[redacted]

Child Custody

This file includes:

- A copy of H.R. 1218, which would prohibit adults from taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions
- Billie Lominick's Congressional Testimony during the House Judiciary Committee/ Constitution Subcommittee's hearing on H.R. 1218
- The target List – Child Custody Protection Act – 106th Congress
- Final Vote Results for Roll Call 280 – the vote on the Child Custody Act
- Letter to Henry Hyde from the American Academy of Pediatrics that voices the organization's opposition to the Child Custody Protection Act
- Editorials in opposition to the Child Protection Act
- Memo to the Judiciary Committee from a Harvard University Law School professor that argues that the Child Custody Act is inconsistent with the constitutional principles of federalism
- NARAL publications that address the myths and facts about the Child Custody Protection Act, discuss how the H.R. 1218 threatens young women's health, and discuss the inadequacy of judicial bypass procedures in the act
- Clinton Administration policy statement on the Child Custody Protection Act
- Justice Department's report on the Child Custody Protection Act

106TH CONGRESS
1ST SESSION

H. R. 1218

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

106TH CONGRESS
1ST SESSION

H. R. 1218

AN ACT

To amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Child Custody Protection Act".

SEC. 2. TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 117 the following:

"CHAPTER 117A—TRANSPORTATION OF MINORS IN CIRCUMVENTION OF CERTAIN LAWS RELATING TO ABORTION

"§ 2431. Transportation of minors in circumvention of certain laws relating to abortion

"(a) OFFENSE.—

"(1) GENERALLY.—Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.

"(2) DEFINITION.—For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

"(b) EXCEPTIONS.—(1) The prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself.

"(2) An individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 based on a violation of this section.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the

abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

"(d) CIVIL ACTION.—Any parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action.

"(e) DEFINITIONS.—For the purposes of this section—

"(1) a law requiring parental involvement in a minor's abortion decision is a law—

"(A) requiring, before an abortion is performed on a minor, either—

"(i) the notification to, or consent of, a parent of that minor; or

"(ii) proceedings in a State court; and

"(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph;

"(2) the term 'parent' means—

"(A) a parent or guardian;

"(B) a legal custodian; or

"(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides,

who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required;

"(3) the term 'minor' means an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision; and

"(4) the term 'State' includes the District of Columbia and any commonwealth, possession, or other territory of the United States.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 117 the following new item:

Passed the House of Representatives June 30, 1999.

Attest:

Clerk.

TO: **Jenny Luray,**
White House Office of Women's Initiatives and Outreach
FAX NUMBER: 202-456-7311
FROM: **Maureen M. Britell, Director of Government Relations**
DATE: 5/26/99
NUMBER OF PAGES INCLUDING COVER: 7

Enclosed please find a preliminary copy of Grandma Billie's testimony and NAF's letter to legislators.

Please feel free to contact me on my cell phone with any questions—202-256-2224.

National Abortion Federation
1755 Massachusetts Avenue, NW, Suite 600 · Washington, DC 20036
PHONE: 202/667.5881 FAX: 202/667.5890

BILLIE LOMINICK
HOUSE JUDICIARY COMMITTEE
CONSTITUTION SUBCOMMITTEE HEARING ON HR 1218
MAY 27, 1999

Good morning, my name is Billie Lominick and I live in Newbury, South Carolina. In 1990, after 33 years of marriage, I lost my husband Bennie to leukemia. Together, Bennie and I were blessed to see our child grow into a devoted wife and loving mother to our only grandson, "Tom."

My husband loved Tom with all his heart, as I do. He's our only grandson, and is such a good boy. Tom was Bennie's whole life, and I know he would have been so proud to watch him develop into the gentleman he has become. About a year ago, Tom started dating his high school sweetheart, "Mary."

Tom's parents and I immediately fell in love with Mary. She is a sweet girl, and it has broken our hearts to hear about all that she and her younger brother have been through. With a great deal of courage, they have managed to survive living with an abusive mother and stepfather.

On Christmas Day of 1996, social services removed both children from their home for one year as a result of their parents' physical and emotional abuse, which included sexual abuse. The children were sent to an orphanage in a town an hour away. The orphanage had regularly scheduled visitation days for the parents. I'll never forget Mary telling us that her parents only came to visit her a handful of times. I still don't understand how parents could treat their children that way.

After Mary's parents had attended a few "parenting classes" and Alcoholics Anonymous meetings, Mary and her brother were returned to their home. While the sexual abuse did stop, both parents continued to use drugs and alcohol, frequently running into trouble with the law.

When Tom and Mary started dating, we didn't hesitate to welcome her into our family. She was facing so much at home, and did not have any other relatives in town. Tom's parents and I gladly became a support system for her.

Mary and Tom discovered this past January that Mary was pregnant. Mary wasn't feeling well, so she and Tom and her mother had gone together to the doctor for a check-up. The doctor told them that Mary was pregnant. Within a few days, Tom's mother and I also knew. Together, we all went with Mary when she had her ultrasound.

After taking a few days to think things over, Tom and Mary decided that they just weren't ready to become parents. They both wanted to finish school, and felt that they didn't yet have the resources to raise a child.

When Tom and Mary told us about their decision to have an abortion, we supported their choice. His parents and I felt that this was their decision to make. We also thought they were too young to bring a child into the world. Mary's parents, however, had a very different reaction to the news. Mary's stepfather hit her in the face, and both parents violently opposed the abortion. Scared to death by this latest abuse, Mary decided to move out of her parents' house. I knew that I could provide a stable, loving home for her, so I asked her to move in with me.

Three days after Mary began living with me, her stepfather came looking for her. He literally tried to beat the door down to get to Mary. We called the police, and that same day a warrant was issued for his arrest.

Tom and his mother began contacting clinics in South Carolina, who stated that Mary needed her parent's consent in order to have an abortion. We knew that her parents would not give their permission, so we began calling clinics in North Carolina. It was a clinic staff member in North Carolina who told us that there was an alternative to parental consent. She said that Mary could go before a judge and explain the situation, and that he could grant her request for an abortion.

We made more phone calls, and were only able to find two courts in our whole state that would take judicial bypass cases. The closest judge who would hear a petition was over an hour from our home. Mary was determined to get the bypass, so we prepared for the hearing. Our hopes were dashed, however, when we learned that the judge had announced only a month earlier that the court would only take cases from minors residing within that county.

