No. 18-35926

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE GREAT NORTHWEST
AND THE HAWAIIAN ISLANDS,
Plaintiff-Appellant,

v.

LAWRENCE WASDEN, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

BRIEF OF APPELLANT

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CORPORATE DISCOSURE STATEMENT

The corporate Appellant, Planned Parenthood of the Great Northwest and the Hawaiian Islands ("Planned Parenthood"), has no parent corporation, nor is there a publicly held corporation that owns 10 percent or more of its stock.

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JURISDICTIONAL STATEMENT

This is an interlocutory appeal from the district court's order denying Planned Parenthood's motion for a preliminary injunction. Planned Parenthood moved the district court to enjoin enforcement of Idaho's recently enacted Abortion Complications Reporting Act, Idaho Code §§ 39-9501 *et seq*., and amendments to Idaho Code § 54-1413 (1) and § 54-1814 (25) ("Reporting Act" or "the Act").

The district court entered a memorandum decision and order denying preliminary injunctive relief on October 22, 2018. (Excerpts of the Record ("ER") 4-26.) Planned Parenthood filed a timely notice of appeal on October 31, 2018. (ER 1–3.)

The district court had subject matter jurisdiction over the case below under 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction on appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

The district court erred by denying Planned Parenthood's motion for a preliminary injunction of Idaho's new Abortion Complications Reporting Act despite finding that Planned Parenthood had satisfied the success on the merits prong of the preliminary injunction standard with respect to its claim that the Act is unconstitutionally vague.

ADDENDUM OF PERTINENT AUTHORITIES

Planned Parenthood has reproduced the pertinent provisions of the Reporting Act, I.C. §§ 39-9501 *et seq*., 54-1413(1) & 54-1814(25)) ("the Act"), as an addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

Idaho enacted a new law, called the Abortion Complications Reporting Act ("Act" or "Reporting Act"), which requires all medical providers to submit reports to the state of Idaho (the "State") about an extensive list of what the State deems to be abortion "complications." Because the Act makes it impossible for providers to be sure how to comply with the new law, at the risk of severe penalties, it is unconstitutionally vague. The district court, indeed, held that Plaintiff Planned Parenthood of the Great Northwest and the Hawaiian Islands ("Planned Parenthood") had satisfied the success on the merits prong of the preliminary injunction standard as to Plaintiffs' constitutional vagueness challenge to the law.

Despite finding Plaintiff had satisfied the first prong of the test, the district court refused to enjoin the Act. Instead, it determined that Planned Parenthood had not established that it would be irreparably harmed absent a preliminary injunction. In reaching its conclusion, the court ignored longstanding law in this circuit, which holds that a constitutional violation shows irreparable harm. Additionally, irreparable harm is present here because the reporting requirement is, and has been, in effect, and all Idaho medical providers and facilities face the immediate threat of disciplinary investigation, professional sanction, and other severe penalties for

non-compliance with the unprecedented Act. The district court also erred in finding that the Act's irrational distinction between abortion and other, far more dangerous medical procedures, as well as the law's uselessness in achieving any legitimate state interest, did not violate equal protection and due process. Further, there is an additional danger that the legislature's attempt to exclude these reports from the public domain is void under Idaho law, risking the disclosure of sensitive identifying information. The balance of the equities and the public interest tip strongly in Planned Parenthood's favor. Because Planned Parenthood met all requirements for the issuance of a preliminary injunction, this Court should reverse.

II. FACTUAL BACKGROUND

A. Abortion Is A Safe and Effective Procedure With Few Complications.

Planned Parenthood provides comprehensive reproductive health services throughout Alaska, Hawaii, Idaho and Western Washington. (ER 57-58.) In Idaho, it provides aspiration and medication abortions at two health centers, in Meridian and Twin Falls, and medication abortions at its Boise health center. (*Id*.)

Though sometimes called "surgical abortion," the aspiration abortion procedure used at Planned Parenthood's health centers does not involve making any incisions, and does not require general anesthesia. (ER 99–110, 481–82.)

Normal and expected side effects from this procedure can include cramping, bleeding, and the passing of small blood clots, which are generally not cause for concern and which patients are typically able to manage at home without additional medical intervention. (ER, 100, 220–21, 482.)

In a medication abortion, a patient ingests two medications. (ER 99–102, 219, 480–82.) One of these, which the patient typically ingests at home, induces uterine contractions, allowing the contents of the uterus to be expelled, similar to an early miscarriage. (*Id.*) Like aspiration abortions, expected side effects of a medication abortion include uterine cramping, bleeding and the passing of small blood clots. (*Id.*) After a medication abortion, a patient might also experience temporary nausea, diarrhea, fatigue, headache, dizziness, soreness or a low-grade temperature. (*Id.*) These side effects are also typically resolved through patient counseling, reassurance and pain medication. (*Id.*)

It is undisputed that, regardless of the method, legal abortion is a safe and effective medical procedure. "[L]egal abortion is one of the safest medical procedures in the United States." (ER 221); *see also Whole Woman*'s *Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 908 (9th Cir. 2014).

It is also one of the most studied. The National Academies of Sciences,

Engineering, and Medicine recently concluded that "[t]he clinical evidence shows that legal abortions in the United States . . . are safe and effective." (ER 221); *The Safety and Quality of Abortion Care in the United States*, S-8. Washington, D.C.: The National Academies Press ("National Academies Report").

Large scale peer-reviewed studies of abortion have repeatedly shown that complications very rarely occur after abortion. National Academies Report at S-8 ("Serious complications are rare."). (ER 68, 222–23.) Further, in the event these rare complications do occur, they are generally managed and resolved and do not result in any longstanding damage to the health of the patient, at Planned Parenthood's health centers and nationwide. (ER 101, 222–23.)

The very rare complications from surgical abortion include infection, prolonged heavy bleeding (beyond the amount that is expected and normal) and retained tissue. There is also a very minimal risk of uterine perforation and cervical laceration. (ER 222–23.) The rare complications after a medication abortion include infection, prolonged heavy bleeding, or an "incomplete abortion," where the uterus has either retained tissue or the pregnancy is ongoing. (*Id.*)

B. Idaho's Own Data Shows Abortion is Safe and Effective.

The State of Idaho knows that abortion is safe because of its own data. For decades, Idaho law has required abortion providers to file a report with the State

after each abortion. (ER 44–45.) That report identifies whether there were any complications, allowing providers to choose from five specific complications or to select and describe any "other" complications. I.C. § 39-261; (*Id.*)[1] According to the most recent induced abortion report prepared by the State, in 2017 there were 1,285 abortions performed in Idaho and a total of just eight complications. (*Id.*) A compilation of reports compiled by the State from 1978 to 2017 shows that complications from abortions have occurred in Idaho in a mere 1/10 of 1 percent of cases. (*Id.*)

C. The Idaho Legislature Cobbled Together the New Law to Poison the Data.

In 2018, despite all evidence—including the State's own data—showing that abortion is well-studied, safe, and effective, the Idaho Legislature passed the new Abortion Complications Reporting Act, which took effect on July 1, 2018. The Act imposes extensive obligations and burdens for medical providers to collect and report data to the state. It also carries civil and criminal penalties.

