that the abortion was caused or performed, the physician shall, in lieu of notifying a parent as required above, make a report to a law enforcement agency pursuant to section 16-1619, Idaho Code, and a petition shall be filed pursuant to section 16-1605, Idaho Code, which petition shall include a reference to this code section. Upon adjudication that the minor comes within the purview of chapter 16, title 16, Idaho Code, either on the basis of homelessness or abandonment such that no parent can be found, or on the basis of abuse or neglect such that the minor's physical safety would be in jeopardy if a parent were notified that the abortion was performed, the court shall, as a part of the decree, also order that the physician's duty to so notify a parent is relieved. In any other event, unless the court enters a finding that the best interests of the child require withholding notice to a parent, the court shall order that a parent receive actual notification of the medical emergency and the causing or performing of the abortion.
(b) A proceeding for the right of a minor to self-consent to an abortion pursuant to paragraph (a)(iii) of this subsection or for a court order pursuant to paragraph (a)(iv) of this subsection, may be adjudicated by a court as follows:
(i) The petition shall be filed in the judicial district where the minor resides. A minor shall have the legal capacity to make and prosecute a petition and appeal as set out herein. A guardian ad litem may assist the minor in preparing her petition and other documents filed pursuant to this section and may seek appointment as set forth below. A guardian ad litem, whether prospective or appointed, must be an attorney properly licensed in this state. The court shall ensure that the minor is given assistance in filing the petition if the minor so desires a guardian ad litem but no qualified guardian ad litem is available.
(ii) The petition shall set forth:
1. The initials of the minor;
2. The age of the minor;
3. The name and address of each parent, guardian, or, if the minor's parents are deceased or the minor is abandoned and no guardian has been appointed, the name and address of any other person standing in loco parentis of the minor;
4. That the minor has been fully informed of the risks and consequences of the abortion procedure to be performed;
5. A claim that the minor is mature, of sound mind and has sufficient intellectual capacity to consent to the abortion for

herself;
6. A claim that, if the court does not grant the minor the right to self- consent to the abortion, the court should find that causing or performing the abortion, despite the absence of the consent of a parent, is in the best interest of the minor and give judicial consent to the abortion; and
7. If so desired by the minor, a request that the court appoint a guardian ad litem, or, alternatively, if no guardian ad litem is requested, that the court should consider whether appointment of a guardian ad litem for the minor is appropriate.
The petition shall be signed by the minor and, if she has received assistance from a prospective guardian ad litem in preparing the petition, by the guardian ad litem.
(iii) A hearing on the merits of the petition shall be held as soon as practicable but in no event later than five (5) days from the filing of the petition. The petition shall be heard by a district judge on the record in a closed session of the court. The court shall appoint a qualified guardian ad litem for the minor if one is requested in the petition. If no qualified guardian ad litem is available, the court may appoint some other person to act in the capacity of a guardian ad litem, who shall act to fulfill the purposes of this section and protect the confidentiality and other rights of the minor.
At the hearing, the court shall, after establishing the identity of the minor, hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature of the abortion procedure to be performed and the reasonably foreseeable complications and risks to the minor from such procedure, including those related to future childbearing; the available alternatives to the abortion; the relationship between the minor and her parents; and any other evidence that the court may find relevant in determining whether the minor should be granted the right to self-consent to the abortion or whether the court's consent to causing or performing of the abortion, despite the absence of consent of a parent, is in the best interests of the minor.
(iv) The order shall be entered as soon as practicable, but in no event later than five (5) days after the conclusion of the hearing. If, by clear and convincing evidence, the court finds the allegations of the petition to be true and sufficient to establish good cause, the court shall:
1. Find the minor sufficiently mature to decide whether to have the abortion and grant the petition and give the minor the right of self-consent to the abortion, setting forth the grounds for so finding; or
2. Find the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding.
If the court does not find the allegations of the petition to be true or if good cause does not appear from the evidence heard, the court shall deny the petition, setting forth the grounds on which the petition is denied.
If, in hearing the petition, the court becomes aware of allegations which, if true, would constitute a violation of any section of title 18, Idaho Code, or would bring a child within the purview of chapter 16, title 16, Idaho Code, the court shall order, upon entry of final judgment in the proceeding under this subsection, that an appropriate investigation be initiated or an appropriate information, complaint or petition be filed. Such allegations shall be forwarded by the court with due consideration for the confidentiality of the proceedings under this section.
(c) A notice of appeal from an order issued under the provisions of this subsection shall be filed within two (2) days from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected as soon as practicable, but in no event later than five (5) days from the filing of notice of appeal. Because time may be of the essence regarding the performance of the abortion, appeals pursuant to this subsection shall receive expedited appellate review.
(d) Except for the time for filing a notice of appeal, a court may enlarge the times set forth pursuant to this subsection upon request of the minor or upon other good cause appearing, with due consideration for the expedited nature of these proceedings.
(e) No filing, appeal or other fees shall be charged for cases or appeals brought pursuant to this section.
(f) If a minor desires an abortion, then she shall be orally informed of, and, if possible, sign the written consent required by this act, in the same manner as an adult person. No abortion shall be caused or performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to court order if the abortion is necessary to preserve the life of the minor.
(g) All records contained in court files of judicial proceedings arising under the provisions of this subsection, and subsection (3) of this section, shall be confidential and exempt from disclosure pursuant to section 9-340G, Idaho Code. Dockets and other court records shall be maintained and court proceedings undertaken so that the names of the parties to actions brought pursuant to this section will not be disclosed to the public.
(2) The administrative director of the courts shall compile statistics for each county for each calendar year, accessible to the public, including:
(a) The total number of petitions filed pursuant to paragraph (b) of subsection (1) of this section; and
(b) The number of such petitions filed where a guardian ad litem was requested and the number where a guardian ad litem or other person acting in such capacity was appointed; and
(c) The number of such petitions for which the right to self-consent was granted; and
(d) The number of such petitions for which the court granted its informed consent; and
(e) The number of such petitions which were denied; and
(f) For categories described in paragraphs (c), (d) and (e) of this subsection, the number of appeals taken from the court's order in each category; and
(g) For each of the categories set out in paragraph (f) of this subsection, the number of cases for which the district court's

