

HOUSE BILL 122

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Nora Espinoza

AN ACT

RELATING TO ABORTION; ENACTING THE WOMAN'S RIGHT TO KNOW ACT;
SPECIFYING REQUIREMENTS FOR INFORMED CONSENT THAT INCLUDE
INFORMATION TO BE PROVIDED TO THE PREGNANT FEMALE BY THE
REFERRING PHYSICIAN, THE PHYSICIAN PERFORMING THE ABORTION AND
THEIR AGENTS; MANDATING AN ULTRASOUND AND THE USE OF A FETAL
MONITOR TO MAKE THE FETAL HEARTBEAT AUDIBLE TO THE PREGNANT
FEMALE; REQUIRING A CERTIFICATION FROM THE PREGNANT FEMALE THAT
SHE HAS BEEN FURNISHED WITH REQUIRED INFORMATION; MANDATING THE
DEVELOPMENT AND MAINTENANCE OF A DEPARTMENT OF HEALTH WEB SITE
TO PROVIDE REQUIRED INFORMATION TO THE PREGNANT FEMALE;
MANDATING REQUIREMENTS FOR ABORTION PROVIDER WEB SITES;
MANDATING REPORTING BY PHYSICIANS TO THE DEPARTMENT OF HEALTH
TO DEMONSTRATE THAT THEY HAVE PROVIDED THE REQUIRED INFORMATION
TO PREGNANT FEMALES AND TO PROVIDE STATISTICS ON INFORMED
CONSENT FOR ABORTION; REQUIRING THE DEPARTMENT OF HEALTH TO

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1 ANNUALLY REPORT STATISTICS ON INFORMED CONSENT FOR ABORTION;
2 IMPOSING PENALTIES ON PHYSICIANS FOR FAILURE TO REPORT OR LATE
3 REPORTING OF REQUIRED INFORMATION; IMPOSING CRIMINAL PENALTIES
4 FOR THE KNOWING OR RECKLESS PERFORMANCE OF AN ABORTION IN
5 VIOLATION OF THE ACT; PROVIDING CIVIL REMEDIES FOR THE PREGNANT
6 FEMALE, THE FATHER OF THE UNBORN CHILD AND GRANDPARENTS OF THE
7 UNBORN CHILD FOR VIOLATIONS OF THE ACT; AUTHORIZING ACTUAL AND
8 PUNITIVE DAMAGES FOR KNOWING OR RECKLESS VIOLATION OF THE ACT
9 AND ATTORNEY FEES TO THE PREVAILING PARTY; CREATING A RIGHT OF
10 ACTION TO COMPEL THE DEPARTMENT OF HEALTH TO COMPILE AN ANNUAL
11 REPORT; MAKING PROVISIONS TO PROTECT THE PRIVACY OF FEMALES
12 UPON WHOM AN ABORTION HAS BEEN ATTEMPTED OR PERFORMED IN COURT
13 PROCEEDINGS BROUGHT UNDER THE ACT.

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

16 SECTION 1. SHORT TITLE.--This act may be cited as the
17 "Woman's Right to Know Act".

18 SECTION 2. DEFINITIONS.--As used in the Woman's Right to
19 Know Act:

20 A. "abortion" means the use or prescription of any
21 instrument, medicine, drug or any other substance or device
22 intentionally to terminate the pregnancy of a female known to
23 be pregnant with an intention other than to increase the
24 probability of a live birth, to preserve the life or health of
25 the child after live birth, to remove an ectopic pregnancy or

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1 to remove a dead unborn child who died as a result of a
2 spontaneous abortion, accidental trauma or a criminal assault
3 on the pregnant female or her unborn child;

4 B. "attempt to perform an abortion" means an act,
5 or an omission of a statutorily required act, that, under the
6 circumstances as the actor believes them to be, constitutes a
7 substantial step in a course of conduct planned to culminate in
8 the performance of an abortion in New Mexico in violation of
9 this act;

10 C. "abortion provider" means any person legally
11 qualified to perform an abortion under New Mexico law;

12 D. "certified technician" means:

13 (1) a registered diagnostic medical
14 sonographer who is certified in obstetrics and gynecology by
15 the American registry for diagnostic medical sonography; or