The Act now requires all hospitals, licensed health care facilities, and individual medical practitioners, including nurses, in Idaho to file a written report with the State regarding patients who require medical treatment for, or even merely

[1] The reporting form lists: hemorrhage, infection, uterine perforation, cervical laceration, retained products, and "other," a "catch-all" category. (ER 42–43.)

report, anything on a list of often nonsensical things that the State deems to be "complication[s]" whenever the practitioner has reason to believe, in the practitioner's reasonable medical judgment, the "complication" is "a direct or indirect result of an abortion." I.C. § 39-9504(1). This duty is not just limited to abortion providers; it now falls on all medical providers in the state to determine whether a "complication" has occurred from an abortion. I.C. § 39-9504(1).

The Act, however, deems by law that any complication listed in the Act is "abnormal or deviant" and establishes, granting no discretion, what those complications are:

> "Complication" means an abnormal or a deviant process or event arising from the performance or completion of an abortion, as follows:

I.C. § 39-9503(2). The list of 37 things that follows are set by statute to be "complications," regardless of whether they are in fact abnormal, deviant, or actual medical complications in the first place, leaving practitioners to guess when and whether they must report. *Id*.

Planned Parenthood's undisputed evidence shows that many of these deemed "complications," such as any "emotional condition," or "physical injury associated with care received in the medical facility" are not medical terms and leave providers confused as to what events may qualify. (ER 103–06, 218.) Some, such as heavy bleeding or blood clots, are not abnormal or deviant, but instead

normal side effects of an abortion. (ER 103–04, 226–27.) Others, like a missed follow-up visit, are not medical reactions at all. (ER 68, 236–37.) Still others can be symptoms of other complications, but not complications themselves. (ER 235–36.) Some, such as breast cancer, have no connection to abortion. (ER 229–30.) And still others, such as coma, renal failure, and cardiac arrest, are medical conditions that are not likely effects of abortion, and are instead far more likely to occur after other procedures that carry no reporting requirement. (ER 71–72, 104, 232–33.)

Planned Parenthood also presented evidence that even if practitioners understand what the events listed in the Act mean, practitioners have to guess, yet again, about whether a "complication" is an "indirect" result of an abortion and thus must be reported. (ER 71–72, 237–38.) As Dr. Sabrina Holmquist, a board-certified obstetrician and gynecologist with a master's degree in public health, testified in her declaration, "indirect" is confusing, as "complications are understood to arise as a direct result of a patient's primary condition." (ER 237–37.)

The Act also lacks any time limitations, meaning providers must make reports years after an abortion if a patient self-reports that she suffered a listed "complication." I.C. § 39-9504(1). And a provider must report if a patient self-

reports she suffered a listed abortion "complication" at some point in her life, even when the complication is "indirect[ly]" related to a prior abortion, regardless whether the provider agrees it is a complication. *Id.*

Planned Parenthood also submitted uncontradicted evidence showing that the Act could never further its purported purpose of "adding to the sum of medical and public health knowledge," I.C. § 39-9502(2), but rather will do the opposite by generating deceptive data. As a leading public health researcher specializing in women's reproductive health, Dr. Ushma Upadhyay, testified before the district court, the Act "will necessarily collect inaccurate information on the abortion procedure and its 'complications.'" (ER 66–67.) Among many other problems, the Act will result in multiple, duplicative reports being made about the same patient experiencing the same "complication": if a woman visits multiple providers complaining about the same symptoms, no matter how long after the abortion, the Act requires each provider to file a report. (ER 69–70.)

Because the data gathered by the Act suffers from numerous methodological flaws, *see* ER, at 66–70, the Act will poison the existing abundant research on the safety of abortion and will only serve to confuse women seeking abortion with "data" that improperly inflates the procedure's health risk. (ER 66–67, 217.) Moreover, Idaho does not require similar reporting for any other medical

procedure, including those with a far higher rate of complications. Indeed, the risk of death from childbirth is significantly higher than that from an abortion, but Idaho has not followed the national trend of examining maternal deaths and significant morbidity related to childbirth. (ER 224–25.)

The Act's penalties are severe. Providers who fail to file a report that the State decides was required can lose their professional license and livelihood, I.C. § 54-1814(25); I.C. § 54-1413(1)(l), and facilities can be fined or have their licenses suspended. I.C. § 39-9506(4). Defendant Board of Medicine has made clear that if it received information that a provider had failed to file a report, the Board intends to investigate. (ER 120.) Just the filing of a disciplinary complaint with Idaho's Board of Medicine or Board of Nursing will endanger providers' practices, due to the lost time necessary to respond to the investigation, as well as their professional opportunities. Providers can also be criminally sanctioned if they file a report that one of the 44 prosecutors in the State decides was "false." I.C. §39-9506(1).

III. THE PROCEEDINGS BELOW

Planned Parenthood challenged the Act as unconstitutionally vague and a violation of equal protection and substantive due process (ER 27–44), and subsequently moved for a preliminary injunction preventing its enforcement, citing to a recent decision from a federal court in Indiana preliminarily enjoining a nearly

identical reporting requirement. *Planned Parenthood of Ind. and N. Ky. v. Comm'r, Ind. State Dep't of Health*, Case No. 1:18-cv-01219-RLY-DLP (S. D. Ind., June 28, 2018) (ER 195–213.)

The district court denied Planned Parenthood's motion. The court concluded that Planned Parenthood had satisfied the first prong of the preliminary injunction standard on the merits of its vagueness claim. (ER 13.) Despite this finding, and despite the fact that the Act remains in effect, the district court determined that Planned Parenthood had not demonstrated sufficient threat of irreparable injury. (ER 24.) Planned Parenthood filed a timely notice of appeal. (ER 1–3.)[2]

SUMMARY OF THE ARGUMENT

The Act's terms are so ill-defined and convoluted that persons of common intelligence must necessarily guess at their meaning and will differ as to their application. The Act carries a significant risk that medical providers, civil and criminal investigators, prosecutors, administrative officials, judges, and juries will all place different interpretations on the Act's requirements and prohibitions. For this reason, and as the district court found, Planned Parenthood established that it

[2] Planned Parenthood first sought an injunction pending appeal before the district court, and the district court denied its motion. Planned Parenthood then filed a motion for injunction in this Court. (Dkt. 8.) A divided motions panel of this Court denied Planned Parenthood's motion on December 5, 2018. (Dkt. 15.)

will likely succeed on the merits of its claim that the statute is unconstitutionally vague under the Fourteenth Amendment.