order was affirmed and the number of cases for which the district court's order was reversed.
(3) In addition to any other cause of action arising from statute or otherwise, any person injured by the causing or performing of an abortion on a minor in violation of any of the requirements of paragraph (a) of subsection (1) of this section, 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.
(4) Statistical records.
(a) The vital statistics unit of the department of health and welfare shall, in addition to other information required pursuant to section 39-261, Idaho Code, require the complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include, at a minimum, the following:
(i) Whether the abortion was performed following the physician's receipt of:
1. The written informed consent of a parent and the minor; or
2. The written informed consent of an emancipated minor for herself; or
3. The written informed consent of a minor for herself pursuant to a court order granting the minor the right to self-consent; or
4. The written informed consent of a court pursuant to an order which includes a finding that the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor; or
5. The professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order.
(ii) If the abortion was performed due to a medical emergency and without consent from a parent or court order, the diagnosis upon which the attending physician determined that the abortion was immediately necessary due to a medical emergency.
(b) The knowing failure of the attending physician to perform any one (1) or more of the acts required under this subsection is grounds for discipline pursuant to section 54-1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars ($100) for each month or portion thereof that each such failure continues, payable to the center for vital statistics and health policy, but such failure shall not constitute a criminal act.
(5) As used in this section:
(a) "Cause or perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage upon a minor known to be pregnant.
(b) "Emancipated" means any minor who has been married or is in active military service.
(c) (i) "Medical emergency" means a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:
1. To prevent her death; or
2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.
(ii) The term "medical emergency" does not include:
1. Any physical condition that would be expected to occur in normal pregnancies of women of similar age, physical condition and gestation; or
2. Any condition that is predominantly psychological or psychiatric in nature.
(d) "Minor" means a woman less than eighteen (18) years of age.
(e) "Parent" means one (1) parent of the unemancipated minor, or a guardian appointed pursuant to chapter 5, title 15, Idaho Code, if the minor has one.