Since we had nowhere else to turn in South Carolina, we called more clinics in North Carolina and also called clinics in Georgia. Finally, we were able to locate a clinic in Georgia that could help Mary. While Georgia does have a parental notification requirement, we were able to find a judge who was willing to hear judicial bypass cases. We worked with the clinic to arrange the bypass hearing, and finally were able to schedule Mary's appointment.

After days of feeling as though we had no options, and that judges and lawyers just didn't care about teenagers like Mary, we prepared for the three-hour drive to Georgia. Tom wanted to take Mary, but I didn't like the thought of the two of them traveling all that way alone. I decided to take time off from work and go with them. We made the trip together.

Mary went before a judge in Atlanta, and was given permission for her abortion. However, she did not meet the requirements of South Carolina's parental consent law before we went to Georgia. Under the law you are considering, I would have been sent to jail for helping Mary go to Georgia for her abortion. I would have been punished for helping her when she had nowhere else to turn. I would have been punished for seeing to it that my grandson and Mary got to Atlanta and home again safely.

Mary is still living with me. She had no complications from the abortion, and feels better now than she has ever felt in her whole life. She has just finished her sophomore year of high school, and is looking forward to finishing school in two years and getting a job. I think about this law, and wonder if I was sent to jail for taking Mary to Georgia, who would be taking care of her now? It's frightening to me to realize that abusive parents could have more of a say in their child's life than a grandmother like me who loves her very much. I shouldn't be behind bars – her abusive parents should.

I hope that you will see how wrong this law is, and how much it would hurt families like ours. I hope that you will not make our lives any more difficult than they already are. Please, think of the other girls like Mary who are out there and vote against this bill not for me, but for them.

Thank you.

NATIONAL ABORTION FEDERATION

May 26, 1999

Dear Representative:

RE: 1218– "Child Custody Protection Act" or "Teen Endangerment Act"

On Thursday, May 27, 1999, anti-choice legislators will ask you to vote once again in the Constitution Subcommittee to restrict women's access to abortion services. This time, the proposed legislation takes aim at our younger women with the "Teen Endangerment Act." On behalf of the National Abortion Federation, and the women we serve, I urge you to reject this legislation and vote against this bill.

The National Abortion Federation agrees that parents should be involved in their teenager's decision to have an abortion – and in the majority of cases they are. According to an Alan Guttmacher Institute study of states without parental involvement laws, 61% of parents knew about their teen's decision to have an abortion. Of those teens whose parents did not know about their abortion, almost one-third were at risk of physical harm. This bill takes away safe alternatives to parental involvement, such as turning to other relatives or close family friends, and replaces them with life-endangering ones, like hitchhiking, self-inducing, or seeking out back alley abortions.

Under the Teen Endangerment Act, grandmothers like Billie Lominick could be federally prosecuted for helping family members with an unplanned and unwanted pregnancy. This past January, high school sweethearts "Mary" and "Tom" learned that "Mary" had become pregnant. "Mary" and "Tom," both still in school, felt that they were not ready to become parents. When "Mary's" mother and stepfather learned of the pregnancy, they refused to grant her permission to have an abortion and became violent. Due to her family's history of sexual and physical abuse, "Mary" fled in fear to Grandma Billie's home.

After placing many phone calls across the state, "Mary" could only find two courts that would hear judicial bypass cases. The closest judge who would hear a petition case was over an hour from her home. Determined to obtain a judicial bypass, "Mary" spoke with an attorney in preparation for the hearing. "Mary's" hopes were soon dashed when she learned that the judge had announced a month earlier that the court would only hear cases from minors residing within that county. "Mary" did not live in the judge's county, so she was unable to obtain a court order granting her permission to obtain an abortion without her parent's consent.

1755 Massachusetts Ave., NW Suite 600 Washington, DC 20036 Telephone: 202.667.5881 Fax: 202.667.5890

Since "Mary" was unable to obtain a judicial bypass in South Carolina, she began inquiring about other states. The closest clinic was over three hours away in Georgia. Grandma Billie, fearful of "Mary" and "Tom" traveling the long distance alone, offered to accompany them. "Mary" was able to obtain a judicial bypass from a judge in Georgia before obtaining her abortion. While "Mary" did meet Georgia's parental involvement law, she did not meet the requirements of South Carolina's law before traveling to Georgia. Under the Teen Endangerment Act, Grandma Billie would go to jail for helping "Mary" when she needed her most.

"Mary" is currently living with Grandma Billie, and has just completed her sophomore year in high school. Along with school, both "Mary" and "Tom" have part-time jobs.

On behalf of teenagers at risk, the National Abortion Federation urges you to reject this legislation. Please help prevent desperate teens from the isolation and danger that this bill would create. Please ensure that Grandma Billie and other family members are not prosecuted for helping their loved ones.

Sincerely,

Vicki Saporta
Executive Director

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TARGET LIST - CHILD CUSTODY PROTECTION ACT
HOUSE OF REPRESENTATIVES - 106TH CONGRESS

	PRO (138)	LEANS PRO (19)	UNDECIDED (7)	LEANS ANTI (22)	ANTI (249)
AL					Aderholt (R) Bachus (R) Callahan (R) Cramer (D) Everett (R) Hilliard (D) Riley (R)
AK					Young (R)
AZ	Pastor (D)				Hayworth (R) Kolbe (R) Salmon (R) Shadegg (R) Stump (R)
AR					Berry (D) Dickey (R) Hutchinson (R) Snyder (D)
CA	Becerra (D) Berman (D) Brown (D) Campbell (R) Capps (D) Dixon (D) Dooley (D) Eshoo (D) Farr (D) Filner (D) Horn (R) Lantos (D) Lee (D) Lofgren (D) Martinez (D) Matsui (D) Millender-McDonald (D) Miller, George (D) Pelosi (D) Sanchez (D) Sherman (D) Stark (D) Tauscher (D) Waters (D) Waxman (D) Woolsey (D)	Napolitano (D) Roybal-Allard (D) Thompson (D)	Kuykendall (R) Ose (R)	Miller, Gary (R)	Bilbray (R) Bono (R) Calvert (R) Condit (D) Cox (R) Cunningham (R) Doolittle (R) Dreier (R) Gallegly (R) Herger (R) Hunter (R) Lewis (R) McKeon (R) Packard (R) Pombo (R) Radanovich (R) Rogan (R) Rohrabacher (R) Royce (R) Thomas (R)
CO	DeGette (D)	Udall (D)		Tancredo (R)	Hefley (R) McInnis (R) Schaffer (R)