The Act is also constitutionally deficient because it is untethered to any legitimate government objective and lacks a rational basis. The uncontested evidence below showed that the Act cannot and will not generate usable or reliable data, its purported goal. The reports and data generated will not further any attempt to protect women's health. The Act thus violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Further, the Act violates the informational privacy rights of Plaintiff's providers and patients, by exposing providers' and patients' sensitive identifying information to public disclosure.

After holding that Planned Parenthood had satisfied the first prong of the preliminary injunction test on the merits of its claim that the Act is unconstitutionally vague, the district court erred in concluding that Planned Parenthood had not carried its burden to show irreparable harm. In reaching its conclusion, the district court incorrectly dismissed the longstanding law from this circuit that a likely constitutional violation is irreparable harm. It also erroneously determined that Planned Parenthood's injury was speculative even though Planned Parenthood and its providers are currently at immediate risk for investigations and

discipline based on allegations that they are misinterpreting and misapplying a vague law. The harm is real, pressing, and ongoing.

Finally, the balance of the equities favors Planned Parenthood. Abortion providers, who are already required to report complications, have been safely providing abortion for years, as the State's data shows, and the State can show no prejudice from an injunction against a likely unconstitutional law. Nor is it in the public interest for a party's constitutional rights to be violated.

STANDARD OF REVIEW

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008). Although this is a deferential standard, an abuse of discretion will be found if the district court based its decision "on an erroneous legal standard or clearly erroneous finding of fact." *Id.* This Court reviews "conclusions of law de novo and findings of fact for clear error." *Id.* at 986–87.

The legal premises underlying a district court's preliminary injunction decision are reviewed de novo. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002); *United States v. Blaine Cty., Montana*, 363 F.3d 897, 909 (9th Cir. 2004). If a preliminary injunction denial was premised on an inaccurate view of the law, the district court has abused its discretion. *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING PLANNED PARENTHOOD'S MOTION FOR A PRELIMINARY INJUNCTION.

A plaintiff seeking a preliminary injunction must establish that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an

injunction is in the public interest. *Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008).

In this circuit, the "serious questions" sliding scale test for preliminary injunctions also remains valid. *McCormack v. Hiedeman*, 694 F.3d 1004, 1016 n.7 (9th Cir. 2012). Under that test, "[S]erious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Planned Parenthood Ariz. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (alteration in original) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

II. PLANNED PARENTHOOD IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT THE ACT IS UNCONSTITUTIONAL.

A. The Act is unconstitutionally vague.

The Act carries both serious civil consequences with professional licensing boards for non-compliance as well as the possibility of criminal prosecution for willfully submitting a false report. Yet its requirements are unclear and confusing, and medical providers in Idaho are left to guess at how to comply. Governmental

civil and criminal authorities can reasonably attach different interpretations to the Act, leading to arbitrary enforcement and punishment.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A vague law raises a substantial risk that those who are subject to its requirements will not know how to comply, which will lead to arbitrary enforcement and punishment. *E.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). This Act is unconstitutionally vague, and the district court correctly ruled "that this prong of the inquiry is met." (ER 13.)

1. The State's predetermined list of complications is vague.

A provider must be able to understand the 37 things that the State has deemed to be "complications," and be able to identify those things as to individual patients, before the provider could determine whether a patient's complaint or condition is what the State has defined as a complication. Yet, many of the "process[es] or event[s]" on that list are hopelessly vague.

For example, an "emotional condition" is not a defined medical term. I.C. § 39-9503(jj). As one abortion provider in Idaho, Dr. A, put it: "[d]oes this mean that if a patient reports being sad the day of the procedure, I must report? Or what if the patient reports feeling less anxious after the procedure?" (ER 103.)

It is also unclear what type of "weakness" qualifies as a reportable condition. I.C. § 39-9503(l). And providers are left to guess whether "[p]hysical injur[ies]" such as a sprained ankle on the way out of the clinic, or bruising at an injection site, must be reported. (ER 73,103, 229.) In striking down a similar statute in Indiana, the district court there noted that this term might include something as mundane as "stubbed toe in the procedure room." (ER 205); *Planned Parenthood of Ind. and N. Ky. v. Comm'r*, Case No. 1:18-cv-01219-RLY-DLP (referring to plaintiff's expert's testimony). And here, providers are particularly confused because the Act also includes the actual but extremely rare possible "physical injuries" from an abortion: uterine perforation and cervical laceration, leaving providers unsure as to what else the legislature must have meant. (ER 229.)

The Act lists "heavy" or "excessive" bleeding as a complication, but it also separately lists "hemorrhage." I.C. § 95-3903(e),(f). There is no further definition given to distinguish between those terms. Some bleeding is normally expected after a medication abortion. One provider may find the amount of bleeding after a procedure to be less than "heavy" while someone else may disagree, opening the first provider up to arbitrary enforcement for a failure to report. (ER 226–27.)

These are but illustrative examples of the unclear definitions that place providers at risk of civil and criminal penalties. And though the State argued below

that by limiting the universe of complications to the 37 listed processes or events, it has avoided a flaw that resulted in Indiana's similar statute being struck down, that belief is mistaken. The inclusion of such broad, ill-defined, and uncertain terms as those listed in the Act leaves medical providers, civil and criminal enforcement officials, judges, and juries, without firm guidance as to how to comply with or enforce the Act, rendering it unconstitutionally vague. *See, e.g., Sessions* 138 S. Ct. at 1212 (stating the vagueness "doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the action of police officers, prosecutors, juries, and judges").

2. The statute's provision for assessing causation is vague.

The Act contains yet another layer of vagueness beyond the definitional section. The State's persistent refrain that the statute allows the exercise of reasonable professional judgment is correct to a point, but it is misplaced and doesn't save the Act. Under the statute's provisions, the Act does not allow medical judgment to be exercised, as the State has argued, at the initial level of determining what an abortion complication *is*. It is instead ostensibly allowed only at a second level of deciding whether the event or process that the Act has defined as a complication is a "direct or indirect" result of an abortion. I.C. § 39-9504(1).

Nevertheless, the State repeatedly claimed below, and likely will argue again here, that the Act is not vague because medical providers purportedly retain their professional judgment to decide whether any of the 37 listed items in the definitional section is a "complication." According to the State, if a provider reasonably decides that something is not an "abnormal and deviant processes or event" arising from an abortion, then it is not a complication and not reportable.