16 (2) a nurse-midwife or an advanced-practice
17 nurse practitioner in obstetrics, with certification in
18 obstetrical ultrasonography;

19 E. "embryonic or fetal heartbeat" means embryonic
20 or fetal cardiac activity or the steady and repetitive rhythmic
21 contraction of the embryonic or fetal heart;

22 F. "medical emergency" means a condition which, in
23 reasonable medical judgment, so complicates the medical
24 condition of the pregnant woman as to necessitate the immediate
25 abortion of her pregnancy to avert her death, or for which a

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1 delay will create serious risk of substantial and irreversible
2 physical impairment of a major bodily function, not including
3 psychological or emotional conditions. No condition shall be
4 deemed a medical emergency if based on a claim or diagnosis
5 that the woman will engage in conduct which she intends to
6 result in her death or in substantial and irreversible physical
7 impairment of a major bodily function;

8 G. "physician" means a physician licensed under the
9 Medical Practice Act or an osteopathic physician licensed by
10 the board of osteopathic medical examiners;

11 H. "probable gestational age of the unborn child"
12 means what, in the judgment of the physician, will, with
13 reasonable probability, be the gestational age of the unborn
14 child at the time the abortion is planned to be performed; and

15 I. "stable internet web site" means a web site
16 that, to the extent reasonably practicable, is safeguarded from
17 having its content altered other than by the department of
18 health.

19 SECTION 3. INFORMED CONSENT.--

20 A. No abortion shall be performed in this state
21 except with the voluntary and informed consent of the female
22 upon whom the abortion is to be performed. Except in the case
23 of a medical emergency, consent to an abortion is voluntary and
24 informed only if the female is told the following, by telephone
25 or in person, by the physician who is to perform the abortion

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1 or by a referring physician, at least twenty-four hours before
2 the abortion:

3 (1) the name of the physician who will perform
4 the abortion;

5 (2) the particular medical risks associated
6 with the particular abortion procedure to be employed
7 including, when medically accurate, the risks of infection,
8 hemorrhage, breast cancer, danger to subsequent pregnancies and
9 infertility;

10 (3) the probable gestational age of the unborn
11 child at the time the abortion is to be performed; and

12 (4) the medical risks associated with carrying
13 her child to term.

14 B. The information required by Subsection A of this
15 section may be provided by telephone without conducting a
16 physical examination or tests of the patient, in which case the
17 information required to be provided may be based on facts
18 supplied the physician by the female and whatever other
19 relevant information is reasonably available to the physician.

20 C. The information required by Subsection A of this
21 section may not be provided by a tape recording, but must be
22 provided during a consultation in which the physician is able
23 to ask questions of the female and the female is able to ask
24 questions of the physician.

25 D. If a physical examination, tests or the

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1 availability of other information to the physician subsequently
2 indicate, in the medical judgment of the physician, a revision
3 of the information previously supplied to the patient, that
4 revised information may be communicated to the patient at any
5 time prior to the performance of the abortion.

6 E. Nothing in this section may be construed to
7 preclude provision of required information in a language
8 understood by the patient through a translator.

9 F. The female shall be informed, by telephone or in
10 person, by the physician who is to perform the abortion, by a
11 referring physician or by an agent of either physician at least
12 twenty-four hours before the abortion that:

13 (1) medical assistance benefits may be
14 available for prenatal care, childbirth and neonatal care;

15 (2) the father is legally responsible to
16 assist in the support of her child, even in instances in which
17 the father has offered to pay for the abortion; and

18 (3) she has the right to review the printed
19 materials described in Section 4 of the Woman's Right to Know
20 Act, that these materials are available on a state-sponsored
21 web site and what the web site address is.

22 G. The physician or the physician's agent shall
23 orally inform the female that the materials have been provided
24 by the state of New Mexico, that they describe the unborn child
25 and list agencies which offer alternatives to abortion and are

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1 available on the department of health web site.

