

SETTLEMENT AGREEMENT BETWEEN ALL PARTIES IN CASE *ALMERICO ET AL. V. DENNEY ET AL.*, CASE NO. 1:18-CV-00239-BLW.

I. Introduction

This Settlement Agreement (“Agreement”) is entered into between Anna Almerico, Chelsea Gaona-Lincoln, Micaela Akasha de Loyola-Carkin, and Hannah Sharp, (“Plaintiffs”), and Lawrence Denney, Idaho Secretary of State, in his official capacity; Lawrence Wasden, Idaho Attorney General, in his official capacity; and Dave Jeppesen, Director of the Idaho Department of Health and Welfare, in his official capacity. (The term “Defendants” as used in this agreement includes these named defendants and their successors and assignees). Collectively, these parties are referred to throughout this agreement as “the Parties” and individually “any Party”). The Parties voluntarily contract to end this litigation, and to respect the rights of all Idahoans who express their health care decisions in an advance directive, regardless of their capacity for pregnancy or whether they are pregnant. This Agreement is effective as of the date on which it is fully executed as indicated by the signatures below.

II. Recitals

1. In the action entitled *Almerico et al. v. Denney et al.*, Case NO. 1:18-cv-00239-BLW, filed in the United States District Court for the District of Idaho in May, 2018 (the “Lawsuit”), Plaintiffs sued Defendants for their respective state agencies’ roles in enforcement and interpretation of Idaho’s Medical Consent and Natural Death Act, I.C. §§ 39-4501- 4515, which provides that “[a]ny competent person” may execute a health care directive, which “shall be in substantially the following form, or in another form that contains the elements in this chapter.” The model form provided in the Act includes a “Pregnancy Exclusion,” as follows: “If I have been diagnosed as pregnant, this Directive shall have no force during the course of my

pregnancy.” I.C. § 39-4510. In the Lawsuit, Plaintiffs asserted that the Pregnancy Exclusion violated their First and Fourteenth Amendment rights, and the First Amendment rights of all Idahoans with the capacity for pregnancy. Defendants denied Plaintiffs’ claims and ultimately argued that the Act does not require any person to use the form in the Act or to include the Pregnancy Exclusion in a directive. The District Court entered its Memorandum Decision & Order on the Parties’ Cross-Motions for Summary Judgment on April 6, 2021 (“Memorandum Decision & Order”). The District Court determined that the Act does not require use of the form in the Act or inclusion of the Pregnancy Exclusion and that “the defendants’ erroneous interpretation that the pregnancy exclusion was required to be in a [person’s] advance directive violated plaintiffs’ First, Fifth, and Fourteenth Amendment rights.” Mem. of Decision and Order (Dkt 71) at 1. All Parties have appealed aspects of the Memorandum Decision & Order, which appeals are pending in the Ninth Circuit Court of Appeals (“Appeals”).

2. The Parties agree the Lawsuit should be resolved without further litigation and therefore enter into this Agreement. In consideration of the full performance of the terms and conditions contained herein, and for other good and valuable consideration, Plaintiffs and Defendants, intending to be legally bound, agree to the following:

III. Terms and Conditions

A. Revised Advance Directive Template

1. The Defendants have replaced the old version of the Defendants’ Advance Directive Template with the following agreed upon template, which Plaintiffs have approved, and which is posted on the Department of Health and Welfare’s website:

Check one box and initial the line after such box:

If I have been diagnosed as pregnant, this Directive shall be honored in its entirety during the course of my pregnancy.

OR

If I have been diagnosed as pregnant, I direct that the following treatment shall shall not be withheld or withdrawn:

OR

If I have been diagnosed as pregnant, my instructions regarding medical care shall have no force during my pregnancy except that my healthcare agent is authorized to make such decisions for me.

2. Defendants agree to replace all print and online/electronic versions of the old Advance Directive Template with the revised version included in Section III.A.1 above, wherever they exist, in both English and Spanish, by January 15, 2022.

3. Defendants have removed from their websites any template that requires the Pregnancy Exclusion, as well as any statement(s) by Defendants that claims or suggests that the Pregnancy Exclusion is mandatory and/or that any person who is pregnant and incapacitated will be maintained on life support until their pregnancy ends. Defendants agree to replace any such language or former template with the revised version of the template set out in III.A.1 above.

4. Defendants agree to include the revisions set forth in III.A.1 above in any future templates they create, unless the legislature amends the Act to require the Pregnancy Exclusion.

B. Notice of the Revised Template

1. Defendants agree to mail written notice as set out below to each person, regardless of gender, who has a registered advance directive, at their last known mailing address on file with the state registry, by January 1, 2022.