The textual basis for this argument remains just as elusive on appeal as it did in the district court. There, the district court wrote that the State's interpretation is "difficult to reconcile . . . with the actual words of the statute that a 'complication means . . . as follows' which appear to take away the initial discretion and instead tell a practitioner what is considered abnormal or deviant." (ER 10.)

The district court was right. The plain language of the definitional section of the Act is a legislatively mandated list of 37 items that the state of Idaho deems *as a matter of law* to be complications of abortion. In other words, the legislature has said that each of these items on the list are "abnormal and deviant processes or events arising from the performance or completion of an abortion." I.C. § 39-9504(2). Medical providers have no say in that analysis. Despite the veneer of allowing for the exercise of professional judgment, the statute breaks down yet

again at this second level. A provider must have some guiding standards by which to exercise professional judgment, and here they are lacking.

First, there is no temporal limitation on how far back in time a provider must go to determine whether a "complication," "treatment" or "death" is caused directly or indirectly by an abortion.

Second, "requires treatment" is also not defined and does not appear to be linked in any way to the previously defined "complications." Does "treatment" include something as simple as giving an over the counter pain reliever to a patient who has had a recent abortion? Does it include simply giving follow-up advice? Reasonable minds can differ, creating uncertainty and a risk for arbitrary enforcement.

Third, providers are left with no guidance as to how complications may be "indirect" result of an abortion, leaving providers confused. Dr. A has testified that Dr. A has "no idea how to determine if something is an indirect result of an abortion." (ER 105.) As but one example: a patient may choose to cancel or not show for a scheduled follow-up visit, which is defined as an abortion "complication" in Idaho Code § 39-9053(gg). There is no practical way to know whether this event was indirectly caused by an abortion and, hence, a reportable complication. Or, assume that a patient is on her way home from a procedure when

she is in a car accident, which results in "pain" to her (also defined as a complication, I.C. § 39-9503(m)). A person of common intelligence may be able to say that her pain was not "directly caused" by the abortion procedure. But such pain could be said to have been "indirectly caused" by the procedure if the patient would not have driving home at that particular time but for her appointment. The scope of indirect causation is lacking any discernable outer boundaries.

Vagueness infects this hodge-podge of a statute at every level. Many of the "complications" are themselves excessively broad and lacking in sufficient definitional clarity. And, the duty to report any complication or treatment that is an indirect result of an abortion lacks sufficient standards.

The lower court was correct. Planned Parenthood satisfies the first prong of the preliminary injunction test on the merits of the vagueness challenge.

B. The Act Likely Violates Planned Parenthood's Equal Protection and Due Process Rights.

The district court erroneously concluded that Planned Parenthood had not shown a likelihood of success on the merits of its claim that the statute also violated its right to equal protection of the law and to due process under the Fourteenth Amendment. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). The first

step in an equal protection analysis "is to identify the [defendants'] classification of groups," which can be accomplished by showing that a statute "imposes different burdens on different classes of people." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) (alteration in original) (citations omitted). The next step in the analysis is to determine the applicable level of scrutiny, but even under the lowest level of scrutiny, a classification fails if there is no legitimate basis for the distinctions drawn. Under rational basis review, courts can examine and reject the proffered rationale offered by the government. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).[3]

Here, the Idaho legislature requires exhaustive reporting of complications following abortions, which are extremely safe and effective, but does not collect data on any other medical procedure, even those that are far more dangerous. In fact, Idaho has no adverse event or medical error reporting requirements for other medical procedures, yet it already, for decades prior to the Act, collected information about complications from abortion.

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[3] "[T]he rational-basis standard is 'not a toothless one.'" *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)); *see also Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012), *vacated and remanded on other grounds by Hollingsworth v. Perry*, 570 U.S. 693 (2013) ("'[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.'" (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993)).

The Act also fails rational basis review because the classification drawn by the Act is utterly untethered from any legitimate government objective. *See Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450 (9th Cir. 2018); *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. Dep't of Health*, 888 F.3d 300, 309 (7th Cir. 2018) (finding law unconstitutional where no "rational relationship between the State's interest . . . and the law as written"). The purported purpose of the Act is "to promote the health and safety of women by adding to the sum of medical and public health knowledge." I.C. § 39-9502(2). However, the Act cannot achieve this purpose, and in fact, will only do the opposite. According to unrebutted testimony of Dr. Upadhyay, a nationally-recognized expert on epidemiologic and demographic methods, the Act:

> cannot and will not facilitate reliable scientific studies or research. The reports required under the Act (and the resulting data the Department must make publicly available) will be useless and unusable for evidence-based scientific research.

(ER 66–67.) Numerous methodological problems "render the data useless." (ER 68–73, 238.) Thus, the Act will in no way facilitate public health research, and instead serves only to confuse women with "data" that improperly inflates the health risk of abortion. (ER 217–18.)

Further, as this Court has recognized, "[w]hen a law exhibits a desire to harm an unpopular group, courts will often apply a 'more searching' application of

rational basis review." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200–01 (9th Cir. 2018) (citing *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)); see also *City of Cleburne,* 473 U.S. at 448–50; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535–38 (1973). While debating the bill, Senator Thayn (R) openly acknowledged the animus of the legislature, stating: "If this was any other subject, we wouldn't put up with this. Any other subject." (ER. 97–99.) The legislature was targeting a safe and legal procedure rather than attempting to gather data to protect women's health.

Similarly, substantive due process prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Thus, if the "legislature has acted in an arbitrary and irrational way," due process has been violated. *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976). For the same reasons that the Act violates Planned Parenthood's equal protection rights, the Act is irrational, violating due process.

C. The Act Is Unconstitutional Because Its Privacy Provisions Are Null and Void.

The legislature included a confidentiality provision in the Reporting Act that Idaho's Public Records Act expressly nullifies, exposing providers' and patients' sensitive identifying information to disclosure through public records requests.

"The Supreme Court has recognized a fundamental privacy right in non-disclosure of personal medical information." *Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014) (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)); *see also Tucson Women's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) ("Individuals have a constitutionally protected interest in avoiding 'disclosure of personal matters,' including medical information." (quoting *Whalen*, 429 U.S. at 599)); *id*. ("[T]he right to informational privacy applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public." (internal quotation marks omitted)).

Reports under the new Act directly identify abortion providers and even referring providers. I.C. § 39-9504(2)(e). Reports under the new Act also identify the age, race, county of residence, number of live births, and—in some cases—specific medical conditions defined as complications under the Act for women who have obtained abortions. In many small, rural and frontier communities in Idaho, that information could easily be used to identify a specific patient from a report.