2 H. If the female chooses to view the materials
3 other than on the department of health web site, the materials
4 shall either be given to her at least twenty-four hours before
5 the abortion or mailed to her at least seventy-two hours before
6 the abortion by certified mail, restricted delivery to
7 addressee.

8 I. The information required by Subsection F of this
9 section may be provided by a tape recording if provision is
10 made to record or otherwise register specifically whether the
11 female does or does not choose to have the printed materials
12 given or mailed to her.

13 J. The female shall certify in writing, prior to
14 the abortion, that the information described in Subsections A
15 and F of this section has been furnished to her, and that she
16 has been informed of her opportunity to review the information
17 referred to in Paragraph (3) of Subsection F of this section.

18 K. Prior to the performance of the abortion, the
19 physician who is to perform the abortion or the physician's
20 agent shall receive a copy of the written certification
21 described by Subsection J of this section.

22 SECTION 4. PRINTED INFORMATION.--

23 A. Within ninety days after the Woman's Right to
24 Know Act is enacted, the department of health shall cause to be
25 published, in English and in each language which is the primary

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1 language of two percent or more of the state's population, and
2 shall cause to be available on the web site provided for in
3 Section 7 of the Woman's Right to Know Act, the following
4 printed materials in such a way as to ensure that the
5 information is easily comprehensible:

6 (1) geographically indexed materials designed
7 to inform the female of public and private agencies and
8 services available to assist a female through pregnancy, upon
9 childbirth and while the child is dependent, including adoption
10 agencies, which shall include a comprehensive list of the
11 agencies available, a description of the services they offer
12 and a description of the manner, including telephone numbers,
13 in which they might be contacted or, at the option of the
14 department of health, printed materials including a toll-free,
15 twenty-four-hour-a-day telephone number which may be called to
16 obtain, orally, such a list and description of agencies in the
17 locality of the caller and of the services they offer; and

18 (2) materials designed to inform the female of
19 the probable anatomical and physiological characteristics of
20 the unborn child at two-week gestational increments from the
21 time when a female can be known to be pregnant to full term,
22 including any relevant information on the possibility of the
23 unborn child's survival and pictures or drawings representing
24 the development of unborn children at two-week gestational
25 increments, provided that any such pictures or drawings must

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1 contain the dimensions of the fetus and must be realistic and
2 appropriate for the stage of pregnancy depicted. The materials
3 shall be objective, nonjudgmental and designed to convey only
4 accurate scientific information about the unborn child at the
5 various gestational ages. The material shall also contain
6 objective information describing the methods of abortion
7 procedures commonly employed, the medical risks commonly
8 associated with each such procedure, the possible detrimental
9 psychological effects of abortion, the medical risks commonly
10 associated with each such procedure and the medical risks
11 commonly associated with carrying a child to term.

12 B. The materials referred to in Subsection A of
13 this section shall be printed in a typeface large enough to be
14 clearly legible. The web site provided for in Section 7 of the
15 Woman's Right to Know Act shall be maintained at a minimum
16 resolution of seventy dots per inch. All pictures appearing on
17 this web site shall be a minimum of two hundred by three
18 hundred pixels. All letters on the web site shall be a minimum
19 of eleven-point font. All information and pictures shall be
20 accessible with an industry standard browser, requiring no
21 additional plug-ins.

22 C. The materials required under this section shall
23 be available at no cost from the department of health upon
24 request and in appropriate number to any person, facility or
25 hospital.

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1 SECTION 5. ULTRASOUND REQUIREMENT.--

2 A. Prior to a woman giving informed consent to
3 having any part of an abortion performed or induced, and prior
4 to the administration of any anesthesia or medication in
5 preparation for the abortion on the woman, the physician who is
6 to perform the abortion or a certified technician shall:

7 (1) perform an obstetric ultrasound on the
8 pregnant woman, using whichever method the physician and
9 patient agree is best under the circumstance;

10 (2) provide a simultaneous verbal explanation
11 of what the ultrasound is depicting, which shall include the
12 presence and location of the unborn child within the uterus and
13 the number of unborn children depicted. If the ultrasound
14 image indicates that fetal demise has occurred, a woman shall
15 be informed of that fact;