2. The notice must be in English and Spanish, and must be in substantially the following form:

English language version:

You registered an advance directive (also known as a living will) with the State of Idaho.

The State of Idaho had a form you may have used for that directive. That form included a sentence that said “If I am diagnosed as pregnant, my instructions regarding medical care shall have no force during my pregnancy.” There was no option on that form to cross out or opt out of that sentence.

In 2021, an Idaho federal court determined that sentence is NOT required.

Instead, you have the right to include in your advance directive your actual wishes regarding the medical care you would or would not want if you become incapacitated while pregnant.

If you wish to change your advance directive, you may do so. You can access a new form at the DHW website: <https://healthandwelfare.idaho.gov/services-programs/advance-directives-and-registry-services>. The new form is here: <https://healthandwelfare.idaho.gov/services-programs/start-your-advance-directive>. If a lawyer helped you with your advance directive, you can contact that lawyer for help. The State is not responsible for paying your lawyer, but registering your new advance directive with the State registry is free.

If you make changes, please update the registry by sending a new form electronically to IHDR@dhw.idaho.gov, OR mailing the documents to:

Idaho Healthcare Directive Registry
450 W State Street, 4th Floor
PO Box 83720
Boise ID 83720-0036

If you are satisfied with the advance directive you created before, you need not take any action.

4. The notice, whether print or electronic, must include copies of the revised Advance Directive Template set out in III.A.1. in both English and Spanish.

5. Defendants agree to post a shortened version of this notice on the Department of Health and Welfare page containing the link to the revised template until December 31, 2031.

The shortened version notice will state:

The State of Idaho’s previous advance directive form had a sentence that said “If I am diagnosed as pregnant, my instructions regarding medical care shall have no force during my pregnancy.” In 2021, an Idaho federal court determined that sentence is NOT required. Instead, you have the right to include in your advance directive your actual wishes regarding the medical care you would or would not want if you become incapacitated while pregnant.

C. Notification of the District Court’s summary judgment decision to certain entities

1. Defendants agree to notify the following entities about the Memorandum Decision & Order and its interpretation of the law:

- The Governing Bodies, as described in IDAPA 16-200 et seq., of each hospital licensed in the State of Idaho
- The licensing bodies and professional associations of Idaho’s licensed physicians, advance registered nurse practitioners, physician assistants, licensed midwives, certified nurse midwives, and registered nurses:
 - Idaho State Board of Medicine
 - Idaho Medical Association
 - District VIII of the American College of Obstetricians & Gynecologists
 - Idaho Academy of Family Physicians
 - Idaho Board of Midwifery
 - Idaho Midwifery Council
 - Idaho Chapter of National Association of Certified Professional Midwives
 - American Nurses Association - Idaho (f/k/a Idaho Nurses Association)
 - Idaho Board of Nursing
- The Idaho Bar Association
 - Idaho Bar Association: Health Law Section
 - Idaho Bar Association: Taxation, Probate, & Trust Law Section
- AARP

- Hospice Agencies

2. Defendants agree to cooperate with Plaintiffs in drafting the notice to be sent to the entities above. The Parties agree that at a minimum, the notice will include information about the Court's ruling, including the unconstitutionality of the State's previous interpretation, and will include a copy of the revised Advance Directive template set out in III.A.1 and link(s) to the electronic version(s) of that form.

3. Defendants agree to include in its notification to the Governing Bodies, as described in IDAPA 16-200 et seq., of each hospital licensed in the State of Idaho additional information as follows:

- a. A statement requesting the hospital to replace the old Advance Directive Template with the revised template set forth in III.A.1, and, if applicable, replace any informational materials created by or disseminated by those entities that claim or suggest that the Pregnancy Exclusion is mandatory with the notices set forth in III.B.2 and III.C.2.
- b. A statement requesting hospitals offering maternity care to offer the revised Advance Directive Template set forth in III.A.1, in their patient populations' primary languages, to all maternity patients who pre-register for care.

4. The Defendants will 1) mail the above-referenced notice to the above entities by June 1, 2022, and 2) post that notice prominently on the following websites in both English and Spanish by June 1, 2022:

- Idaho Department of Health and Welfare
- Idaho Secretary of State
- Any successor to the Honoring Choices Idaho campaign that the Idaho Department of Health and Welfare may create in the future
- Idaho Office of the Attorney General

D. Notice

The Defendants shall notify Plaintiffs when they have taken each step required by the terms of this Agreement. Such notices are sufficient if sent electronically or by mail to counsel for Plaintiffs at Perkins Coie, attention Richard Boardman, 1111 West Jefferson Street Suite 500, Boise, ID 83702-5391, RBoardman@perkinscoie.com.

