EXHIBIT 5
DATE 2/17/05
HB 730

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; SUSAN CAHILL, P.A.; INTERMOUNTAIN PLANNED PARENTHOOD; PLANNED PARENTHOOD OF MISSOULA; CLAYTON McCRACKEN, M.D.; and YELLOWSTONE VALLEY WOMEN§S CLINIC, INC., on behalf of themselves and their patients, Plaintiffs, v. STATE OF MONTANA, JOSEPH P. MAZUREK, Attorney General in his official capacity, Defendants.	Cause No. ADV 97-671 ORDER ON SUMMARY JUDGMENT

Presently before the Court is Plaintiffs' motion for summary judgment. The motion has been fully briefed and is submitted for decision.

The chronology of this case has been set forth in an earlier ruling and need not be repeated here. This lawsuit challenges the constitutionality of the Parental Notice of Abortion Act (the Act), Sections 50-20-201 to 215, MCA. A preliminary injunction was issued by this Court on February 13, 1998, enjoining the enforcement of the Act pending final resolution of the issues raised in the complaint.

Plaintiffs have moved for summary judgment on the ground that the Act violates Montana's constitutional guarantee of equal protection, Article II, Section 4, Montana Constitution. The motion and briefs are supported by affidavits, depositions, published articles and other discovery materials.

Legal Standard

This Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. ***Wagner v. Glasgow Livestock Sales Co.***, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); ***Clarks Fork Nat'l Bank v. Papp***, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); ***Bonawitz v. Bourke***, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), M.R.Civ.P.; ***Cate v. Hargrave***, 209 Mont. 265, 269, 680 P.2d 952, 954 (1984).

Equal Protection under the Montana Constitution

A statute is presumed to be constitutional and will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt. ***State v. Lilburn***, 265 Mont. 258, 262, 875 P.2d 1036, 1039 (1994), *citing* ***City of Billings v. Laedeke***, 247 Mont. 151, 154, 805 P.2d 1348, 1349 (1991).

Article II, Section 4, of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws." The purpose of this provision is to ensure that citizens are not subject to arbitrary and discriminatory state action. ***Davis v. Union Pacific R.R. Co.***, 282 Mont. 233, 937 P.2d 27, 32 (1997), *citing* ***Godfrey v. State Fish and Game Comm'n***, 193 Mont. 304, 306, 631 P.2d 1265, 1267 (1981). The constitutional guarantee of equal protection requires all persons to be treated alike under like circumstances. ***White v. State***, 203 Mont. 363, 368, 661 P.2d 1272, 1274 (1983).

The United States District Court has upheld Montana's parental notification statute under the United States Constitution's Equal Protection Clause. However, a statute, even though constitutional under the federal constitution, is not necessarily constitutional under analogous provisions of a state constitution, which may be interpreted by the state courts to provide heightened and expanded rights. ***Butte Community Union v. Lewis***, 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986).

Analysis of constitutionality of legislation under an equal protection challenge requires the court to review the legislation under one of three recognized levels of scrutiny. The "strict scrutiny" standard, the highest level of scrutiny, is used when an action complained of infringes upon the exercise of a fundamental right or discriminates against a suspect class. ***Davis***, 282 Mont. at 241, 937 P.2d at 31, *citing* ***Gulbrandson v. Carey***, 272 Mont. 494, 502, 901 P.2d 572, 579 (1995). Strict scrutiny requires the government to show a compelling state interest for its action. ***Id.***, *citing* ***Butte Community Union***, 219 Mont. at 430, 712 P.2d at 1311.

The next level of scrutiny is used in limited situations, such as where the rights at issue have some origin in the Montana constitution, but are not found in the Declaration of Rights. This middle tier of scrutiny requires the state to demonstrate that its classification is reasonable and that its interest in the classification is greater than that of the individual's interest in the right infringed. ***Id.***, at 241, 937 P.2d at 31-32.