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CT	DeLauro (D) Gejdenson (D) Johnson (R) Maloney (D) Shays (R)	Larson (D)			
DE	Castle (R)				
FL	Brown (D) Deutsch (D) Hastings (D) Meek (D) Thurman (D) Wexler (D)				Bilirakis (R) Boyd (D) Canady (R) Davis (D) Diaz-Balart (R) Foley (R) Fowler (R) Goss (R) McCollum (R) Mica (R) Miller (R) Ros-Lehtinen (R) Scarborough (R) Shaw (R) Stearns (R) Weldon (R) Young (R)
GA	Lewis (D) McKinney (D)		Isakson (R)		Barr (R) Bishop (D) Chambliss (R) Collins (R) Deal (R) Kingston (R) Linder (R) Norwood (R)
HI	Abercrombie(D) Mink (D)				
ID				Simpson (R)	Chenoweth (R)
IL	Blagojevich (D) Davis (D) Evans (D) Gutierrez (D) Jackson (D) Rush (D)	Porter (R) Schakowsky (D)	Biggert (R)	Phelps (D)	Costello (D) Crane (R) Ewing (R) Hastert (R) Hyde (R) LaHood (R) Lipinski (D) Manzullo (R) Shimkus (R) Weller (R)

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IN	Carson (D) Visclosky (D)		Hill (D)		Burton (R) Buyer (R) Hostettler (R) McIntosh (R) Pease (R) Souder (R) Roemer (D)
IA					Boswell (D) Ganske (R) Latham (R) Leach (R) Nussle (R)
KS		Moore (D)			Moran (R) Ryun (R) Tiahrt (R)
KY				Fletcher (R) Lucas (D)	Lewis (R) Northup (R) Rogers (R) Whitfield (R)
LA				Tauzin (R) Vitter (R)	Baker (R) Cooksey (R) Jefferson (D) John (D) McCrery (R)
ME	Allen (D) Baldacci (D)				
MD	Cardin (D) Cummings (D) Gilchrest (R) Hoyer (D) Morella (R) Wynn (D)				Ehrlich (R) Bartlett (R)
MA	Delahunt (D) Frank (D) McGovern (D) Markey (D) Meehan (D) Olver (D) Tierney (D)	Capuano (D)			Moakley (D) Neal (D)

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MI	Conyers (D) Kilpatrick (D) Levin (D) Rivers (D) Stabenow (D)		Dingell (D)		Barcia (D) Bonior (D) Camp (R) Ehlers (R) Hoekstra (R) Kildee (D) Knollenberg (R) Smith (R) Stupak (D) Upton (R)
MN	Luther (D) Sabo (D)				Gutknecht (R) Minge (D) Oberstar (D) Peterson (D) Ramstad (R) Vento (D)
MS	Thompson (D)			Shows (D)	Pickering (R) Taylor (D) Wicker (R)
MO	Clay (D) Gephardt (D) McCarthy (D)				Blunt (R) Danner (D) Emerson (R) Hulshof (R) Skelton (D) Talent (R)
MT					Hill (R)
NE				Terry (R)	Barrett (R) Bereuter (R)
NV		Berkley (D)			Gibbons (R)
NH	Bass (R)				Sununu (R)
NJ	Andrews (D) Menendez (D) Pallone (D) Payne (D) Rothman (D)	Holt (D)			Franks (R) Frelinghuysen (R) LoBiondo (R) Pascrell (D) Roukema (R) Saxton (R) Smith (R)
NM		Udall (D)			Wilson (R) Skeen (R)

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NY	Ackerman (D) Boehlert (R) Engel (D) Gilman (R) Hinchey (D) Houghton (R) Lowey (D) Maloney (D) Meeks (D) Nadler (D) Owens (D) Rangel (D) Serrano (D) Slaughter (D) Towns (D) Velazquez (D)	Weiner (D)		Crowley (D) McNulty (D) Reynolds (R) Sweeney (R)	Forbes (R) Fossella (R) Kelly (R) King (R) LaFalce (D) Lazio (R) McCarthy (D) McHugh (R) Quinn (R) Walsh (R)
NC	Clayton (D) Price (D) Watt (D)			Hayes (R)	Ballenger (R) Burr (R) Coble (R) Etheridge (D) Jones (R) McIntyre (D) Myrick (R) Taylor (R)
ND					Pomeroy (D)
OH	Brown (D) Sawyer (D)	Tubbs-Jones (D)			Boehner (R) Chabot (R) Gillmor (R) Hall (D) Hobson (R) Kasich (R) Kaptur (D) Kucinich (D) LaTourette (R) Ney (R) Oxley (R) Pryce (R) Portman (R) Regula (R) Strickland (D) Traficant (D)
OK					Coburn (R) Istook (R) Largent (R) Lucas (R) Watts (R) Watkins (R)

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OR	Blumenauer (D) DeFazio (D) Hooley (D)	Wu (D)		Walden (R)	
PA	Brady (D) Coyne (D) Fattah (D) Greenwood (R)	Hoeffel (D)		Sherwood (R) Toomey (R)	Borski (D) Doyle (D) English (R) Gekas (R) Goodling (R) Holden (D) Kanjorski (D) Klink (D) Mascara (D) Murtha (D) Peterson (R) Pitts (R) Shuster (R) Weldon (R)
RI	Kennedy (D)				Weygand (D)
SC	Clyburn (D)			DeMint (R)	Graham (R) Sanford (R) Spratt (D) Spence (R)
SD					Thune (R)
TN	Ford Jr. (D)				Bryant (R) Clement (D) Duncan (R) Gordon (D) Hilleary (R) Jenkins (R) Tanner (D) Wamp (R)