The Act attempts to provide that "[t]he statistical report shall not lead to the disclosure of the identity of any medical practitioner or person filing a report under this section nor of a woman about whom a report is made." I.C. § 39-9504(4). It

states further that reports filed pursuant to this section shall not be deemed public records and shall remain confidential. I.C. § 39-9504(6).

But these statutory provisions squarely conflict the Idaho Public Records Act. The legislature amended the Public Records Act in 2015 to explicitly provide that after January 1, 2016, "[a]ny statute which is added to the Idaho Code and provides for the confidentiality or closure of any public record or class of public records shall be placed in the Public Records Act. Any statute which was added to the Idaho Code on and after January 1, 2016, and which provides for confidentiality or closure of a public record or class of public records and is located at a place other than this chapter"—as is the case here—"is null, void and of no force and effect regarding the confidentiality or closure of the public record and such public record shall be open and available to the public for inspection as provided in this chapter." I.C. § 74-122.

Accordingly, the Reporting Act's confidentiality provisions are null, void, and of no force and effect, violating the privacy of providers and patients that the reports concern and subjecting them to potential physical violence.

The State argued below, and the district court accepted, that the confidentiality provisions of the subsequent Act were not voided by the "null and void" provision of the Idaho Public Records Act. (ER 22–24.) The district court

concluded that these provisions were not in conflict. (*Id*.) This is cold comfort to Planned Parenthood, and its providers, and its patients, however. Neither the State's representations here, nor the federal district court's interpretation, are binding on a state court. Anyone could lodge a public records request for these reports and, if denied by the state agency, then file suit in state court claiming that the Public Records Act controls and the confidentiality provision in the Reporting Act is void. There is a grave risk that private and confidential information will be released, in violation of the Fourteenth Amendment to the U.S. Constitution.

III. PLANNED PARENTHOOD AND ITS PROVIDERS HAVE BEEN, AND WILL CONTINUE TO BE, IRREPARABLY HARMED ABSENT A PRELIMINARY INJUNCTION.

The district court's decision to deny Planned Parenthood's motion was based on its conclusion that Planned Parenthood had failed to show that it would be irreparably harmed by the law if the motion were not granted. The district court made several critical errors on the way to making that determination.

The most fundamental error was that the court cast aside the longstanding rule that a finding that a parties' constitutional rights have likely been violated necessarily means that the party will be irreparably harmed absent injunctive relief. This Court has plainly and repeatedly said that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695

F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, after determining that Planned Parenthood had satisfied the first prong of the preliminary injunction test, the district court erred in finding that it did not sufficiently show irreparable harm. *See Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (finding of irreparable harm "follows inexorably from our conclusion that the government's current policies are likely unconstitutional").

The district court instead found itself "duty bound to analyze the actual injury that may result" from the violation of Planned Parenthood's rights in determining irreparable injury. (ER 21.) It cited a 30-year-old case for that proposition, *Caribbean Marine Services Company, Inc., v. Baldridge*, 844 F.2d 668 (9th Cir. 1988). That case is inapposite, though, because the Ninth Circuit there simply held that an allegation of a future economic injury or "inconvenience" to privacy interests was speculative. *Id*. at 676. Notably, the Court of Appeals did not decide whether there was constitutional injury, as the district court had not done so. *Id*. Instead, the Court of Appeals agreed "with the government that mere allegations of inconvenience will not support crew members' claims of irreparable injury to their constitutional rights." *Id*.

Here, unlike in *Caribbean Marine*, the district court *did* find that Planned Parenthood had satisfied the first prong of the preliminary injunction test on the merits of a constitutional claim. There is no support for the district court's reasoning that it must further analyze the injury that may result, as caselaw in this circuit makes clear. *See, e.g., Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("[I]t follows from our conclusion that . . . [there are] serious constitutional concerns 'that irreparable harm is likely, not just possible' in the absence of preliminary injunctive relief."); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058–59 (9th Cir. 2009).

In *American Trucking*, for example, this Court reversed a district court's denial of preliminary injunctive relief. 559 F.3d at 1060. At issue were certain local regulations governing commerce in the ports of Los Angeles that required, in part, companies doing business there to sign "concession agreements." *Id*. at 1046–1052. Plaintiff, a trucking association, sued claiming that terms and conditions in the concession agreements were preempted by federal law and violated the Commerce Clause of the Constitution. *Id*. The district court concluded that while the plaintiff had shown likely success on the merits, there was only a speculative claim of irreparable harm because plaintiffs could refuse to sign the agreements, and then they would be left with a money damages claim, which typically is not

considered irreparable harm. *Id*. at 1057. On appeal, this Court rejected that reasoning as short-sighted and pointed to precedent reasserting that "[u]nlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Id*. at 1058 (quoting *Nelson v. NASA*, 530 F.3d 865, 881–82 (9th Cir. 2008)).

What's more, even if the district court were correct that further analyzing the injury is required, Planned Parenthood has shown that it and its providers are suffering actual and severe irreparable injury. The district court gave short shrift to the harm that exists under this statute. If Planned Parenthood and its providers fail to abide by the Act's confusing requirements, they can be subject to investigation by the Idaho Board of Medicine or Idaho Board of Nursing, as well as severe penalties and professional discipline, which could include loss of their professional licenses and livelihood. While abortions are safe and true complications are rare, the Act requires providers to report a wide variety of events that may be the direct or indirect result of an abortion, including normal side effects of an abortion and events that are not even medical conditions, as well as other things that providers do not understand. (ER 71, 217–18.)

The Act's excessive vagueness leaves providers highly susceptible to the risk that anyone who reads the Act's vague provisions differently than a provider

will lodge complaints with the medical boards, starting a professional licensure proceeding. Indeed, the Board of Medicine made clear before the district court that it would investigate any reports it receives. (ER 120.) Or a politically-minded criminal prosecutor may open a criminal investigation to determine whether Planned Parenthood filed a "false" report.

The district court also erred in concluding that injury was speculative, based on its determination that the earliest deadline for filing reports under the Act would be in early December of 2018. (ER 23.) Planned Parenthood disagrees with the district court's interpretation of the timing: these reports have to be filed, and providers will face the risk of severe penalties including loss of their livelihood, on a continuing basis as long as the Act remains in effect. Even if the district court were correct that the reports are only required beginning on December 8, 2018, that deadline passes tomorrow, and the case is nowhere near a decision on the merits. "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Boardman v. Pac. Seafood Grp*., 822 F.3d 1011, 1023 (9th Cir. 2016) (citation omitted). Planned Parenthood and its providers thus face irreparable injury that is not a mere possibility, but instead immediate, substantial, and very likely.