<< Repealed: ID ST § 18-611 >>

SECTION 6. That Section 18-611, Idaho Code, be, and the same is hereby repealed.
SECTION 7. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-614, Idaho Code, and to read as follows:

<< ID ST § 18-614 >>

18-614. IDENTIFICATION REQUIRED. (1) No person may cause or perform an abortion otherwise permitted pursuant to Idaho law until the physician either confirms the age of the woman by positive identification or secures legal consent pursuant to section 18-609A, Idaho Code. A photocopy of such positive identification or legal consent shall be kept in the physician's office file for the woman. If due to medical emergency there is insufficient time for the physician to confirm the woman's age by positive identification before performing the abortion, the physician shall as soon as possible after performing the abortion, confirm the age of the woman by positive identification and retain a photocopy.
(2) "Positive identification" means a lawfully issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military card, bearing the person's photograph and date of birth, or the person's valid passport, or certified copy of the person's own birth certificate.

SECTION 8. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-615, Idaho Code, and to read as follows:

<< ID ST § 18-615 >>

18-615. SEVERABILITY. If any one (1) or more provision, section, subsection, sentence, clause, phrase, or word of this chapter or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this chapter shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed every section of this chapter and each provision, section, subsection, sentence, clause, phrase or word thereof irrespective of the fact that any one (1) or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.
SECTION 9. That Chapter 3, Title 9, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 9-340G, Idaho Code, and to read as follows:

<< ID ST § 9-340G >>

9-340G. EXEMPTION FROM DISCLOSURE --RECORDS OF COURT PROCEEDINGS REGARDING JUDICIAL AUTHORIZATION OF ABORTION PROCEDURES FOR MINORS. In accordance with section 18-609A, Idaho Code, the following records are exempt from public disclosure: records contained in court files of judicial proceedings regarding judicial authorization of a minor's consent to an abortion or the performance of abortion procedures upon a minor who would otherwise have to obtain consent for the procedure from a parent or guardian, in addition to records of any judicial proceedings filed under section 18-609A(3), Idaho Code.
SECTION 10. This act shall be in full force and effect on and after July 1, 2000.

Approved on the 22nd day of February, 2000.

Effective: July 1, 2000.

STATEMENT OF PURPOSE

RS 09605C1

*Requires parental consent to perform an abortion upon a minor.
FISCAL IMPACT
This bill has no fiscal impact.
Contact: Name: Christian Coalition
Phone: 336-5900
Name: Rep. Bill Sali
Phone: 332-1000
ID LEGIS 7 (2000)
END OF DOCUMENT

HOUSE BILL NO. 340

View Daily Data Tracking History
View Bill Text
View Statement of Purpose / Fiscal Impact

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.

This sentence is marked with bold and underline to show added text.

~~*This sentence is marked with strikethrough and italic, indicating text to be removed.*~~

Daily Data Tracking History

H0340.....by STATE AFFAIRS
ABORTION - Amends, repeals and adds to existing law to revise penalties relating to unlawful abortions; to provide that a petition may be filed in the county where a minor resides or in the county where the abortion is caused or performed; to provide for initiation of an investigation or filing of an information, complaint or petition against a person other than the petitioner, based upon certain allegations of which the court is made aware during a petition hearing; to provide that if a minor would have been privileged to withhold information or evidence that was required as proof under Section 18-609A, Idaho Code, then her answers given, evidence produced and information directly or indirectly derived from her answers may not be used against her in a criminal case except that she may be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, failing to answer or producing or failing to produce evidence as required by the court; and to provide defenses to prosecution.

02/28 House intro - 1st rdg - to printing
03/01 Rpt prt - to St Aff
03/05 Rpt out - rec d/p - to 2nd rdg
03/06 2nd rdg - to 3rd rdg
03/08 3rd rdg - PASSED - 66-2-2
AYES -- Barraclough, Barrett, Bedke, Bell, Bieter, Black, Boe, Bolz, Bradford, Bruneel, Callister, Campbell, Chase, Clark, Collins, Crow, Cuddy, Deal, Denney, Ellis, Ellsworth, Eskridge, Field(13), Field(20), Gagner, Gould, Hadley, Hammond, Harwood, Henbest, Higgins, Hornbeck, Jones, Kellogg, Kendell, Kunz, Lake, Langford, Loertscher, Mader, Marley, McKague, Meyer, Montgomery, Mortensen, Moss, Moyle, Pearce, Pischner, Pomeroy, Raybould, Ridinger, Roberts, Robison, Sali, Schaefer, Shepherd, Smylie, Stevenson, Swan, Tilman, Trail, Wheeler, Wood, Young, Mr. Speaker
NAYS -- Jaquet, Stone
Absent and excused -- Sellman, Smith
Floor Sponsor -- Kunz
Title apvd - to Senate
03/09 Senate intro - 1st rdg - to St Aff
03/19 Rpt out - rec d/p - to 2nd rdg
03/20 2nd rdg - to 3rd rdg
03/21 3rd rdg - PASSED - 23-10-2
AYES -- Andreason, Boatright, Branch, Brandt, Bunderson, Burtenshaw,