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TX	Bentsen (D) Doggett (D) Edwards (D) Frost (D) Green (D) Hinojosa (D) Jackson Lee (D) Johnson (D) Lampson (D) Paul (R)** Rodriguez (D)		Gonzalez (D)		Archer (R) Armey (R) Barton (R) Bonilla (R) Brady (R) Combest (R) DeLay (R) Granger (R) Hall (D) Johnson (R) Ortiz (D) Reyes (D) Sandlin (D) Sessions (R) Smith (R) Stenholm (D) Thornberry (R) Turner (D)
UT					Hansen (R) Cannon (R) Cook (R)
VT	Sanders (I)				
VA	Boucher (D) Moran (D) Pickett (D) Scott (D) Sisisky (D)				Bateman (R) Bliley (R) Davis (R) Goode (D) Goodlatte (R) Wolf (R)
WA	Dicks (D) McDermott (D) Smith (D)	Baird (D) Inslee (D)			Dunn (R) Hastings (R) Metcalf (R) Nethercutt (R)
WV	Wise (D)				Mollohan (D) Rahall (D)
WI	Barrett (D) Kind (D)	Baldwin (D)		Green (R) Ryan (R) Petri (R)	Kleczka (D) Obey (D) Sensenbrenner (R)
WY					Cubin (R)

NARAL-6/17/99

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SENATE COMPOSITION ON CHOICE- 106th Congress

PRO (32)	MIXED (17)	ANTI (51)
Akaka (D-HI)	Bayh (D-IN)	Abraham (R-MI)
Baucus (D-MT)	Biden (D-DE)	Allard (R-CO)
Bingaman (D-NM)	Bryan (D-NV)	Ashcroft (R-MO)
Boxer (D-CA)	Byrd (D-WV)	Bennett (R-UT)
Chafee (R-RI)	Cleland (D-GA)	Bond (R-MO)
Collins (R-ME)	Conrad (D-ND)	Breaux (D-LA)
Dodd (D-CT)	Daschle (D-SD)	Brownback (R-KS)
Durbin (D-IL)	Dorgan (D-ND)	Bunning (R-KY)
Edwards (D-NC)	Graham (D-FL)	Burns (R-MT)
Feingold (D-WI)	Hollings (D-SC)	Campbell (R-CO)
Feinstein (D-CA)	Johnson (D-SD)	Cochran (R-MS)
Harkin (D-IA)	Landrieu (D-LA)	Coverdell (R-GA)
Inouye (D-HI)	Leahy (D-VT)	Craig (R-ID)
Jeffords (R-VT)	Lincoln (D-AR)	Crapo (R-ID)
Kennedy (D-MA)	Moynihan (D-NY)	DeWine (R-OH)
Kerrey (D-NE)	Specter (R-PA)	Domenici (R-NM)
Kerry (D-MA)	Stevens (R-AK)	Enzi (R-WY)
Kohl (D-WI)		Fitzgerald (R-IL)
Lautenberg (D-NJ)		Frist (R-TN)
Lieberman (D-CT)		Gorton (R-WA)
Levin (D-MI)		Gramm (R-TX)
Mikulski (D-MD)		Grams (R-MN)
Murray (D-WA)		Grassley (R-IA)
Reed (D-RI)		Gregg (R-NH)
Robb (D-VA)		Hagel (R-NE)
Rockefeller (D-WV)		Hatch (R-UT)
Sarbanes (D-MD)		Helms (R-NC)
Schumer (D-NY)		Hutchinson (R-AR)
Snowe (R-ME)		Hutchison (R-TX)
Torricelli (D-NJ)		Inhofe (R-OK)
Wellstone (D-MN)		Kyl (R-AZ)
Wyden (D-OR)		Lott (R-MS)
		Lugar (R-IN)
		Mack (R-FL)
		McCain (R-AZ)
		McConnell (R-KY)
		Murkowski (R-AK)
		Nickles (R-OK)
		Reid (D-NV)
		Roberts (R-KS)
		Roth (R-DE)
		Santorum (R-PA)
		Sessions (R-AL)
		Shelby (R-AL)
		Smith (R-NH)
		Smith (R-OR)
		Thomas (R-WY)
		Thompson (R-TN)
		Thurmond (R-SC)
		Voinovich (R-OH)
		Warner (R-VA)

NARAL -11/5/98

FINAL VOTE RESULTS FOR ROLL CALL 280

(Republicans in roman; Democrats in *italic*; Independents underlined)

H R 3682 RECORDED VOTE 15-JUL-1998 4:36 PM
QUESTION: On Passage
BILL TITLE: Child Custody Protection Act

	AYES	NOES	PRES	NV
REPUBLICAN	209	14		4
DEMOCRATIC	67	135		4
INDEPENDENT		1		
TOTALS	**276**	**150**		**8**

--- AYES 276 ---

Aderholt	Goodling	Oxley
Archer	*Gordon*	Packard
Armey	Goss	Pappas
Bachus	Graham	Parker
Baesler	Granger	*Pascrell*
Baker	Gutknecht	Paxon
Ballenger	*Hall (OH)*	Pease
Barcia	*Hall (TX)*	*Peterson (MN)*
Barr	*Hamilton*	Peterson (PA)
Barrett (NE)	Hansen	Pickering
Bartlett	Hastert	Pitts
Barton	Hastings (WA)	Pombo
Bateman	Hayworth	*Pomeroy*
Bereuter	Hefley	Portman
Berry	Herger	*Poshard*
Bilbray	Hilleary	Pryce (OH)
Bilirakis	*Hilliard*	Quinn
Bishop	Hobson	Radanovich
Bliley	Hoekstra	*Rahall*
Blunt	*Holden*	Ramstad
Boehner	Hostettler	Redmond
Bonilla	Hulshof	Regula
Bonior	Hunter	*Reyes*
Bono	Hutchinson	Riggs