Finally, Planned Parenthood is further injured because the legislature's attempt to keep all reports submitted pursuant to the Act confidential by including a non-disclosure provision in the Act squarely conflicts with Idaho's Public Records Act, exposing providers and patients to the possibility that sensitive identifying information could be released pursuant to a public records request. The harm that can result from public disclosure of private information of abortion providers can be severe. (ER 61, 107.)

For all of these reasons, Planned Parenthood demonstrated likely irreparable harm, and the district court erred in finding to the contrary.

IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVORS AN INJUNCTION.

Where a plaintiff is threatened with "irreparabl[e] los[s]," "the balance of hardships between the parties tips sharply in favor of [the plaintiff]," and an injunction is warranted. *All. for the Wild Rockies* 632 F.3d at 1137. In contrast to the grave and irreparable harm that will befall Planned Parenthood and its providers if the Act continues in effect, Defendants will suffer no harm if an injunction is granted. Indeed, Defendants cannot suffer harm where Planned Parenthood continues as always to provide safe care and is already required to report abortion complications to the State, even prior to the Act. Finally, "it is

always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (punctuation omitted, reviewing cases).

CONCLUSION

The Act is a confusing and convoluted mess, seeking an elusive solution for a non-existent problem through an irrational process. It poisons existing longstanding reliable data about abortion safety with useless data. It carries significant civil and criminal penalties for non-compliance. It is unconstitutionally vague and violates the due process and equal protection clauses of the Fourteenth Amendment. Each day that Planned Parenthood and its providers attempt to comply with an unconstitutional statute is one when they are suffering irreparable harm. This Court should reverse the district court and remand with instructions to order a preliminary injunction.

Respectfully submitted on this 7th day of December, 2018.

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STATEMENT OF RELATED CASES

Appellant is not aware of any related cases currently before this Court.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 7,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 and Times New Roman size 14 font.

DATED: December 7, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 7, 2018.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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ADDENDUM

Idaho Code §§ 39-9501 – 39-9509

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9501. SHORT TITLE. This act shall be known and may be cited as the "Abortion Complications Reporting Act."
History:
[39-9501, added 2018, ch. 225, sec. 1, p. 509.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9502. LEGISLATIVE FINDINGS AND PURPOSE. (1) The legislature of the state of Idaho asserts and finds that:
(a) The state "has legitimate interests from the outset of pregnancy in protecting the health of women," as found by the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*;
(b) Specifically, the state "has a legitimate concern with the health of women who undergo abortions," as found by the United States Supreme Court in *Akron v. Akron Ctr. for Reproductive Health, Inc.*;
(c) Surgical abortion is an invasive procedure that can cause severe physical and psychological complications for women, both short-term and long-term, including, but not limited to, uterine perforation, cervical perforation, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion, retained tissue, pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm delivery in subsequent pregnancies, free fluid in the abdomen, adverse reactions to anesthesia and other drugs, an increased risk for developing breast cancer, psychological or emotional complications such as depression, suicidal ideation, anxiety and sleeping disorders, and death;
(d) To facilitate reliable scientific studies and research on the safety and efficacy of abortion, it is essential that the medical and public health communities have access to accurate information both on the abortion procedure and on complications resulting from abortion;
(e) Abortion "record keeping and reporting provisions that are reasonably directed to the preservation of maternal health and that

properly respect a patient's confidentiality and privacy are permissible," according to the United States Supreme Court in *Planned Parenthood v. Danforth*;
(f) Abortion and complication reporting provisions do not impose an undue burden on a woman's right to choose whether or not to terminate a pregnancy. Specifically, the "collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult," as found by the United States Supreme Court in *Planned Parenthood v. Casey*;
(g) The use of RU-486 as part of a chemical abortion can cause significant medical risks including, but not limited to, abdominal pain, cramping, vomiting, headache, fatigue, uterine hemorrhage, infections and pelvic inflammatory disease;
(h) The risk of abortion complications increases with advancing gestational age;
(i) Studies document that increased rates of complications, including incomplete abortion, occur even within the gestational limit approved by the federal food and drug administration (FDA);
(j) In July 2011, the FDA reported two thousand two hundred seven (2,207) adverse events after women used RU-486 for abortions. Among these events were fourteen (14) deaths, six hundred twelve (612) hospitalizations, three hundred thirty-nine (339) blood transfusions, and two hundred fifty-six (256) infections, including forty-eight (48) severe infections;
(k) The adverse event reports systems relied upon by the FDA have limitations and typically detect only a small proportion of events that actually occur. Furthermore, the FDA has failed to publicly release data since 2011, and it is necessary to develop a state-based information system in the wake of court rulings legalizing telemedicine abortions; and
(l) To promote its interest in maternal health and life, the state of Idaho maintains an interest in:
(i) Collecting information on all complications from all abortions performed in the state; and
(ii) Compiling statistical reports based on abortion complication information collected pursuant to this chapter for future scientific studies and public health research.

(2) Based on the findings in subsection (1) of this section, it is the purpose of this chapter to promote the health and safety of women by adding to the sum of medical and public health knowledge through the compilation of relevant data on all abortions performed in the state, as well as on all medical complications and maternal deaths resulting from these abortions.

History:

[39-9502, added 2018, ch. 225, sec. 1, p. 509.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9503. DEFINITIONS. As used in this chapter:

(1) "Abortion" shall have the same meaning as provided in section 18-502, Idaho Code.

(2) "Complication" means an abnormal or a deviant process or event arising from the performance or completion of an abortion, as follows:

(a) Uterine perforation or injury to the uterus;
(b) Injury or damage to any organ inside the body;
(c) Cervical perforation or injury to the cervix;
(d) Infection;
(e) Heavy or excessive bleeding;
(f) Hemorrhage;
(g) Blood clots;
(h) Blood transfusion;
(i) Failure to actually terminate the pregnancy;
(j) Incomplete abortion or retained tissue;
(k) The need for follow-up care, surgery or an aspiration procedure for incomplete abortion or retained tissue;
(l) Weakness, nausea, vomiting or diarrhea that lasts more than twenty-four (24) hours;
(m) Pain or cramps that do not improve with medication;
(n) A fever of one hundred and four-tenths (100.4) degrees or higher for more than twenty-four (24) hours;
(o) Hemolytic reaction due to the administration of ABO-incompatible blood or blood products;
(p) Hypoglycemia where onset occurs while the patient is being cared for in the abortion facility;
(q) Physical injury associated with care received in the abortion facility;
(r) Pelvic inflammatory disease;
(s) Endometritis;
(t) Missed ectopic pregnancy;
(u) Cardiac arrest;
(v) Respiratory arrest;
(w) Renal failure;
(x) Metabolic disorder;
(y) Shock;
(z) Embolism;
(aa) Coma;
(bb) Placenta previa or preterm delivery in subsequent pregnancies;
(cc) Free fluid in the abdomen;
(dd) Adverse or allergic reaction to anesthesia or other drugs;
(ee) Subsequent development of breast cancer;

(ff) Inability, refusal or unwillingness to have follow-up care, surgery or an aspiration procedure following an incomplete abortion or retained tissue;
(gg) Inability, refusal or unwillingness to have a follow-up visit;
(hh) Referral to or care provided by a hospital, emergency department or urgent care clinic or department;
(ii) Death;
(jj) Any psychological or emotional condition reported by the patient, such as depression, suicidal ideation, anxiety or a sleeping disorder; or
(kk) Any other adverse event as defined by the federal food and drug administration criteria provided in the medwatch reporting system.