E. Dismissal of Lawsuit and Appeals

1. In consideration of the performance of the above terms and conditions, Plaintiffs shall dismiss their Lawsuit against Defendants, including Plaintiffs' claims for prevailing party fees, and the Parties agree to dismiss their respective Appeals from the Memorandum Decision & Order. Within three business days after the Parties have exchanged fully executed copies of this Agreement, the Parties shall file a Joint Stipulation for Dismissal with Prejudice (subject to the terms of this Agreement) of the Lawsuit with the United States District Court pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and a Joint Stipulation for Dismissal of the Appeals with Prejudice with the Ninth Circuit Court of Appeals pursuant to Fed. Rule of Appellate Procedure 42(b). The Parties shall bear their own attorneys' fees and costs incurred in the Lawsuit and the Appeals.

F. Retention of Rights

1. Notwithstanding anything else in this Agreement, it is understood and agreed that this Agreement is not intended to and does not release Defendants from liability arising from any future enforcement of the Pregnancy Exclusion, as it exists in the statutory model form, against Plaintiffs. It is the intent of the Parties to preserve all of Plaintiffs' future rights and claims against all persons and entities including Defendants, and nothing in this Agreement shall be construed to provide otherwise. To the extent Plaintiffs have standing, Plaintiffs further retain the

right to sue Defendants if, for example, the Idaho Legislature enacts any legislation that would nullify, prohibit, or otherwise undermine Defendants' ability to carry out the terms of this Agreement, or if Defendants, their successors, or assignees take or otherwise participate in any action, in any court or nonjudicial forum, to subject a pregnant incapacitated person to medical treatment of any kind, at any point in pregnancy, without that person's express and explicit consent in an advance directive, or through their duly-named health care agent, or personally to their health care provider.

2. In the event Defendants are made aware of any future action by a named Defendant that is contrary to the Memorandum Decision & Order, Defendant Lawrence Wasden (or his successors) will direct to the attention of the responsible Defendant a summary of the Memorandum Decision and Order, along with a copy of the Memorandum Decision & Order, and a copy of this settlement agreement.

3. Defendant Lawrence Wasden (or his successors) will provide a summary of the Memorandum Decision and Order, along with a copy of the Memorandum Decision and Order, to any state actor seeking the advice of the Attorney General about a state action inconsistent with the Memorandum Decision and Order.

G. No Admission of Liability or Weakness

The Parties understand and acknowledge this settlement is a compromise of disputed allegations. It is not to be construed or interpreted as an admission of (a) liability by Defendants, by whom liability is expressly denied, or (b) weakness of claims or defenses asserted by any Party.

H. Binding Effect

Unless otherwise provided, this Agreement and the terms, covenants, conditions, provisions, obligations, undertakings, rights and benefits shall be binding upon and shall inure to the benefit of the Parties, the Plaintiffs' spouses, marital communities, heirs, executors, administrators, or representatives, and to Defendants' agents, attorneys, employees, successors and assigns.

I. Non-Confidentiality

It is the desire of the Plaintiffs that all people capable of pregnancy in Idaho understand their rights to direct their healthcare, and the terms of this settlement agreement will therefore not be confidential.

J. Non-Modification

This Agreement may not be amended or modified except by a writing, signed by the parties to be bound, or signed by their respective attorneys as authorized.

K. Choice of Law and Venue

This Agreement shall be interpreted, construed and enforced under federal law and under the laws of the State of Idaho, except for that state's laws and rules regarding conflict of laws. Should any dispute arise between or among the Parties regarding the interpretation or performance of this Agreement, the Parties agree that such dispute shall be resolved in the District Court for the State of Idaho in Ada County, or in any federal district court in the District of Idaho as may have jurisdiction over the subject matter. In the event Plaintiffs bring an action to enforce the terms of this Agreement, Defendants agree not to raise jurisdictional or justiciability objections in

such enforcement proceedings. Defendants do not, however, waive any jurisdictional or justiciability defenses in the event Plaintiffs file a new lawsuit based on future events such as those mentioned in Paragraph F.1. above.

L. Enforcement Costs, Expenses and Attorneys' Fees

If any Party initiates litigation to resolve a dispute regarding the interpretation or performance of this Agreement, the prevailing party in such litigation may recover their costs, expenses and reasonable attorneys' fees in that litigation.

