February 10, 2017

Idaho State Board of Examiners
c/o State Controller’s Office
700 W. State Street, 5th Floor
P.O. Box 83720
Boise ID 83720-0011

Re: February 20, 2017 Board of Examiners Meeting: Agenda Item Related to Payment of Attorney’s Fees, Costs and Expenses in Planned Parenthood of the Great Northwest and Hawaiian Islands v. Wasden

Dear Board Members:

On behalf of the defendants in this matter—Attorney General Lawrence Wasden, the Idaho State Board of Medicine, Jan M. Bennetts (Ada County Prosecutor) and Grant P. Loebs (Twin Falls County prosecutor)—I request that the following item be placed on the agenda of the Board of Examiners’ meeting scheduled for Tuesday, February 20, 2017: Attorney’s Fees, Costs and Expense Settlement of $151,209.88 in Planned Parenthood of the Great Northwest and Hawaiian Islands v. Wasden, No. 1:15-cv-00557-BLW (D. Idaho).

This case was filed in December 2015 in federal district court. The plaintiff, Planned Parenthood of the Great Northwest and the Hawaiian Islands, operates three clinics in Idaho where it performs surgical and/or medication (or “chemical”) abortions: Boise, Meridian and Twin Falls. Medication abortions are performed through the use of two abortifacients, mifepristone and misoprostol. The 2015 Legislature enacted two statutes—Idaho Code §§ 18-617 and 54-5707(3)—that regulated medication abortions. The first statute dealt specifically with the performance of medication abortions and required, in relevant part, that the prescribing physician have “examined in person the woman to whom the abortifacient is administered to determine the medical appropriateness of such administration and has determined that the abortifacient is sufficiently safer for use in the gestational age at which it will be administered.” Id. § 18-617(2)(c) (emphasis added). The second statute is part of the Idaho Telehealth Access Act and prohibits prescribing any drug “through telehealth services for the purpose of causing an abortion.” The two provisions thus work hand-in-hand to make unlawful use of telemedicine in the performance of medication abortions.
Planned Parenthood alleged that it intended to commence offering medication abortions through telemedicine at its Twin Falls clinic. The use of telemedicine, it further contended, would allow it to offer such abortions more frequently because Planned Parenthood physicians were physically on site at the clinic only two days per month in Twin Falls. Use of telemedicine, however, would allow a physician in the Boise clinic to communicate with the patient through an audio-video connection after following completion of pre-abortion procedures. Those procedures include matters such as taking a patient’s medical history; performing an ultrasound to determine fetal age and the presence of an inter-uterine (i.e., non-ectopic) pregnancy; various blood and urine-based tests; and advised consent counseling. These procedures are performed by non-physicians in the three Idaho clinics. This information is stored electronically. The performing, or prescribing, physician would review it, consult with the patient through the audio-video link to ensure that she is confident about having the abortion and is not acting under coercion from any other person; authorize administration of the first abortifacient (mifepristone); and observe the patient taking the drug. The second abortifacient, misoprostol, is self-administered by the patient at home. The physician, in other words, performs the same routine through telemedicine as he or she would if actually present in the Twin Falls clinic with the patient except that the physician interaction is done through telemedicine.

The district court entered a stay with respect to the statutes’ enforcement in May 2016 and established an accelerated discovery schedule. Planned Parenthood began offering medication abortions through telemedicine in August 2016. In the interim, the United States Supreme Court issued its opinion in Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016), holding that the undue burden test “requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer” and “weigh[] the asserted benefits against the burdens.” Id. at 2310. The discovery thus focused on identifying the medical benefits of an in-person exam performed by a physician in the medication abortion context and the burdens alleged by Planned Parenthood because of the ban on telemedicine medication abortions on access to abortion. Planned Parenthood and the defendants also exchanged expert reports from OB-GYN expert witnesses and deposed them. The defendants additionally conducted intensive paper discovery through interrogatories, requests to produce documents and depositions of non-experts to determine facts relevant to the benefits and burdens.

Following the completion of discovery in the case, the Attorney General and the other defendants concluded that, given the undue burden standard endorsed by the Supreme Court in Whole Woman’s Health, successful defense of the two statutes was not possible before the district court or the Ninth Circuit Court of Appeals. They also concluded that the likelihood of securing Supreme Court review and reversal of the lower courts was highly unlikely.

The parties therefore entered into a Joint Motion for Continuation of Stay and Entry of Final Order that is attached. On January 20, 2017, the court entered an Order Continuing Stay of Enforcement (“Order”), which is also attached to this letter. This Order continued to enjoin Defendants form enforcing the statutory provisions at issue. That Order further provides that the Idaho Legislature shall have through the 2017 legislative session within which to repeal the
statutory provisions at issue, else the court will enter a Final Order finding those provisions unenforceable and unconstitutional. The Order also provides for payment of Planned Parenthood’s attorney’s fees, expenses and costs in accordance with 42 U.S.C. § 1988. Planned Parenthood’s attorneys supplied Defendants with their billing records, and Defendants determined that the requested amount, $151,209.88, is reasonable.

Sincerely,

Clay R. Smith  
Deputy Attorney General

c: Brian Kane  
    Steven L. Olsen  
    Cynthia Yee-Wallace

Exhibits Attached
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD OF THE GREAT NORTHWEST AND THE HAWAIIAN ISLANDS, a Washington corporation,

Plaintiff,

v.

LAWRENCE G. WASDEN, in his official capacity as Attorney General of the State of Idaho; JAN M. BENNETTS, in her official capacity of Ada County Prosecutor; GRANT P. LOEBS, in his official capacity of Twin Falls County Prosecutor; IDAHO STATE BOARD OF MEDICINE,

Defendants.