16 (3) display the ultrasound images so that the
17 pregnant female may view them;

18 (4) provide a medical description of the
19 ultrasound images, which shall include the dimensions of the
20 embryo or fetus and external members and internal organs, if
21 present and visible;

22 (5) obtain a written certification from the
23 female, prior to the abortion, that the requirements of
24 Paragraphs (1) through (4) of this subsection have been
25 complied with; and

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1 (6) retain a copy of the written certification
2 prescribed by Paragraph (5) of this subsection. The
3 certification shall be placed in the medical file of the female
4 and shall be kept by the abortion provider for a period of not
5 less than seven years. If the female is a minor, then the
6 certification shall be placed in the medical file of the minor
7 and kept for at least seven years or for five years after the
8 minor reaches the age of majority, whichever is longer.

9 B. Nothing in this section shall be construed to
10 prevent a pregnant female from averting her eyes from the
11 ultrasound images required to be provided to and reviewed with
12 her. Neither the physician nor the pregnant female shall be
13 subject to any penalty if she refuses to look at the presented
14 ultrasound images.

15 SECTION 6. AUDIBLE EMBRYONIC OR FETAL HEARTBEAT
16 REQUIREMENT.--

17 A. Prior to a woman giving informed consent to
18 having any part of an abortion performed or induced, if the
19 pregnancy is at least eight weeks after fertilization, the
20 abortion provider who is to perform or induce the abortion, a
21 certified technician or another agent of the abortion provider
22 shall, using a hand-held Doppler fetal monitor, make the
23 embryonic or fetal heartbeat of the unborn child audible for
24 the pregnant woman to hear.

25 B. A physician, a certified technician or another

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1 agent of the physician shall not be in violation of Subsection
2 A of this section if:

3 (1) the physician, certified technician or
4 agent has attempted, consistent with standard medical practice,
5 to make the embryonic or fetal heartbeat of the unborn child
6 audible for the pregnant woman to hear using a hand-held
7 Doppler fetal monitor;

8 (2) that attempt does not result in the
9 heartbeat being made audible; and

10 (3) the physician has offered to attempt to
11 make the heartbeat audible at a subsequent date.

12 C. Nothing in this section shall be construed to
13 prevent the pregnant woman from not listening to the sounds
14 detected by the hand-held Doppler fetal monitor pursuant to
15 Subsection A of this section.

16 SECTION 7. INTERNET WEB SITE.--

17 A. The department of health shall develop and
18 maintain a stable internet web site to provide the information
19 described in Section 4 of the Woman's Right to Know Act. No
20 information regarding who uses the web site shall be collected
21 or maintained. The department of health shall monitor the web
22 site on a daily basis to prevent and correct tampering and
23 shall immediately notify abortion providers of any change in
24 the location of the material on the web site.

25 B. The web site:

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1 (1) must use enhanced, user-friendly search
2 capabilities to ensure that the information described in
3 Section 4 of the Woman's Right to Know Act is easily accessible
4 and must be searchable by keywords and phrases, specifically to
5 ensure that entering the term "abortion" yields the Woman's
6 Right to Know Act Section 4 materials, regardless of how these
7 materials are labeled;

8 (2) must ensure that the Woman's Right to Know
9 Act Section 4 materials are printable;

10 (3) must give clear prominent instructions on
11 how to receive the information in printed form; and

12 (4) must be accessible to the public without
13 requiring registration or use of a user name, password or
14 another user identification.

15 **SECTION 8. ABORTION PROVIDER WEB SITE.**--If an abortion
16 provider has a web site, the abortion provider's internet web
17 site home page, by use of at least two direct links, one of
18 which is posted prominently, must link to the department of
19 health informed consent materials on the department's internet
20 web site.

21 **SECTION 9. PROCEDURE IN CASE OF MEDICAL EMERGENCY.**-- When
22 a medical emergency compels the performance of an abortion, the
23 physician shall inform the female, prior to the abortion if
24 possible, of the medical indications supporting the physician's
25 judgment that an abortion is necessary to avert her death or

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1 that a twenty-four-hour delay will create serious risk of
2 substantial and irreversible physical impairment of a major
3 bodily function, not including psychological or emotional
4 conditions.