The lowest level of scrutiny is applicable to examination of rights not determined to be fundamental under the Montana constitution, and not worthy of middle tier scrutiny. This test requires the government to show that the objective of the statute is legitimate and bears a rational relationship to the classification used by the legislature. ***Id.***, *citing* ***Cottrill v. Cottrill Sodding Service***, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987).

Applying Equal Protection Analysis to this Case

The first step in this analysis is to identify the classes involved and

determine whether they are similarly situated. ***In re C.H.***, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984). Plaintiffs assert that the Act creates a class of pregnant minors who want to obtain an abortion and a class of pregnant minors who do not want an abortion. For purposes of equal protection analysis, both of these classes are composed of persons who are similarly situated, i.e., minors who are pregnant.

The next step is to determine whether a suspect classification is involved. ***Id.*** A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." ***Id.***, *citing* ***San Antonio Sch. Dist. v. Rodriguez***, 411 U.S. 1, 28 (1973). The class of minor pregnant women is not a suspect class.

The next step is to determine whether the individual interest affected is a fundamental right, triggering a strict scrutiny analysis. ***In re S.L.M.***, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997). This question is resolved by the Montana Constitution itself. Article II, Section 10, entitled **Right of Privacy**, provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

This constitutional right of privacy explicitly protects individual privacy, which includes personal autonomy privacy, as a fundamental right by its placement in the Declaration of Rights. ***Gryczan v. State***, 283 Mont. 433, 450-51, 942 P.2d 112, 123 (1997).

Article II, Section 15, entitled **Rights of Persons Not Adults**, provides: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons."

Thus, minors, including pregnant minors, have a fundamental right of individual privacy that includes personal-autonomy privacy, and, as this Court previously ruled in its order granting preliminary injunction, the constitutional right of privacy encompasses a woman's right to decide whether to terminate her pregnancy.

The next question is whether the challenged legislation infringes pregnant minors' rights to privacy.

Plaintiffs assert that the Act invades the privacy rights of those minors who want to obtain an abortion. Defendants contend that it does not. The Court has been provided with much evidence concerning adolescent women faced with the consideration of abortion. That evidence provides undisputed facts material to the issue of whether pregnant minors who want to obtain an abortion are infringed of their privacy rights by the Act.

With respect to pregnant women in general, some refuse to tell their partner or parents about the pregnancy and/or decision to have an abortion because of their fear of disapproval. Nancy E. Adler, ***Abortion:***

A Social-Psychological Perspective, 35 J. Social Issues 100, 104 (1979).

The younger the minor, the more likely it is that she will involve her parents. Minors who chose not to tell their parents about their pregnancy tended to be more financially independent and more likely to live alone. Minors who chose not to tell their parents about their pregnancy often had good reason for doing so. Nancy E. Adler, et al., ***Abortion among Adolescents***, *in* ***The New Civil War*** 285, 290 (Linda J. Beckman & S. Marie Harvey eds., 1998). In a study by Stanley K. Henshaw and Kathryn Kost, 30 percent of the young women who did not tell their parents had experienced domestic violence, feared it would occur, or were fearful of being forced to leave home. Sometimes the pregnancy is the result of incest, making it difficult, impractical or dangerous for the parents to know about the pregnancy. Stanley K. Henshaw and Kathryn Kost, ***Parental Involvement in Minors' Abortion Decisions***, 24 Family Planning Perspectives 196 (1992). Minors are often accurate in their prediction of their parents' reactions. (Henshaw Aff.)

In that same study, 39 percent of minors who had an abortion did not tell a parent. The vast majority of these women were older adolescents, many of whom were independent in various respects: they were employed, living apart from parents, already had a child, or had previously had an abortion. A study by Henshaw and Kost revealed that very few women under the age of 15 did not tell a parent about the pregnancy. Henshaw and Kost, *supra*, at 200. Minors who did not obtain parental involvement all had discussions with friends, relatives or others not a parent. ***Id.;*** Adler, ***Abortion among Adolescents***, *supra*, at 291.