EXHIBIT D

Cameron, Darrington, Davis, Frasure, Geddes, Goedde, Hawkins, Ipsen, King-Barrutia, Lee, Lodge, Richardson, Risch, Sandy, Thorne, Wheeler, Williams,
NAYS -- Deide, Dunklin, Ingram, Keough, Noh, Schroeder, Sims, Stegner, Stennett, Whitworth
Absent and excused -- Danielson, Sorensen
Floor Sponsor -- King-Barrutia
Title apvd - to House

03/22 To enrol - rpt enrol - Sp signed
03/23 Pres signed
03/26 To Governor
03/31 Governor signed
Session Law Chapter 277
Effective: 07/01/01

Bill Text

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature First Regular Session - 2001

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 340

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO ABORTIONS; AMENDING SECTION 18-605, IDAHO CODE, TO REVISE PENALTIES RELATING TO UNLAWFUL ABORTIONS AND TO MAKE TECHNICAL CORRECTION; AMENDING SECTION 18-609A, IDAHO CODE, TO PROVIDE THAT A PETITION MAY BE FILED IN THE COUNTY WHERE THE MINOR RESIDES OR THE COUNTY WHERE THE ABORTION IS CAUSED OR PERFORMED, TO PROVIDE FOR INITIATION OF AN INVESTIGATION OR FILING OF AN INFORMATION, COMPLAINT OR PETITION AGAINST A PERSON OTHER THAN THE PETITIONER BASED UPON CERTAIN ALLEGATIONS OF WHICH THE COURT IS MADE AWARE DURING A PETITION HEARING AND TO PROVIDE THAT IF A MINOR WOULD HAVE BEEN PRIVILEGED TO WITHHOLD INFORMATION OR EVIDENCE THAT WAS REQUIRED AS PROOF UNDER SECTION 18-609A, IDAHO CODE, THEN HER ANSWERS GIVEN, EVIDENCE PRODUCED AND INFORMATION DIRECTLY OR INDIRECTLY DERIVED FROM HER ANSWERS MAY NOT BE USED AGAINST HER IN A CRIMINAL CASE EXCEPT THAT SHE MAY BE PROSECUTED OR SUBJECTED TO PENALTY OR FORFEITURE FOR ANY PERJURY, FALSE SWEARING OR CONTEMPT COMMITTED IN ANSWERING, FAILING TO ANSWER OR PRODUCING OR FAILING TO PRODUCE EVIDENCE AS REQUIRED BY THE COURT; REPEALING SECTION 18-614, IDAHO CODE; AND AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-614, IDAHO CODE, TO PROVIDE FOR DEFENSES TO PROSECUTION.

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

SECTION 1. That Section 18-605, Idaho Code, be, and the same is hereby amended to read as follows:

18-605. UNLAWFUL ABORTIONS -- PROCUREMENT OF -- PENALTY. (1) Every person **not licensed or certified to provide health care in Idaho** who, except as permitted by this ~~act~~ **chapter**, provides, supplies or administers any medicine drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to ~~produc~~

cause or perform an abortion shall be guilty of a felony and shall be fine not to exceed five thousand dollars ($5,000) and/or imprisoned in the sta prison for not less than two (2) and not more than five (5) years.