Borski	Hyde	Riley
Boswell	Inglis	*Roemer*
Boyd	Istook	Rogan
Brady (TX)	*Jefferson*	Rogers
Bryant	Jenkins	Rohrabacher
Bunning	*John*	Ros-Lehtinen
Burr	*Johnson (WI)*	Roukema
Burton	Johnson, Sam	Royce
Buyer	Jones	Ryun
Callahan	*Kanjorski*	Salmon
Calvert	*Kaptur*	*Sandlin*
Camp	Kasich	Sanford
Canady	Kelly	Saxton
Cannon	*Kildee*	Scarborough
Chabot	Kim	Schaefer, Dan
Chambliss	King (NY)	Schaffer, Bob
Chenoweth	Kingston	Sensenbrenner
Christensen	*Kleczka*	Sessions
Clement	*Klink*	Shadegg
Coble	Knollenberg	Shaw
Coburn	Kolbe	Shimkus
Collins	*Kucinich*	Shuster
Combest	*LaFalce*	Skeen
Condit	LaHood	*Skelton*
Cook	Largent	Smith (MI)
Cooksey	Latham	Smith (NJ)
Costello	LaTourette	Smith (OR)
Cox	Lazio	Smith (TX)
Cramer	Leach	Smith, Linda
Crane	Lewis (CA)	Snowbarger
Crapo	Lewis (KY)	*Snyder*
Cubin	Linder	Solomon
Cunningham	*Lipinski*	Souder
Danner	Livingston	Spence
Davis (FL)	LoBiondo	*Spratt*
Davis (VA)	Lucas	Stearns
Deal	*Manton*	*Stenholm*
DeLay	Manzullo	*Strickland*

Diaz-Balart	*Mascara*	Stump
Dickey	*McCarthy (NY)*	*Stupak*
Doolittle	McCollum	Sununu
Doyle	McCrery	Talent
Dreier	McDade	*Tanner*
Duncan	*McHale*	*Taylor (MS)*
Dunn	McHugh	Taylor (NC)
Ehlers	McInnis	Thomas
Ehrlich	McIntosh	Thornberry
Emerson	*McIntyre*	Thune
English	McKeon	Tiahrt
Ensign	Metcalf	*Traficant*
Etheridge	Mica	*Turner*
Everett	Miller (FL)	Upton
Ewing	*Minge*	*Vento*
Fawell	*Moakley*	Walsh
Foley	*Mollohan*	Wamp
Forbes	Moran (KS)	Watkins
Fossella	*Murtha*	Watts (OK)
Fowler	Myrick	Weldon (FL)
Fox	*Neal*	Weldon (PA)
Franks (NJ)	Nethercutt	Weller
Frelinghuysen	Neumann	*Weygand*
Gallegly	Ney	White
Ganske	Northup	Whitfield
Gekas	Norwood	Wicker
Gibbons	Nussle	Wilson
Gillmor	*Oberstar*	Wolf
Goode	*Obey*	Young (AK)
Goodlatte	*Ortiz*	Young (FL)

--- NOES 150 ---

Abercrombie	*Furse*	*Mink*
Ackerman	*Gejdenson*	*Moran (VA)*
Allen	*Gephardt*	Morella
Andrews	Gilchrest	*Nadler*
Baldacci	Gilman	*Olver*

Barrett (WI)	*Green*	*Owens*
Bass	Greenwood	*Pallone*
Becerra	*Gutierrez*	*Pastor*
Bentsen	*Harman*	Paul
Berman	*Hastings (FL)*	*Payne*
Blagojevich	*Hefner*	*Pelosi*
Blumenauer	*Hinchey*	*Pickett*
Boehlert	*Hinojosa*	*Price (NC)*
Boucher	*Hooley*	*Rangel*
Brady (PA)	Horn	*Rivers*
Brown (CA)	Houghton	*Rodriguez*
Brown (FL)	*Hoyer*	*Rothman*
Brown (OH)	*Jackson (IL)*	*Rush*
Campbell	*Jackson-Lee (TX)*	*Sabo*
Capps	Johnson (CT)	*Sanchez*
Cardin	*Johnson, E. B.*	Sanders
Carson	*Kennedy (MA)*	*Sawyer*
Castle	*Kennedy (RI)*	*Schumer*
Clay	*Kennelly*	*Scott*
Clayton	*Kilpatrick*	*Serrano*
Clyburn	*Kind (WI)*	Shays
Conyers	Klug	*Sherman*
Coyne	*Lampson*	*Sisisky*
Cummings	*Lantos*	*Skaggs*
Davis (IL)	*Lee*	*Slaughter*
DeFazio	*Levin*	*Smith, Adam*
DeGette	*Lewis (GA)*	*Stabenow*
Delahunt	*Lofgren*	*Stark*
DeLauro	*Lowey*	*Stokes*
Deutsch	*Luther*	*Tauscher*
Dicks	*Maloney (CT)*	*Thompson*
Dixon	*Maloney (NY)*	*Thurman*
Doggett	*Markey*	*Tierney*
Dooley	*Martinez*	*Torres*
Edwards	*Matsui*	*Towns*
Engel	*McCarthy (MO)*	*Velazquez*
Eshoo	*McDermott*	*Visclosky*
Evans	*McGovern*	*Waters*

Farr	*McKinney*	*Watt (NC)*
Fattah	*Meehan*	*Waxman*
Fazio	*Meek (FL)*	*Wexler*
Filner	*Meeks (NY)*	*Wise*
Ford	*Menendez*	*Woolsey*
Frank (MA)	*Millender-McDonald*	*Wynn*
Frost	*Miller (CA)*	*Yates*

--- NOT VOTING 8 ---

Dingell	*McNulty*	*Roybal-Allard*
Gonzalez	Petri	Tauzin
Hill	Porter	

American Academy of Pediatrics

SAM
THE SOCIETY FOR ADOLESCENT MEDICINE

June 14, 1999

The Honorable Henry J. Hyde
U.S. House of Representatives
2110 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Hyde:

On behalf of the American Academy of Pediatrics (AAP), representing 55,000 pediatricians nationally, and the Society for Adolescent Medicine (SAM), representing 1,400 adolescent health professionals, we are writing in opposition of H.R. 1218, the Child Custody Protection Act. Assuring adolescent access to health care, including reproductive health care, has been a long-standing objective of the Academy. The problematic nature of this bill is in it's potential to restrict a patient's access to care by making it a federal offense to transport a minor across state lines if this circumvents the state's parental involvement laws.

The AAP and SAM firmly believe that parents should be involved in and responsible for assuring medical care for their children. While parental involvement is desirable and should be encouraged, it may not always be feasible, and the Academy and SAM believe it should not be legislated. Adolescents who cannot rely on a parent to help them through the trauma of a pregnancy and who may need to go to an adjoining state for termination are precluded from receiving supportive care during a traumatic time in their lives. It is in these situations that adolescents would be limited in their options for receiving care.