(3) "Department" means the state department of health and welfare.

(4) "Facility" means any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician’s office, infirmary, dispensary, ambulatory surgical center or other institution or location where medical care is provided to any person.

(5) "Hospital" means any institution licensed as a hospital pursuant to chapter 13, title 39, Idaho Code.

(6) "Medical practitioner" means a licensed medical care provider capable of making a diagnosis within the scope of such provider’s license.

(7) "Pregnant" or "pregnancy" means the reproductive condition of having an unborn child in the uterus.

History:

[39-9503, added 2018, ch. 225, sec. 1, p. 510.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9504. ABORTION COMPLICATION REPORTING. (1) Every hospital, licensed health care facility or individual medical practitioner shall file a written report with the department regarding each woman who comes under the hospital’s, health care facility’s or medical practitioner’s care and reports any complication, requires medical treatment or suffers death that the attending medical practitioner has reason to believe, in the practitioner’s reasonable medical judgment, is a direct or an indirect result of an abortion. Such reports shall be completed by the hospital, health care facility or attending medical practitioner who treated the woman, signed by the attending medical practitioner and transmitted to the department within ninety (90) days from the last date of treatment or other care or consultation for the complication.

(2) Every hospital, licensed health care facility or individual medical practitioner required to submit a complication report shall attempt to ascertain and shall report on the following:
(a) The age and race of the woman;
(b) The woman's state and county of residence;
(c) The number of previous pregnancies, number of live births and number of previous abortions of the woman;
(d) The date the abortion was performed and the date that the abortion was completed, as well as the gestational age of the fetus, as defined in section 18-604, Idaho Code, and the methods used;
(e) Identification of the physician who performed the abortion, the facility where the abortion was performed and the referring medical practitioner, agency or service, if any; and
(f) The specific complication, as that term is defined in section 39-9503(2), Idaho Code, including, where applicable, the location of the complication in the woman's body, the date on which the complication occurred and whether there were any preexisting medical conditions that would potentially complicate pregnancy or the abortion.

(3) Reports required under this section shall not contain:
(a) The name of the woman;
(b) Common identifiers such as the woman's social security number or motor vehicle operator's license number; or
(c) Other information or identifiers that would make it possible to identify, in any manner or under any circumstances, a woman who has obtained an abortion and subsequently suffered an abortion-related complication.

(4) The department shall prepare a comprehensive annual statistical report for the legislature based on the data gathered from reports under this section. The statistical report shall not lead to the disclosure of the identity of any medical practitioner or person filing a report under this section nor of a woman about whom a report is filed. The aggregate data shall also be made independently available to the public by the department in a downloadable format.

(5) The department shall summarize aggregate data from the reports required under this chapter and submit the data to the federal centers for disease control and prevention for the purpose of inclusion in the annual vital statistics report. The aggregate data shall also be made independently available to the public by the department in a downloadable format.

(6) Reports filed pursuant to this section shall not be deemed public records and shall remain confidential, except that disclosure may be made to law enforcement officials upon an order of a court after application showing good cause. The court may condition disclosure of the information upon any appropriate safeguards it may impose.

(7) Absent a valid court order or judicial subpoena, the department, any other state department, agency or office, or any employees or contractor thereof shall not compare data concerning abortions or abortion complications maintained in an electronic or

other information system file with data in any other electronic or other information system, a comparison of which could result in identifying, in any manner or under any circumstances, a woman obtaining or seeking to obtain an abortion.

(8) Statistical information that may reveal the identity of a woman obtaining or seeking to obtain an abortion shall not be maintained by the department, any other state department, agency or office, or any employee or contractor thereof.

(9) The department or an employee or contractor of the department shall not disclose to a person or entity outside the department the reports or the contents of the reports required under this section in a manner or fashion that would permit the person or entity to whom the report is disclosed to identify, in any way or under any circumstances, the woman who is the subject of the report.

(10) Original copies of all reports filed under this section shall be available to the state board of medicine for use in the performance of its official duties.

(11) The department shall communicate this reporting requirement to all medical professional organizations, medical practitioners, hospitals, emergency departments, abortion facilities, clinics, ambulatory surgical facilities, and other health care facilities operating in the state.

History:

[39-9504, added 2018, ch. 225, sec. 1, p. 511.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9505. REPORTING FORMS. The department shall create the forms required by this chapter within sixty (60) days after the effective date of this chapter. Such forms shall provide for the reporting of information required by section39-9504(2), Idaho Code. No provision of this chapter requiring the reporting of information on forms published by the department shall be applicable until ten (10) days after the requisite forms are first created or until the effective date of this chapter, whichever is later.

History:

[39-9505, added 2018, ch. 225, sec. 1, p. 513.]

TITLE 39
HEALTH AND SAFETY
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39-9506. PENALTIES AND PROFESSIONAL SANCTIONS. (1) Any person who willfully delivers or discloses to the department any report, record or information required pursuant to this chapter and known by him or her to be false is guilty of a misdemeanor.

(2) Any person who willfully discloses any information obtained from reports filed pursuant to this chapter, other than the disclosure authorized by this chapter or otherwise authorized by law, is guilty of a misdemeanor.

(3) Any person required under this chapter to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or rule, is:

(a) Guilty of unprofessional conduct, and his or her professional license is subject to discipline in accordance with procedures governing his or her license; and

(b) Subject to a civil fine of five hundred dollars ($500) for each instance of failure to report, if such person is a medical practitioner responsible for filing an adverse reaction report with the department.

(4) In addition to the above penalties, any facility that willfully violates any of the requirements of this chapter shall:

(a) In the case of a first violation, be subject to a civil fine of one thousand dollars ($1,000) for each instance of failure to report;

(b) Have its license suspended for a period of six (6) months for the second violation; and

(c) Have its license suspended for a period of one (1) year upon a third or subsequent violation.

History:

[39-9506, added 2018, ch. 225, sec. 1, p. 513.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9507. CONSTRUCTION. (1) Nothing in this chapter shall be construed as creating or recognizing a right to abortion.