(2) Any person licensed or certified to provide health care pursuant t title 54, Idaho Code, and who, except as permitted by the provisions of thi chapter, provides, supplies or administers any medicine, drug or substance t any woman or uses or employs any instrument or other means whatever upon an then-pregnant woman with intent to cause or perform an abortion shall:

(a) For the first violation, be subject to professional discipline and b assessed a civil penalty of not less than one thousand dollars ($1,000) payable to the board granting such person's license or certification;

(b) For the second violation, have their license or certification t practice suspended for a period of not less than six (6) months and b assessed a civil penalty of not less than two thousand five hundred dol lars ($2,500), payable to the board granting such person's license or cer tification; and

(c) For each subsequent violation, have their license or certification t practice revoked and be assessed a civil penalty of not less than fiv thousand dollars ($5,000), payable to the board granting such person' license or certification.

(3) Any person who is licensed or certified to provide health care pursu ant to title 54, Idaho Code, and who knowingly violates the provisions of thi chapter is guilty of a felony punishable as set forth in subsection (1) o this section, separate from and in addition to the administrative penaltie set forth in subsection (2) of this section.

SECTION 2. That Section 18-609A, Idaho Code, be, and the same is here amended to read as follows:

18-609A. CONSENT REQUIRED FOR ABORTIONS FOR MINORS.

(1) (a) No person shall knowingly cause or perform an abortion upon minor unless:

(i) The attending physician has secured the written informed co sent of the minor and the written informed consent of the minor parent; or

(ii) The minor is emancipated and the attending physician h received written proof of emancipation and the minor's writt informed consent; or

(iii) The minor has been granted the right of self-consent to t abortion by court order pursuant to paragraph (b) of this subsecti and the attending physician has received the minor's written inform consent; or

(iv) A court has found that the causing or performing of the abo tion, despite the absence of informed consent of a parent, is in t best interests of the minor and the court has issued an order, purs ant to paragraph (b)(iv)2. of this subsection, granting permissi for the causing or performing of the abortion, and the minor is ha ing the abortion willingly, pursuant to paragraph (f) of this subse tion; or

(v) A medical emergency exists for the minor so urgent that the is insufficient time for the physician to obtain the informed conse of a parent or a court order and the attending physician certifi such in the pregnant minor's medical records. In so certifying, t attending physician must include the factual circumstances supporti his professional judgment that a medical emergency existed and t grounds for the determination that there was insufficient time obtain the informed consent of a parent or a court order. Immediate

after an abortion pursuant to this paragraph, the physician shall with due diligence, attempt to provide a parent of an unemancipate minor actual notification of the medical emergency. If the paren cannot be immediately contacted for such actual notification, th physician shall, with due diligence, attempt to provide actual noti fication to a parent for an eight (8) hour period following the caus ing or performing of the abortion and shall, until a parent receive such notification, ensure that the minor's postabortion medical need are met. Notwithstanding the above, a physician shall, within twenty four (24) hours of causing or performing an abortion pursuant to thi paragraph, provide actual notification of the medical emergency by:

1. Conferring with a parent or agent designated by the parent and providing any additional information needed for the minor' proper care, and, as soon as practicable thereafter, securin

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the parent's written acknowledgement of receipt of such notifi cation and information; or

2. Providing such actual notification in written form addressed to the parent at the usual place of abode of the par ent and delivered personally to the parent by the physician o an agent with written acknowledgement of such receipt by th parent returned to the physician; or

3. Providing such actual notification in written form and mail ing it by certified mail, addressed to the parent at the usua place of abode of the parent with return receipt requested an restricted delivery to the addressee so that a postal employe can only deliver the notice to the authorized addressee.

For the purposes of this section, "actual notification includes, but is not limited to, a statement that an abortion wa caused or performed, a description of the factual circumstances sup porting the physician's judgment that the medical emergency existe and a statement of the grounds for the determination that there wa insufficient time to obtain the informed consent of a parent or court order.

If the physician causing or performing such abortion reasonabl believes that the minor is homeless or abandoned so that the parent cannot be readily found or that the minor has suffered abuse o neglect such that the minor's physical safety would be jeopardized i a parent were notified that the abortion was caused or performed, th physician shall, in lieu of notifying a parent as required above make a report to a law enforcement agency pursuant to sectio 16-1619, Idaho Code, and a petition shall be filed pursuant to sec tion 16-1605, Idaho Code, which petition shall include a reference t this code section. Upon adjudication that the minor comes within th purview of chapter 16, title 16, Idaho Code, either on the basis o homelessness or abandonment such that no parent can be found, or o the basis of abuse or neglect such that the minor's physical safet would be in jeopardy if a parent were notified that the abortion wa performed, the court shall, as a part of the decree, also order tha the physician's duty to so notify a parent is relieved. In any othe event, unless the court enters a finding that the best interests o the child require withholding notice to a parent, the court shal order that a parent receive actual notification of the medical emer gency and the causing or performing of the abortion.