Our ultimate goal is to provide access to health care that is in the best interest of the adolescent. Pediatricians hope and strongly encourage adolescents to communicate with and involve their parents or other trusted adults in important health care decisions affecting their lives, including those regarding pregnancy or pregnancy termination. Studies show that a majority of adolescents voluntarily do so. However, studies also indicate that legislation mandating parental involvement does not achieve the intended benefit of promoting family communication. It may increase the risk of harm to the adolescent by delaying access to appropriate medical care.

The American Academy of Pediatrics and the Society for Adolescent Medicine urge you to oppose the Child Custody Protection Act.

Sincerely,

Joel J. Alpert

Joel J. Alpert, MD, FAAP
President
American Academy of Pediatrics

Lawrence S. Neinstein, MD

Lawrence S. Neinstein, MD
President
Society for Adolescent Medicine

JJA:ch

New York Times - 5/29/98

A Dangerous Abortion Curb

Republican leaders in Congress, eager to placate supporters from the Christian right, are promoting cruel and constitutionally suspect legislation that would jeopardize the lives of frightened young women seeking abortions. The G.O.P. calls this new measure, which plays cleverly on the issue of parental consent, the Child Custody Protection Act. It should be called the Teen Endangerment Act.

Twenty-two states have laws requiring teenagers to notify or consult their parents before getting an abortion or else seek a judge's permission. The new legislation would effectively extend the reach of these laws into other states. Under the measure, anyone who accompanies a minor across state lines for an abortion — including grandparents, religious advisers and, in certain instances, even a single parent — would be at risk of Federal criminal prosecution and possible imprisonment if that minor failed to meet the requirements for parental consent in her home state.

For Republican leaders to call this approach "family friendly" ignores the real-world consequences. Sometimes the closest abortion clinic is in another state, and desperate young women who are afraid to inform a parent — perhaps because they fear a violent reaction — will continue to cross state lines to obtain one. There is nothing "friendly" about isolating these youngsters from the trusted adults in their lives. That will only increase the chance that they will resort to illegal or self-induced abortions or delay the procedure, making it more dangerous.

No one would dispute that young women should be encouraged to talk to their parents about their difficult decisions on abortion. More than 75 percent of minors under 16 do consult one or both parents. But it is also true, as Senator Dianne Feinstein, a California Democrat, observed at a recent hearing, that no law can foster communication between a parent and a child where none exists.

Unfortunately, the legislation seems to be on a fast track to passage in both houses. President Clinton, who last year blocked Congress's effort to impose an unconstitutional ban on so-called partial birth abortions, must again stand ready to wield his veto pen.

Washington Post 7/20/98

The Abortion Legislation

THE CHILD Custody Protection Act does not seem, on its face, to be a particularly extreme piece of antiabortion legislation. Presented by its proponents as an effort to protect the right of parents to be involved in the abortion decisions of their underage daughters, the bill would make it a federal crime to transport across state lines a minor in an attempt to evade the parental notification or consent requirements of her home state. The House passed the bill Wednesday, and the Senate Judiciary Committee reported it favorably on Thursday.

The bill, however, is considerably dicier than it initially appears. Abortion foes know that they could not pass a national law requiring parental notification or consent. And this backdoor effort to approximate that goal has serious problems that should trouble even those who don't oppose state laws requiring parental involvement in minors' abortions.

The central problem with the proposal is that it causes restrictive state laws to follow residents in their travels outside of their home state and then has the federal government prosecuting people for activity that is lawful in the locations in which it takes place. The right to travel between states is constitutionally protected, abortion rights similarly are guaranteed and it is legal in many states to accompany a minor to an abortion clinic without telling her parents. It is, therefore, hard to fathom how it could be a crime to cross state lines in helping a minor obtain an abortion. Proponents cite an appeals court decision from 1978 in support of their notion that the government can restrict interstate travel undertaken for purposes that are legal in the destination states. How relevant that precedent proves to be remains to be seen.

Even if it is within Congress's power to adopt this law, it is a bad idea. Indeed, using the federal government to give force to the laws of favored states within the borders of other states that choose not to have similar statutes is a dangerous game. Should the federal government be able to criminalize crossing state lines (or transporting someone across them) in order to gamble, buy cigarettes at lower tax rates or purchase guns? One of the central ideas of this country's structure is that the states will try different approaches to problems and people will vote with their feet in deciding which laws they like. That purpose is eviscerated if Congress criminalizes the transportation.

philadelphia quirer-5/20/98

Opinion

Can parental rights ever be wrong?

Why would a person take someone else's child out of state for an abortion?

Here are three real-life cases from one week at a local abortion clinic.
- A foreign exchange student came to the clinic with her sponsor family, but in Pennsylvania, only the legal guardian can accompany the teen-ager and listen to a state-mandated speech about abortion alternatives, a requirement for parental consent.
- A twentyish woman accompanied her 15-year-old pregnant sister. Each exhibited visible bruises.
- A teen-age girl had her mother's consent for an abortion, but the mother was in a hospital seriously ill.

Under legislation proposed in Congress, adults who helped these young women go out of state to avoid parental-consent laws could be charged with a crime, and if convicted, fined or jailed for a year.

No doubt some supporters of the legislation were disturbed by a 1995 case in upstate Pennsylvania when a woman took a 13-year-old to Binghamton, N.Y., the closest clinic for an abortion. The girl's boyfriend was the woman's 19-year-old stepson, who later pled guilty to statutory rape.

Yet such a law – like current parental consent/notification requirements in 39 states – would have unintended consequences, jeopardizing the safety of teens it is supposed to protect.

Perhaps lawmakers believe that if the law is passed, a pregnant teen-ager will (a) tell her parents, who will understand, (b) go through the several steps – and a possible weeklong delay -- to get a judicial bypass, or (c) change her mind, have the baby and live happily ever after.

What is more likely to happen is that the young woman will (a) go out of state to have the abortion, but alone, (b) go into denial until the second trimester when she'll finally tell her parents and get the abortion, or (c) get an illegal abortion, risking infection and/or death.