5 SECTION 10. REPORTING REQUIREMENTS.--

6 A. Within ninety days after the Woman's Right to
7 Know Act is enacted, the department of health shall prepare a
8 form for physicians that contains a reprint of the Woman's
9 Right to Know Act and that requires physicians to report the
10 following:

11 (1) the number of females provided with the
12 information described in Subsection A of Section 3 of the
13 Woman's Right to Know Act with a breakout of:

14 (a) the number of females to whom
15 information was provided by telephone and in person; and

16 (b) an indication of whether the
17 information was provided by the referring physician or the
18 physician who performed the abortion;

19 (2) the number of females provided with the
20 information described in Subsection F of Section 3 of the
21 Woman's Right to Know Act with a breakout of:

22 (a) the number of females to whom
23 information was provided by telephone and in person; and

24 (b) an indication of whether the
25 information was provided by the referring physician, the

1 physician who performed the abortion or an agent of the
2 physician;

3 (3) the number of females who availed
4 themselves of the opportunity to obtain a copy of the printed
5 information described in Section 4 of the Woman's Right to Know
6 Act other than on the department of health web site and the
7 number who did not, with a breakout of the number of females
8 who, to the best of the reporting physician's information and
9 belief, went on to obtain the abortion;

10 (4) the number of abortions performed by the
11 physician in which information otherwise required to be
12 provided at least twenty-four hours before the abortion was not
13 so provided because an immediate abortion was necessary to
14 avert the female's death; and

15 (5) the number of abortions in which such
16 information was not so provided because a delay would create
17 serious risk of substantial and irreversible impairment of a
18 major bodily function.

19 B. Within one hundred twenty days after the Woman's
20 Right to Know Act is enacted, the department of health shall
21 ensure that copies of the blank reporting forms described in
22 Subsection A of this section are provided:

23 (1) to all physicians licensed to practice in
24 New Mexico;

25 (2) to each physician who subsequently becomes

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1 licensed to practice in New Mexico, at the same time as
2 official notification to that physician that the physician is
3 so licensed; and

4 (3) by December 1 of each year, other than the
5 calendar year in which forms are first distributed, in
6 accordance with Paragraph (1) of this subsection, to all
7 physicians licensed to practice in New Mexico.

8 C. By February 28 of each year following a calendar
9 year in any part of which the Woman's Right to Know Act was in
10 effect, each physician who provided, or whose agent provided,
11 information to one or more females in accordance with Section 3
12 of the Woman's Right to Know Act during the previous calendar
13 year shall submit a copy of the form described in Subsection A
14 of this section, with the requested data entered accurately and
15 completely, to the department of health.

16 D. Reports that are not submitted by the end of a
17 grace period of thirty days following the due date shall be
18 subject to a late fee of five hundred dollars (\$500) for each
19 additional thirty-day period or portion of a thirty-day period
20 they are overdue. Any physician required to report in
21 accordance with this section who has not submitted a report, or
22 who has submitted only an incomplete report, more than one year
23 following the due date, may, in an action brought by the
24 department of health, be directed by a court of competent
25 jurisdiction to submit a complete report within a period stated

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1 by court order or be subject to sanctions for civil contempt.

2 E. By June 30 of each year, the department of
3 health shall issue a public report providing statistics for the
4 previous calendar year compiled from all of the reports
5 covering that year submitted in accordance with this section
6 for each of the items listed in Subsection A of this section.
7 Each such report shall also provide the statistics for all
8 previous calendar years, adjusted to reflect any additional
9 information from late or corrected reports. The department of
10 health shall take care to ensure that none of the information
11 included in the public reports could reasonably lead to the
12 identification of any individual who provided information in
13 accordance with Subsection A of this section.