(b) A proceeding for the right of a minor to self-consent to an abortio pursuant to paragraph (a)(iii) of this subsection or for a court orde pursuant to paragraph (a)(iv) of this subsection, may be adjudicated by court as follows:

(i) The petition shall be filed in the ~~judicial district~~ **count** where the minor resides **or the county where the abortion is caused o performed**. A minor shall have the legal capacity to make and prose cute a petition and appeal as set out herein. A guardian ad litem m assist the minor in preparing her petition and other documents fil pursuant to this section and may seek appointment as set forth belo A guardian ad litem, whether prospective or appointed, must be attorney properly licensed in this state. The court shall ensure th the minor is given assistance in filing the petition if the minor desires a guardian ad litem but no qualified guardian ad litem available.

(ii) The petition shall set forth:

1. The initials of the minor;
2. The age of the minor;
3. The name and address of each parent, guardian, or, if t minor's parents are deceased or the minor is abandoned and guardian has been appointed, the name and address of any oth person standing in loco parentis of the minor;
4. That the minor has been fully informed of the risks and co sequences of the abortion procedure to be performed;
5. A claim that the minor is mature, of sound mind and has su ficient intellectual capacity to consent to the abortion f herself;
6. A claim that, if the court does not grant the minor t right to self-consent to the abortion, the court should fi that causing or performing the abortion, despite the absence the consent of a parent, is in the best interest of the min and give judicial consent to the abortion; and
7. If so desired by the minor, a request that the court appoi a guardian ad litem, or, alternatively, if no guardian ad lit is requested, that the court should consider whether appointme of a guardian ad litem for the minor is appropriate.

The petition shall be signed by the minor and, if she h received assistance from a prospective guardian ad litem in prepari the petition, by the guardian ad litem.

(iii) A hearing on the merits of the petition shall be held as so as practicable but in no event later than five (5) days from the fi ing of the petition. The petition shall be heard by a district jud on the record in a closed session of the court. The court sha appoint a qualified guardian ad litem for the minor if one requested in the petition. If no qualified guardian ad litem available, the court may appoint some other person to act in t capacity of a guardian ad litem, who shall act to fulfill the pu poses of this section and protect the confidentiality and oth rights of the minor.

At the hearing, the court shall, after establishing the identi of the minor, hear evidence relating to the emotional developmen maturity, intellect and understanding of the minor; the nature of t abortion procedure to be performed and the reasonably foreseeab complications and risks to the minor from such procedure, includi those related to future childbearing; the available alternatives the abortion; the relationship between the minor and her parents; a any other evidence that the court may find relevant in determini whether the minor should be granted the right to self-consent to t abortion or whether the court's consent to causing or performing the abortion, despite the absence of consent of a parent, is in t best interests of the minor.

(iv) The order shall be entered as soon as practicable, but in n event later than five (5) days after the conclusion of the hearing If, by clear and convincing evidence, the court finds the allegation of the petition to be true and sufficient to establish good cause the court shall:

1. Find the minor sufficiently mature to decide whether to hav the abortion and grant the petition and give the minor the righ of self-consent to the abortion, setting forth the grounds fo so finding; or

2. Find the performance of the abortion, despite the absence o

the consent of a parent, is in the best interests of the mino and give judicial consent to the abortion, setting forth th grounds for so finding.

If the court does not find the allegations of the petition to b true or if good cause does not appear from the evidence heard, th court shall deny the petition, setting forth the grounds on which th petition is denied.