Older adolescents are more concerned with protecting their privacy and thus are less likely to desire parental involvement. Immature minors, on the other hand, are often more financially and emotionally dependent on their parents. As a result, they are more inclined to seek their parents' advice and support. Adler, ***Abortion among Adolescents***, *supra*, at 291-92.

In one study, pressure from parents finding out about the pregnancy against the minor's wishes and from a source other than the minor had significant consequences. Eighteen percent of the minors were forced or pressured by the parent to have an abortion against the minors' wishes, and another six percent reported other serious consequences such as physical violence or being forced from the home. Henshaw and Kost, ***Parental Involvement in Minors' Abortion Decisions***, *supra*; Henshaw Aff.

The intended effects of parental notification/consent laws and judicial bypass requirements are to assure adequate guidance of adolescents and to promote parental involvement, but they have negative consequences as well. Adolescents who fear telling their parents, and who may have a basis for concern about their parents' response, may not feel comfortable in trying to obtain a judicial bypass of the consent/notification laws. They may be intimidated by the court system and may not know

how to go about obtaining legal approval. Adler, ***Abortion among Adolescents***, *supra*, at 293. Minors have significant difficulties in arranging for the judicial bypass. For example, they may not have an opportunity for a confidential telephone conversation. Additionally, these women may have no access to a private phone for return calls pertaining to the bypass procedure. Many minors still live at home and go to school. The bypass procedure places additional burdens on them to arrange legitimate excuses from school and home, while maintaining privacy and confidentiality. Many of these women have no transportation to and from court, and those who can arrange rides, may have to do so through a parent or friend of the family, jeopardizing the privacy of the minor. Many adolescents are not acquainted with the location of the courthouse, or with the procedures involved. While attempting to defend and maintain their privacy, they are compelled to tell their stories to the judge, a stranger. Some of the women fear breach of confidence in smaller communities, where court personnel may know their families. Adler, ***Abortion among Adolescents***, *supra*, at 293; Jamie Sabino Aff.

Based on this information, the Court finds that the Act infringes on the privacy rights of pregnant minors who wish to terminate their pregnancies.

The next step is the determination of whether there is a compelling state interest sufficient to justify the Act's infringement on the class' fundamental right to privacy. ***Davis***, 282 Mont. at 241, 937 P.2d at 31; ***In re C.H.***, 210 Mont. at 198, 683 P.2d at 938.

The Act itself declares what the compelling state interests are:

(a) protecting minors against their own immaturity;

(b) fostering family unity and preserving the family as a viable social unit;

(c) protecting the constitutional rights of parents to rear children who are members of their household; and

(d) reducing teenage pregnancy and unnecessary abortion.

Section 50-20-202(2), MCA.

With respect to subsections (a) and (b), the following undisputed facts, in addition to those already described above, are material.

The literature addressing adolescents and abortion includes studies involving parental consent laws as well as parental notification laws. Both have the same effect on pregnant minors. (Sabino Aff.)

Medical risks for abortion in the first trimester are low. Mortality risks are 20 times greater for pregnancy and childbirth than for abortion for women 15 to 19 years of age. Adler, ***Abortion among Adolescents***, *supra*, at 286; Mark Miles Aff.

There is little basis for the assertion that abortion leads to severe psychological consequences among women in the general population.

Research directly focused on adolescents does not show them to be particularly vulnerable to serious negative responses following abortion. Studies, including those by the American Psychological Association, have concluded that legal abortion of an unwanted pregnancy in the first trimester does not pose a psychological hazard for most women. Adler, ***Abortion among Adolescents***, *supra*, at 286. Studies following adolescents one and two years post-abortion found no substantial psychological effects, and even found the abortion to have been a positive experience in some of the women. ***Id.*** at 287. A study of African-American adolescents under the age of 17 indicated low rates of psychological effects on those who obtained abortions when compared to those who received negative pregnancy test results and those who carried their pregnancy to term. That study found negative psychological effects related to subsequent pregnancies in the women, and that the women who had obtained abortions had the lowest rates of subsequent pregnancy. The women who had abortions also fared better economically, emotionally and educationally than the other women in the study. ***Id.***; Nancy E. Adler et al., ***Psychological Responses after Abortion***, 248 Science 41 (1990).