(2) It is not the intention of this chapter to make lawful an abortion that is currently unlawful.

History:

[39-9507, added 2018, ch. 225, sec. 1, p. 513.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9508. RIGHT OF INTERVENTION. The legislature, by concurrent resolution, may appoint one (1) or more of its members who sponsored or co-sponsored this chapter in his or her official capacity, or other member or members if the original sponsors and co-sponsors are no longer serving, to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

History:

[39-9508, added 2018, ch. 225, sec. 1, p. 513.]

TITLE 39
HEALTH AND SAFETY
CHAPTER 95
ABORTION COMPLICATIONS REPORTING ACT

39-9509. SEVERABILITY. The provisions of this chapter are hereby declared to be severable, and if any provision of this chapter 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 chapter.

History:

[39-9509, added 2018, ch. 225, sec. 1, p. 514.]

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TITLE 54
PROFESSIONS, VOCATIONS, AND BUSINESSES
CHAPTER 14
NURSES

54-1413. DISCIPLINARY ACTION. (1) Grounds for discipline. The board shall have the power to refuse to issue, renew or reinstate a license issued pursuant to this chapter and may revoke, suspend, place on probation, reprimand, limit, restrict, condition or take other disciplinary action against the licensee as it deems proper, upon a determination by the board that the licensee engaged in conduct constituting any one (1) of the following grounds:

(a) Made, or caused to be made, a false, fraudulent or forged statement or representation in procuring or attempting to procure a license to practice nursing;

(b) Practiced nursing under a false or assumed name;

(c) Is convicted of a felony or of any offense involving moral turpitude;
(d) Is or has been grossly negligent or reckless in performing nursing functions;
(e) Habitually uses alcoholic beverages or drugs as defined by rule;
(f) Is physically or mentally unfit to practice nursing;
(g) Violates the provisions of this chapter or rules and standards of conduct and practice as may be adopted by the board;
(h) Otherwise engages in conduct of a character likely to deceive, defraud or endanger patients or the public, which includes, but is not limited to, failing or refusing to report criminal conduct or other conduct by a licensee that endangers patients;
(i) Has been disciplined by a nursing regulatory authority in any jurisdiction. A certified copy of the order entered by the jurisdiction shall be prima facie evidence of such discipline;
(j) Failure to comply with the terms of any board order, negotiated settlement or probationary agreement of the board, or to pay fines or costs assessed in a prior disciplinary proceeding;
(k) Engaging in conduct with a patient that is sexual, sexually exploitative, sexually demeaning or may reasonably be interpreted as sexual, sexually exploitative or sexually demeaning; or engaging in conduct with a former patient that is sexually exploitative or may reasonably be interpreted as sexually exploitative. It would not be a violation under this subsection for a nurse to continue a sexual relationship with a spouse or individual of majority if a consensual sexual relationship existed prior to the establishment of the nurse-patient relationship; or
(l) Failure to comply with the requirements of the abortion complications reporting act, chapter 95, title 39, Idaho Code.

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TITLE 54
PROFESSIONS, VOCATIONS, AND BUSINESSES
CHAPTER 18
PHYSICIANS AND SURGEONS

54-1814. GROUNDS FOR MEDICAL DISCIPLINE. Every person licensed to practice medicine, licensed to practice as a physician assistant or registered as an extern, intern or resident in this state is subject to discipline by the board pursuant to the procedures set forth in this chapter and rules promulgated pursuant thereto upon any of the following grounds:

(1) Conviction of a felony, or a crime involving moral turpitude, or the entering of a plea of guilty or the finding of guilt by a jury or court of commission of a felony or a crime involving moral turpitude.

(2) Use of false, fraudulent or forged statements or documents, diplomas or credentials in connection with any licensing or other requirements of this act.

(3) Practicing medicine under a false or assumed name in this or any other state.

(4) Advertising the practice of medicine in any unethical or unprofessional manner.

(5) Knowingly aiding or abetting any person to practice medicine who is not authorized to practice medicine as provided in this chapter.

(6) Performing or procuring an unlawful abortion or aiding or abetting the performing or procuring of an unlawful abortion.

(7) The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

(8) Division of fees or gifts or agreement to split or divide fees or gifts received for professional services with any person, institution or corporation in exchange for referral.

(9) Giving or receiving or aiding or abetting the giving or receiving of rebates, either directly or indirectly.

(10) Inability to obtain or renew a license to practice medicine, or revocation of, or suspension of a license to practice medicine by any other state, territory, district of the United States or Canada, unless it can be shown that such action was not related to the competence of the person to practice medicine or to any conduct designated herein.

(11) Prescribing or furnishing narcotic or hallucinogenic drugs to addicted persons to maintain their addictions and level of usage without attempting to treat the primary condition requiring the use of narcotics.

(12) Prescribing or furnishing narcotic, hypnotic, hallucinogenic, stimulating or dangerous drugs for other than treatment of any disease, injury or medical condition.

(13) Failure to safeguard the confidentiality of medical records or other medical information pertaining to identifiable patients, except as required or authorized by law.

(14) The direct promotion by a physician of the sale of drugs, devices, appliances or goods to a patient that are unnecessary and not medically indicated.

(15) Abandonment of a patient.

(16) Willfully and intentionally representing that a manifestly incurable disease or injury or other manifestly incurable condition can be permanently cured.

(17) Failure to supervise the activities of externs, interns, residents, nurse practitioners, certified nurse-midwives, clinical nurse specialists, or physician assistants.

(18) Practicing medicine when a license pursuant to this chapter is suspended, revoked or inactive.

(19) Practicing medicine in violation of a voluntary restriction or terms of probation pursuant to this chapter.

(20) Refusing to divulge to the board upon demand the means, method, device or instrumentality used in the treatment of a disease, injury, ailment, or infirmity.

(21) Commission of any act constituting a felony or commission of any act constituting a crime involving moral turpitude.

(22) Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.

(23) Being convicted of or pleading guilty to driving under the influence of alcohol, drugs or other intoxicating substances or being convicted of or pleading guilty to other drug or alcohol related criminal charges.

(24) Failure to comply with a board order entered by the board.

(25) Failure to comply with the requirements of the abortion complications reporting act, chapter 95, title 39, Idaho Code.

History:

[54-1814, added 1977, ch. 199, sec. 14, p. 547; am. 1979, ch. 58, sec. 1, p. 152; am. 1992, ch. 73, sec. 1, p. 209; am. 1998, ch. 118, sec. 15, p. 446; am. 1998, ch. 177, sec. 5, p. 662; am. 2000, ch. 332, sec. 3, p. 1118; am. 2013, ch. 252, sec. 1, p. 622; am. 2018, ch. 225, sec. 3, p. 515.]