If, in hearing the petition, the court becomes aware of allega tions which, if true, would constitute a violation of any section o title 18, Idaho Code, **by a person other than the petitioner,** or woul bring a child within the purview of chapter 16, title 16, Idaho Cod the court shall order, upon entry of final judgment in the proceedi under this subsection, that an appropriate investigation be initiat or an appropriate information, complaint or petition be filed. Su allegations shall be forwarded by the court with due considerati for the confidentiality of the proceedings under this section. **If but for the requirements for proof as set forth in this section, th minor would have been privileged to withhold information given o evidence produced by her, the answers given or evidence produced an any information directly or indirectly derived from her answers ma not be used against the minor in any manner in a criminal case except that she may nevertheless be prosecuted or subjected to pen alty or forfeiture for any perjury, false swearing or contempt com mitted in answering or failing to answer, or in producing or failin to produce, evidence as required by the court.**

(c) A notice of appeal from an order issued under the provisions of th subsection shall be filed within two (2) days from the date of issuance the order. The record on appeal shall be completed and the appeal shall perfected as soon as practicable, but in no event later than five (5) da from the filing of notice of appeal. Because time may be of the essen regarding the performance of the abortion, appeals pursuant to this su section shall receive expedited appellate review.

(d) Except for the time for filing a notice of appeal, a court m enlarge the times set forth pursuant to this subsection upon request the minor or upon other good cause appearing, with due consideration f the expedited nature of these proceedings.

(e) No filing, appeal or other fees shall be charged for cases or appea brought pursuant to this section.

(f) If a minor desires an abortion, then she shall be orally informed o and, if possible, sign the written consent required by this act, in t same manner as an adult person. No abortion shall be caused or perform on any minor against her will, except that an abortion may be perform against the will of a minor pursuant to court order if the abortion necessary to preserve the life of the minor.

(g) All records contained in court files of judicial proceedings arisi under the provisions of this subsection, and subsection (3) of this se tion, shall be confidential and exempt from disclosure pursuant to secti

9-340G, Idaho Code. Dockets and other court records shall be maintaine and court proceedings undertaken so that the names of the parties t actions brought pursuant to this section will not be disclosed to the pub lic.

(2) The administrative director of the courts shall compile statistic for each county for each calendar year, accessible to the public, including:

(a) The total number of petitions filed pursuant to paragraph (b) of sub section (1) of this section; and

(b) The number of such petitions filed where a guardian ad litem wa requested and the number where a guardian ad litem or other person actin in such capacity was appointed; and

(c) The number of such petitions for which the right to self-consent wa granted; and

(d) The number of such petitions for which the court granted its informe consent; and

(e) The number of such petitions which were denied; and

(f) For categories described in paragraphs (c), (d) and (e) of this sub section, the number of appeals taken from the court's order in each cate gory; and

(g) For each of the categories set out in paragraph (f) of this subsec tion, the number of cases for which the district court's order wa affirmed and the number of cases for which the district court's order wa reversed.

(3) In addition to any other cause of action arising from statute o otherwise, any person injured by the causing or performing of an abortion on minor in violation of any of the requirements of paragraph (a) of subsectio (1) of this section, shall have a private right of action to recover all dam ages sustained as a result of such violation, including reasonable attorney' fees if judgment is rendered in favor of the plaintiff.

(4) Statistical records.

(a) The vital statistics unit of the department of health and welfar shall, in addition to other information required pursuant to sectio 39-261, Idaho Code, require the complete and accurate reporting of infor mation relevant to each abortion performed upon a minor which shal include, at a minimum, the following:

(i) Whether the abortion was performed following the physician' receipt of:

1. The written informed consent of a parent and the minor; or

2. The written informed consent of an emancipated minor fo herself; or

3. The written informed consent of a minor for herself pursuan to a court order granting the minor the right to self-consent or

4. The written informed consent of a court pursuant to an orde which includes a finding that the performance of the abortion despite the absence of the consent of a parent, is in the bes interests of the minor; or

5. The professional judgment of the attending physician tha the performance of the abortion was immediately necessary due t a medical emergency and there was insufficient time to obtai consent from a parent or a court order.

(ii) If the abortion was performed due to a medical emergency an without consent from a parent or court order, the diagnosis upo which the attending physician determined that the abortion was imme diately necessary due to a medical emergency.

(b) The knowing failure of the attending physician to perform any one (1 or more of the acts required under this subsection is grounds for disci

pline pursuant to section 54-1814(6), Idaho Code, and shall subject th physician to assessment of a civil penalty of one hundred dollars ($100 for each month or portion thereof that each such failure continues, pay able to the center for vital statistics and health policy, but such fail ure shall not constitute a criminal act.