Abortion is generally experienced as a stressful event. Much of the stress is associated with the discovery and acknowledgment of an unwanted pregnancy and the need for a decision about whether to continue or terminate it. Women generally report that the greatest distress is between the discovery that they are pregnant and the abortion. Thus, evaluations of psychological stress must be viewed as caused by the pregnancy itself as well as the abortion. Adler, ***Abortion: A Social-Psychological Perspective***, *supra*, at 112. Immediate post-abortion responses were more positive when there was greater social support for the abortion, suggesting that one source of stress on the woman is known or anticipated disapproval of partners or parents. The social climate, disdaining abortion, contributes significantly to the stress on the woman in addition to the process of abortion itself. Many women choose not to tell their partner or parents about the pregnancy and intention to have an abortion because of the fear of disapproval. ***Id.,*** at 104.

The studies addressed in Adler's articles indicate that adolescents do not seem to be at a substantial risk of negative psychological responses up to two years following abortion; that adolescents who had abortions compared with those who either carried to term and those who discovered that they were not pregnant, showed a more favorable psychological profile over time; and that there were no measurable differences in psychological responses among women under 18 compared to those 18 to 21. The studies provide no compelling rationale for restrictive legislation for adolescents based on their degree of risk of adverse effects.

Studies reveal that the younger the adolescent, the more likely it is that she will involve her parents in her decision about an abortion. Adolescents who do not tell their parents tend to be older than the ones who do. More mature adolescents are more concerned with protecting their privacy, and thus are less likely to desire parental involvement. Immature minors, on the other hand, are often more financially and emotionally dependent on their parents. Thus, they are more inclined to

seek their parents' advice and support. Adler, ***Abortion among Adolescents***, *supra*, at 291-92.

Adolescents who choose not to tell their parents about their pregnancy often have good reasons for doing so. They are often accurate in their predictions of their parents' reactions. (Henshaw Aff.)

Judicial bypass procedures accomplish little, if any, protection for adolescents, primarily because virtually all requests for judicial bypass are granted. Adler, ***Abortion among Adolescents***, *supra*, at 293. In Massachusetts, for example, 98 percent of judicial bypasses have been granted. Those women who were forced to experience the judicial bypass procedure were subjected to needless stress, anxiety, delay and breaches of confidentiality. (Sabino Aff.; Henshaw Aff.)

The judicial bypass procedure poses additional health risks to adolescents by causing added delays in obtaining an abortion. Minors tend to seek abortions later in the pregnancy than do adults. A greater percentage of minors than adults have abortions after the first trimester. Adler, ***Abortion among Adolescents***, *supra*, at 293; Henshaw Aff. Such delays are due to a variety of reasons, including the fact that the minors may not be aware of pregnancy symptoms as readily as adults are, they may have more difficulty arranging for pregnancy tests and abortions, and they may simply be less willing to acknowledge their pregnancy for many weeks. When judicial bypass is added, more minors may get pushed into second trimester abortions. Adler, ***Abortion among Adolescents***, *supra*, at 293. In addition, those women who make arrangements to go out of state for an abortion to avoid parental notification or consent requirements are delayed in obtaining abortions, sometimes beyond the first trimester. ***Id.***

The added risks of a delayed abortion and the experience of judicial bypass may themselves be stressful and anxiety provoking for minors. ***Id.***

Studies indicate no evidence that adolescents are incompetent in their decision-making to have an abortion, although their decision-making may be based on different biases from those generally possessed by adults. ***Id.***, at 292-93. Although there are conflicting findings concerning whether younger adolescents are less capable than older adolescents of competent reasoning in general, in the specific domain of reasoning about abortion, findings are more consistent and show little evidence that adolescents lack the capacity to reason effectively about this decision. In studies comparing adolescent women with adult women, there were no significant differences between adolescents and adults in their hypothetical reasoning about abortion, and no differences in reasoning when the studies conducted assessments of legal competence. Adolescents in every age group were as competent as adults in considering abortion. ***Id.***, at 290-93.