Case No. 1:15-cv-00557-BLW

JOINT MOTION FOR CONTINUATION OF STAY AND ENTRY OF FINAL ORDER

The Parties in this case were required to conduct a settlement conference by October 31, 2016. The dispositive motion deadline in this case was extended from December 1, 2016 to February 3, 2017 to provide additional time to pursue a negotiated settlement. The Parties

JOINT MOTION FOR CONTINUATION OF STAY AND ENTRY OF FINAL ORDER - 1
agreed to inform the Court whether a settlement could be reached in this case by December 23, 2016. The Parties, having reached a negotiated settlement, through their undersigned counsel, jointly move the Court to enter the Proposed Order Continuing Stay of Enforcement attached hereto as Exhibit 1 without further hearing or delay.

The Parties also jointly move for the Court to enter the Proposed Final Order attached hereto as Exhibit 2 if the Idaho Legislature does not repeal Idaho Code § 18-617(2)(e) and Idaho Code § 54-5707(3) during the 2017 legislative session.

These motions are supported by the files and records herein and the Stipulated Facts filed herewith.


PLANNED PARENTHOOD OF THE GREAT NORTHWEST AND THE HAWAIIAN ISLANDS

/s/ Laura Einstein
Laura Einstein, Chief Legal Counsel
Alice Clapman
Jennifer Keighley

JONES, GLEDHILL, FUHRMAN, GOURLEY, P.A.
William A. Fuhrman

Attorneys for Plaintiff

OFFICE OF THE IDAHO ATTORNEY GENERAL

/s/ Cynthia Yee-Wallace
/s/ Clay Smith
Deputy Attorneys General

Attorneys for Defendants

JOINT MOTION FOR CONTINUATION OF STAY AND ENTRY OF FINAL ORDER - 2
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 23, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

William A. Fuhrman  
Sam Dotters-Katz  
Laura F. Einstein  
Alice Clapman  
Jennifer Keighley

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/s/ Cynthia Yee-Wallace  
CYNTHIA YEE-WALLACE  
Deputy Attorney General
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PLANNED PARENTHOOD OF THE GREAT
NORTHWEST AND THE HAWAIIAN
ISLANDS, a Washington corporation,

Plaintiff,

v.

LAWRENCE G. WASDEN, in his official
capacity as Attorney General of the State of
Idaho; JAN M. BENNETTS, in her official
capacity of Ada County Prosecutor; GRANT P.
LOEBS, in his official capacity of Twin Falls
County Prosecutor; IDAHO STATE BOARD
OF MEDICINE,

Defendants.

Case No. 1:15-cv-00557-BLW

ORDER CONTINUING STAY OF
ENFORCEMENT

Plaintiff Planned Parenthood of the Great Northwest and the Hawaiian Islands ("Planned Parenthood") and Defendants Lawrence G. Wasden, Jan M. Bennetts, Grant P. Loebcs, and the Idaho State Board of Medicine (collectively, "Defendants") have filed a Joint Motion for Continuation of Stay and Entry of Final Order ("Joint Motion"). The Court has reviewed the Joint Motion and the files and records herein and for good cause shown:

IT IS HEREBY ORDERED that the Joint Motion (Dkt. 40) is granted. IT IS FURTHER ORDERED THAT:

1. Defendants and all of their officers, servants, employees, attorneys, and all those in active concert or participation with them, are hereby enjoined and shall continue to be enjoined from enforcement of Idaho Code § 18-617(2)(e) under Idaho Code § 18-605, Idaho Code § 18-618(2) or otherwise under Chapter 6, Title 18 of the Idaho Code against Planned Parenthood to the extent that § 18-617(2)(e) requires a physician to have "examined in person
the woman to whom the abortifacient is administered.” This Order does not affect any other part of Idaho Code § 18-617.

2. Defendants and all of their officers, servants, employees, attorneys, and all those in active concert or participation with them are hereby enjoined and shall continue to be enjoined from enforcing Idaho Code § 54-5707(3) against Planned Parenthood. This Order does not affect any other provision in Title 54, Chapter 57.

3. This case shall remain open but shall be stayed, including all discovery and submissions in this matter. The purpose of this stay is to give the Idaho Legislature time to repeal Idaho Code §§ 18-617(2)(e) and 54-5707(3) consistent with paragraph 4 below.

4. If the Idaho Legislature repeals Idaho Code § 18-617(2)(e) and Idaho Code § 54-5707(3) during the 2017 legislative session, then, upon motion filed by the parties, this case shall be dismissed, without prejudice. However, if the Idaho Legislature fails to repeal Idaho Code § 18-617(2)(e) and Idaho Code § 54-5707(3) during the 2017 legislative session, then upon joint motion filed by the parties, the Court shall rule upon the Joint Motion seeking entry of the Proposed Final Order (Proposed Final Order is attached to the Joint Motion as Exhibit 2, see Dkt. 40-2), without further hearing or delay.

5. Plaintiff is entitled to reasonable costs and attorney’s fees under 42 U.S.C. § 1988 incurred in this case through the date that the Joint Motion is filed with the Court. Counsel for Plaintiff shall provide to counsel for Defendants an itemized statement of fees and costs that it may claim through the date the Joint Motion was submitted to the Court, no later than 60 days from the date of this order. If the Parties are unable to reach a negotiated agreement as to fees and costs through the date that the Joint Motion was submitted to the Court, the parties shall so notify the Court, and within 60 days of the notice, Plaintiff may petition the Court for an award
of costs and fees for services performed through the date that this Order is signed, plus fees incurred in preparing a fee petition. Thereafter, the Parties shall each bear their own costs and attorney’s fees incurred in connection with this matter.

DATED: January 20, 2017

B. Lynn Winmill
Chief Judge
United States District Court