It's a tricky business to fiddle with parental rights, except in extraordinary circumstances, but teen-age pregnancy is just such a circumstance. And even though judicial bypass is an expedited process in Philadelphia (in other Pennsylvania counties, it may not be), many teens find it too overwhelming.

Besides, the law ignores the fact that lots of teen-agers live in families where aunts or grandmothers or even neighbors are de facto guardians, though not legally.

It's hard to believe Congress truly is interested in the well-being of young people, given its history of neglect. But if Congress truly wants to protect pregnant teen-agers, this isn't the way.

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

HAUSER HALL 420
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

June 17, 1999

To: Committee on the Judiciary, U.S. House of Representatives

From: Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University
Peter J. Rubin, Visiting Associate Professor of Law, Georgetown University

Re: H.R. 1218 and Constitutional Principles of Federalism

Introduction

We have been asked to submit our assessment of whether H.R. 1218, now pending before the Committee on the Judiciary, is consistent with constitutional principles of federalism. It is our considered view that the proposed statute violates those principles, principles that are fundamental to our constitutional order. That statute violates the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States and of the District of Columbia to travel to and from any state of the Union for lawful purposes, a right strongly reaffirmed by the Supreme Court in its recent landmark decision in *Saenz v. Roe*, 119 S.Ct. 1518 (May 17, 1999). We have therefore concluded that the proposed law would, if enacted, violate the Constitution of the United States.

H.R. 1218 provides criminal and civil penalties, including imprisonment for up to one year, for any person who

> knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion. . . [if] an abortion is performed on the individual, in a State other than the State where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law in the State where the individual resides.

H.R. 1218, §2 (proposed 18 U.S.C. §2431(a) and (b)). In other words, this law makes it a *federal crime* to assist a pregnant minor to obtain a *lawful* abortion. The criminal penalties kick in if the abortion the young woman seeks would be performed in a state other than her state of residence, and in accord with the less restrictive laws of that state, unless she complies with the more severe

restrictions her home state imposes upon abortions performed upon minors within its territorial limits. The law contains no exceptions for situations where the young woman's home state purports to disclaim any such extraterritorial effect for its parental consultation rules, or where it is a pregnant young woman's close friend, or her aunt or grandmother, or a member of the clergy, who accompanies her "across a State line" on this frightening journey, even where she would have obtained the abortion anyway, whether lawfully in another state after a more perilous trip alone, or illegally (and less safely) in her home state because she is too frightened to seek a judicial bypass or too terrified of physical abuse to notify a parent or legal guardian who may, indeed, be the cause of her pregnancy.

This amounts to a statutory attempt to force this most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone). Such a law violates the basic premises upon which our federal system is constructed, and therefore violates the Constitution of the United States.[1]

Analysis

The essence of federalism is that the several states have not only different physical territories and different topographies but also different political and legal regimes. Crossing the border into another state, which every citizen has a right to do, may perhaps not permit the traveler to escape *all* tax or other fiscal or recordkeeping duties owed to the state as a condition of remaining a resident and thus a citizen of that state,[2] but necessarily permits the traveler temporarily to shed her home

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[1]Each of us has already made a written submission to Congress demonstrating that the proposed statute also violates the Constitution because of the cruel and dangerous method it employs to attempt to deter pregnant young women from obtaining lawful abortions in neighboring states; because it places an "undue burden" upon the pregnant young woman's right to choose to terminate her pregnancy; and because it lacks a constitutionally-mandated exception for abortions necessary to protect the health of the pregnant woman. See "The Constitution and the Proposed Child Custody Protection Act," Written Testimony of Peter J. Rubin before the Senate Committee on the Judiciary ("Rubin Testimony"), May 20, 1998 at 6-7 (proposed law will brutally endanger the safety of pregnant minors to whom it applies in violation of the Due Process Clause); Memorandum of Law of Professor Laurence H. Tribe to the Hon.Orrin G. Hatch and the other Members of the Senate Committee on the Judiciary, June 23 1998 ("Tribe Memorandum") at 6-9 (proposed law would impose an "undue burden" under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and lacks a required health exception); Rubin Testimony at 7-10 (same). Although the only purpose of this memorandum is to address questions of federalism, each of us adheres to his previously expressed views.

[2]There are significant constitutional limits, of course, even upon a state's authority to tax its residents on transactions undertaken, or income earned, in other states, but so long as there is no taxation without representation (as there is not if the resident's eligibility to vote remains intact

state's regime of laws regulating primary conduct in favor of the legal regime of the state she has chosen to visit. Whether cast in terms of the destination state's authority to enact laws effective throughout its domain without having to make exceptions for travelers from other states, or cast in terms of the individual's right to travel – which would almost certainly be deterred and would in any event be rendered virtually meaningless if the traveler could not shake the conduct-constraining laws of her home state – the proposition that a state may not project its laws into other states by following its citizens there is bedrock in our federal system.

One need reflect only briefly on what rejecting that proposition would mean in order to understand how axiomatic it is to the structure of federalism. Suppose that your home state or Congress could lock you into the legal regime of your home state as you travel across the country. This would mean that the speed limits, marriage regulations, restrictions on adoption, rules about assisted suicide, firearms regulations, and all other controls over behavior enacted by the state you sought to leave behind, either temporarily or permanently, would in fact follow you into all 49 of the other states as you traveled the length and breadth of the nation in search of more hospitable "rules of the road." If your search was for a more favorable legal environment in which to make your home, you might as well just look up the laws of distant states on the internet rather than roaming about in a futile effort at sampling them, since you will not actually experience those laws by traveling there. And if your search was for a less hostile legal environment in which to attend college or spend a summer vacation or obtain a medical procedure, you might as well skip even the internet, since the theoretically less hostile laws of other jurisdictions will mean nothing to you so long as your state of residence remains unchanged. Unless the right to travel interstate means nothing more than the right to change the scenery, opting for the open fields of Kansas or the mountains of Colorado or the beaches of Florida but all the while living under the legal regime of whichever state you call home, telling you that the laws governing your behavior will remain constant as you cross from one state into another and then another is tantamount to telling you that you may in truth be compelled to remain at home — although you may, of course, engage in a simulacrum of interstate travel, with an experience much like that of the visitor to a virtual reality arcade who is strapped into special equipment that provides the look and feel of alternative physical environments — from sea to shining sea — but that does not alter the political and legal environment one iota. And, of course, if home-state legislation, or congressional legislation, may saddle the home state's citizens with that state's abortion regulation regime, then it may saddle them with their home state's adoption and marriage regimes as well, and with piece after piece of the home state's legal fabric until the home state's citizens are all safely and tightly wrapped in the straitjacket of the home state's entire legal regime. There are no constitutional scissors that can cut this process short, no principled metric that can supply a stopping point. The principle underlying H.R. 1218 is nothing less, therefore, than the principle that individuals may indeed be tightly bound by the legal regimes