M. Free Will

The Parties represent and warrant they have entered into this Agreement of their own free will and under their own judgment and upon advice of their own legal counsel, and state they have not been induced to enter into this Agreement by any statement, act or representation of any kind or character by anyone except as set forth in this Agreement.

N. Authority

The individual signatories to this Agreement represent that they have been duly authorized to execute this agreement on behalf of the Parties they purport to represent herein.

O. Entire Agreement

This Agreement constitutes the final and entire agreement of all the Parties regarding the subject hereof, and supersedes any prior and contemporaneous agreements, memoranda, arrangements and understandings, both written and oral, between or among the Parties, or any of them individually, regarding that subject. No representation, warranty, promise, inducement or statement of intention has been made by any Party not contained in this Agreement and no Party shall be bound by, or be liable for, any alleged representation, promise, inducement or statement of intention not contained herein. The Parties expressly disclaim reliance on any information,

statement, representations or warranties regarding the subject of this Agreement other than this Agreement.

P. Effectiveness


This Agreement shall become effective immediately upon execution by all Parties.

Q. Captions

The captions in the paragraphs of this Agreement are for convenience of reference only and do not limit, expand or modify the terms or provisions of this Agreement.

In witness whereof, Defendants, each in their official capacity, and Plaintiffs have executed this Agreement on the dates subscribed.

PLAINTIFFS:



Anna Almerico 1/13/22 Date

Chelsea Gaona-Lincoln Date

Micaela Akasha de Loyola-Carkin Date

Hannah Sharp Date

DEFENDANTS:

Lawrence Denney Date
Idaho Secretary of State

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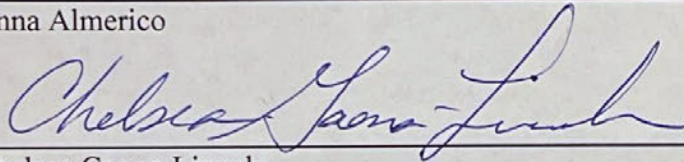
In witness whereof, Defendants, each in their official capacity, and Plaintiffs have executed this Agreement on the dates subscribed.

PLAINTIFFS:

Anna Almerico

Date

Chelsea Gaona-Lincoln



1/20/22

Date

Micaela Akasha de Loyola-Carkin

Date

Hannah Sharp

Date

DEFENDANTS:

Lawrence Denney

Idaho Secretary of State

Date

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PLAINTIFFS:

Anna Almerico Date

Chelsea Gaona-Lincoln Date

Micaela de Loyola-Carkin *1/19/2022*

Micaela Akasha de Loyola-Carkin Date

Hannah Sharp Date

DEFENDANTS:

Lawrence Denney Date
Idaho Secretary of State

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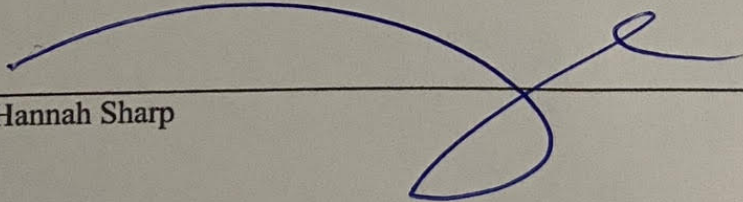
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Anna Almerico Date

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Micaela Akasha de Loyola-Carkin Date



Hannah Sharp 1-23-22
Date

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Idaho Secretary of State

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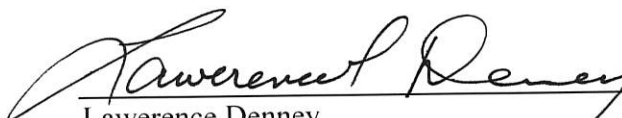
Anna Almerico Date

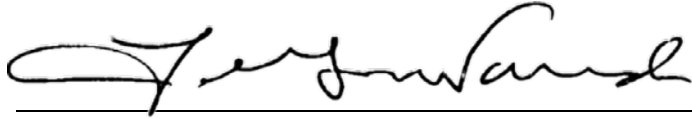
Chelsea Gaona-Lincoln Date

Micaela Akasha de Loyola-Carkin Date

Hannah Sharp Date

DEFENDANTS:


Lawrence Denney 01/11/2022
Idaho Secretary of State Date



1/20/22

Lawrence Wasden
Idaho Attorney General

Date

Dave Jeppesen
Director of the Idaho Department of Health and Welfare

Date

Lawrence Wasden

Date

Idaho Attorney General



1-10-2022

Dave Jeppesen

Date

Director of the Idaho Department of Health and Welfare