(5) As used in this section:

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(a) "Cause or perform an abortion" means to interrupt or terminate pregnancy by any surgical or nonsurgical procedure or to induce a miscar riage upon a minor known to be pregnant.

(b) "Emancipated" means any minor who has been married or is in activ military service.

(c) (i) "Medical emergency" means a sudden and unexpected physical con dition which, in the reasonable medical judgment of any ordinarily pruden physician acting under the circumstances and conditions then existing, i abnormal and so complicates the medical condition of the pregnant minor a to necessitate the immediate causing or performing of an abortion:

1. To prevent her death; or

2. Because a delay in causing or performing an abortion wil create serious risk of immediate, substantial and irreversibl impairment of a major physical bodily function of the patient.

(ii) The term "medical emergency" does not include:

1. Any physical condition that would be expected to occur i normal pregnancies of women of similar age, physical conditio and gestation; or

2. Any condition that is predominantly psychological or psychi atric in nature.

(d) "Minor" means a woman less than eighteen (18) years of age.

(e) "Parent" means one (1) parent of the unemancipated minor, or a guard ian appointed pursuant to chapter 5, title 15, Idaho Code, if the mino has one.

SECTION 3. That Section 18-614, Idaho Code, be, and the same is hereb repealed.

SECTION 4. That Chapter 6, Title 18, Idaho Code, be, and the same i hereby amended by the addition thereto of a **NEW SECTION**, to be known and des ignated as Section 18-614, Idaho Code, and to read as follows:

18-614. DEFENSES TO PROSECUTION. (1) No physician shall be subject t criminal or administrative liability for causing or performing an aborti upon a minor in violation of any provision of subsection (1) of secti 18-609A, Idaho Code, if prior to causing or performing the abortion the physi cian obtains either positive identification or other documentary evidence fr which a reasonable person would have concluded that the woman seeking t abortion was either an emancipated minor or was not then a minor and if t physician retained, at the time of receiving the evidence, a legible photoco of such evidence in the physician's office file for the woman. This defense an affirmative defense that shall be raised by the defendant and is not element of any crime or administrative violation that must be proved by t state.

(2) If, due to a medical emergency as defined in subsection (5) of se tion 18-609A, Idaho Code, there was insufficient time for the physician t confirm that the woman, due to her age, did not then come within the prov sions of subsection (1) of section 18-609A, Idaho Code, the physician sha not be subject to criminal or administrative liability for performing t abortion in violation of subsection (1)(a)(v) of section 18-609A, Idaho Cod if, as soon as possible but in no event longer than twenty-four (24) hou

after performing the abortion, the physician obtained positive identificatio or other documentary evidence from which a reasonable person would have con cluded that the woman seeking the abortion was either an emancipated minor o was not then a minor and if the physician retained, at the time of receivin

the evidence, a legible photocopy of such evidence in the physician's offic file for the woman. This defense is an affirmative defense that shall b raised by the defendant and is not an element of any crime or administrativ violation that must be proved by the state.

(3) If after performing an abortion under circumstances of a medica emergency as defined in subsection (5) of section 18-609A, Idaho Code, th physician, after reasonable inquiry, is unable to determine whether or not th woman is a minor, the physician shall not be subject to criminal, civil o administrative liability for taking any action that would have been require by subsection (1)(a)(v) of section 18-609A, Idaho Code, if the woman had bee a minor at the time the abortion was caused or performed.

(4) For purposes of this section, "positive identification" means a law fully issued state, district, territorial, possession, provincial, national o other equivalent government driver's license, identification card or militar card, bearing the person's photograph and date of birth, the person's vali passport or a certified copy of the person's birth certificate.

Statement of Purpose / Fiscal Impact

STATEMENT OF PURPOSE

RS 11155C1

This legislation makes technical correction to Idaho's Parental Consent statutes which will help to resolve peripheral issues raised in litigation. The original intention of the parental consent statutes remains in tact and its underlying provisions are not weakened. This legislation addresses factual issues raised in the litigation which were not originally intended to be targeted by SB 1299 from the 2000 legislative session.

FISCAL IMPACT

No net fiscal impact.

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STATEMENT OF PURPOSE/FISCAL NOTE H 340