In Massachusetts, there is no evidence that parental consent/notification laws have increased the rate of parental involvement or enhanced minors' decision- making processes. The laws have driven many minors to leave the state to obtain abortions. (Sabino Aff.)

With respect to subsection (d) of the Act's compelling state interests, "reducing teenage pregnancy and unnecessary abortion," the following undisputed facts are material.

Studies found an increase in late abortions and in out-of-state abortions in Missouri after the enactment of parental consent/notification laws in that state, although similar studies in Minnesota were less clear. The study focused on first trimester abortions, and any decrease in first trimester abortions in Minnesota may have been the result of more second trimester abortions, caused by delay from the laws. Adler, ***Abortion among Adolescents***, *supra*, at 294. Women who make arrangements to go out of state for an abortion to avoid those laws may also be delayed in obtaining an abortion. ***Id.***

In Massachusetts, the parental consent/notification laws have driven many minors out of state to obtain abortions, but the abortion rate has remained the same. (Sabino Aff.) The parental consent laws in Mississippi have had little or no effect on the abortion rate in that state. (Henshaw Aff.) Statistics provided by the Defendants with respect to the effect of consent and notification statutes in other states indicated no significant changes in abortion rates.

Montana is particularly difficult in availability of abortion providers. Thirty percent of women seeking abortions have to travel at least 100 miles, due to geographical distances and scarcity of abortion providers. Burdens on adolescents are much greater than on adults for traveling such distances. (Henshaw Aff.) The added burdens on these minors create greater risks of delayed abortions and consequential medical problems.

With respect to the Act's compelling state interest of "protecting the constitutional rights of parents to rear children who are members of their household," when the Court balances the fundamental privacy right of the minor against the rights of the parents that are allegedly enhanced by the Act, the right to privacy prevails over the unsubstantiated rights claimed to be enhanced by the Act. As previously noted, the undisputed evidence before this Court indicates that the majority of pregnant minors involve a parent in decision-making about whether to obtain an abortion, and those minors who do not involve their parents often have a legitimate reason for not doing so. In those cases parental involvement is not in the minors' best interests.

The last step of the analysis is to determine whether the Act complies with the mandates of Article II, Section 15, of the Montana Constitution, which allows the legislature to limit the fundamental rights of minors, if the exception enhances the protection of such minors. ***In re S.L.M.***, 287 Mont. at 21-22, 951 P.2d at 1372-73.

In addition to stating compelling state interests, the Act also provides a statement of purpose:

> (a) immature minors lack the ability to make fully informed choices that take into account both immediate and long-range

parents in the care and rearing of their children.

Thus, the minor who is presumed by the Act to be too immature to decide to have an abortion will, if she continues her pregnancy, become the mother of an infant, fully responsible for its life and for decisions about its medical and other care, without statutory requirements for parental involvement.

Based on the undisputed material facts presented, the Court concludes that the Defendants have not shown a compelling state interest in requiring parental notification of a minor's intent to terminate her pregnancy. Furthermore, the Act does not enhance the protection of minors. Plaintiffs are entitled to judgment as a matter of law on the issue of the Montana constitutional guarantee of equal protection.

Summary judgment is GRANTED to Plaintiffs in accordance with this decision.

Let judgment be entered accordingly.

DATED this 11th day of February, 1999.

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DOROTHY McCARTER

District Court Judge

pc. Simon Heller

Dara Klassel

Roberta Anner-Hughes

Joseph P. Mazurek/Clay R. Smith

T/DMC/WICKLUND.OSJ