14 F. The department of health may, by regulation,
15 alter the dates established by Paragraph (3) of Subsection B,
16 Subsection C or Subsection E of this section or consolidate the
17 forms or reports described in this section with other forms or
18 reports to achieve administrative convenience or fiscal savings
19 or to reduce the burden of reporting requirements, so long as
20 reporting forms are sent to all licensed physicians in the
21 state at least once every year and the report described in
22 Subsection E of this section is issued at least once every
23 year.

24 SECTION 11. CRIMINAL PENALTIES.--

25 A. Any person who knowingly or recklessly performs

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1 or attempts to perform an abortion in violation of the Woman's
2 Right to Know Act shall be guilty of a felony.

3 B. Any physician who knowingly or recklessly
4 submits a false report under Subsection C of Section 10 of the
5 Woman's Right to Know Act shall be guilty of a misdemeanor.

6 C. No penalty may be assessed against the female
7 upon whom the abortion is performed or attempted to be
8 performed.

9 D. No penalty or civil liability may be assessed
10 for failure to comply with:

11 (1) Paragraph (3) of Subsection F and
12 Subsection G of Section 3 of the Woman's Right to Know Act; or

13 (2) that portion of Subsection J of Section 3
14 of the Woman's Right to Know Act requiring a written
15 certification that the female has been informed of her
16 opportunity to review the information referred to in Paragraph
17 (3) of Subsection F of Section 3 of the Woman's Right to Know
18 Act unless the department of health has made the printed
19 materials available at the time the physician or the
20 physician's agent is required to inform the female of her right
21 to review them.

22 SECTION 12. CIVIL REMEDIES.--

23 A. Any person upon whom:

24 (1) an abortion has been attempted without
25 complying with the Woman's Right to Know Act may maintain an

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1 action against the person who attempted to perform the abortion
2 in knowing or reckless violation of this article for actual and
3 punitive damages; and

4 (2) any person upon whom an abortion has been
5 performed without complying with the Woman's Right to Know Act,
6 the father of the unborn child who was the subject of such an
7 abortion or the grandparent of such an unborn child may
8 maintain an action against the person who performed the
9 abortion in knowing or reckless violation of the Woman's Right
10 to Know Act for actual and punitive damages.

11 B. If the department of health fails to issue the
12 public report required by Subsection E of Section 10 of this
13 act, any person with standing may seek an injunction in a court
14 of competent jurisdiction against the secretary of health
15 requiring that a complete report be issued within a period
16 stated by court order. Failure to abide by such an injunction
17 shall subject the secretary of health to sanctions for civil
18 contempt.

19 C. A prevailing plaintiff in any action described
20 in this section shall be entitled to reasonable attorney fees.
21 A prevailing defendant is entitled to reasonable attorney fees
22 upon a finding that the plaintiff's suit was frivolous and
23 brought in bad faith.

24 **SECTION 13. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.--**

25 A. In every civil or criminal proceeding or action

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1 brought under the Woman's Right to Know Act, the court shall
2 issue orders to protect the privacy and anonymity of any female
3 upon whom an abortion has been performed or attempted if she
4 does not give her consent to such disclosure.

5 B. The court, upon motion or sua sponte, shall
6 issue orders to the parties, witnesses and counsel and shall
7 direct the sealing of the record and exclusion of individuals
8 from courtrooms or hearing rooms to the extent necessary to
9 safeguard the female's identity from public disclosure.

10 C. Each such order shall be accompanied by specific
11 written findings explaining why the anonymity of the female
12 should be preserved from public disclosure, why the order is
13 essential to that end, how the order is narrowly tailored to
14 serve that interest and why no reasonable less restrictive
15 alternative exists.

16 D. In the absence of written consent of the female
17 upon whom an abortion has been performed or attempted, anyone,
18 other than a public official, who brings an action under
19 Subsection A of Section 12 of the Woman's Right to Know Act
20 shall do so under a pseudonym. This section may not be
21 construed to conceal the identity of the plaintiff or of
22 witnesses from the defendant.

23 SECTION 14. SEVERABILITY.--If any provision, section,
24 subsection, sentence, clause, phrase or word of the Woman's
25 Right to Know Act or the application thereof to any person or

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circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Woman's Right to Know Act shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed the Woman's Right to Know Act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.