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notwithstanding temporary absence from the state) and so long as the subject of the tax is not such as to incur a danger of multiple taxation, the absent resident's continuing eligibility for whatever benefits and services the state constitutionally extends to *all* its residents and *only* to its residents imposes a potential burden on state resources for which at least a minimal tax may in some circumstances be warranted.

of their home states even as they traverse the nation by traveling to other states with very different regimes of law. It follows, therefore, that — unless the right to engage in interstate travel that is so central to our federal system is indeed only a right to change the surrounding scenery — H.R. 1218 rests on a principle that obliterates that right completely.

It is irrelevant to the federalism analysis that the proposed federal statute does not literally prohibit the minor herself from obtaining an out-of-state abortion without complying with the parental consent or notification laws of her home state, criminalizing instead only the conduct of *assisting* such a young woman by transporting her across state lines. The manifest and indeed avowed purpose of the statute is to prevent the pregnant minor from crossing state lines to obtain an abortion that is lawful in her state of destination whenever it would have violated her home state's law to obtain an abortion there because the pregnant woman has not fully complied with her home state's requirements for parental consent or notification. The means used to achieve this end do not alter the constitutional calculus. Prohibiting assistance in crossing state lines in the manner of this proposed statute suffers the same infirmity with respect to our federal structure as would a direct ban on traveling across state lines to obtain an abortion that complies with all the laws of the state where it is performed without first complying also with the laws that would apply to obtaining an abortion in one's home state.

The federalism principle we have described operates routinely in our national life. Indeed, it is so commonplace it is taken for granted. Thus, for example, neither Virginia nor Congress could prohibit residents of Virginia, where casino gambling is illegal, from traveling interstate to gamble in a casino in Nevada. (Indeed, the economy of Nevada essentially depends upon this aspect of federalism for its continued vitality!) People who like to hunt cannot be prohibited from traveling to states where hunting is legal in order to avail themselves of those pro-hunting laws just because such hunting may be illegal in their home state. And citizens of every state must be free, for example, to read and watch material, even constitutionally unprotected material, in New York City the distribution of which might be unlawful in their own states, but which New York has chosen not to forbid. To call interstate travel for such purposes an "evasion" or "circumvention" of one's home-state laws – as H.R. 1218 purports to do, see H.R. 1218 ("Transportation of minors in circumvention of certain laws relating to abortion") – is to misunderstand the basic premise of federalism: one is *entitled* to "avoid" those laws by traveling interstate. Doing so amounts to neither evasion nor circumvention.

Put simply, you may not be compelled to abandon your citizenship in your home state as a condition of voting with your feet for the legal and political regime of whatever other state you wish to visit. The fact that you intend to return home cannot undercut your right, while in another state, to be governed by *its* rules of primary conduct rather than by the rules of primary conduct of the state from which you came and to which you will return. When in Rome, perhaps you will not do as the Romans do, but you are entitled — if this figurative Rome is within the United States — to be governed as the Romans are. If something is lawful for one of them to do, it must be lawful for you as well. The fact that each state is free, notwithstanding Article IV, to make certain *benefits* available on a preferential basis to its own citizens does not mean that a state's *criminal laws* may

be replaced with stricter ones for the visiting citizen from another state, whether by that state's own choice or by virtue of the law of the visitor's state or by virtue of a congressional enactment. To be sure, a state need not treat the travels of its citizens to other states as suddenly lifting otherwise applicable restrictions when they return home. Thus, a state that bans the possession of gambling equipment, of specific kinds of weapons, of liquor, or of obscene material may certainly enforce such bans against anyone who would bring the contraband items into the jurisdiction, including its own residents returning from a gambling state, a hunting state, a drinking state, or a state that chooses not to outlaw obscenity. But that is a far cry from projecting one state's restrictive gambling, firearms, alcohol, or obscenity laws into another state whenever citizens of the first state venture there.

Thus states cannot prohibit the lawful out-of-state conduct of their citizens, nor may they impose criminal-law-backed burdens – as H.R. 1218 would do – upon those lawfully engaged in business or other activity within their sister states. Indeed, this principle is so fundamental that it runs through the Supreme Court's jurisprudence in cases that are nominally about provisions and rights as diverse as the Commerce Clause, the Due Process Clause, and the right to travel, which is itself derived from several distinct constitutional sources.[3] See, e.g., *Healy v. Beer Institute*, 491 U.S. 324, 336 n. 13 (1989) (Commerce Clause decision quoting *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion), which in turn quoted the Court's Due Process decision in *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limit of the State's power.' ").

The Supreme Court recently reaffirmed this fundamental principle in its landmark right to travel decision, *Saenz v. Roe*, 119 S. Ct. 1518 (1999). There the Court held that, even with congressional approval, the State of California was powerless to carve out an exception to its otherwise-applicable legal regime by providing recently-arrived residents with only the welfare benefits that they would have been entitled to receive under the laws of their former states of residence. This attempt to saddle these interstate travelers with the laws of their former home states – even if only the welfare laws, laws that would operate far less directly and less powerfully than would a special criminal-law restriction on primary conduct – was held to impose an unconstitutional penalty upon their right to interstate travel, which, the Court held, is guaranteed them by the Privileges or Immunities Clause of the Fourteenth Amendment. See *Saenz*, 119 S. Ct. at 1526-1527.

Although *Saenz* concerned new residents of a state, the decision also reaffirmed that the constitutional right to travel under the Privileges and Immunities Clause of Article IV, Section 2, provides a similar type of protection to a non-resident who enters a state not to settle, but with an intent eventually to return to her home state:

[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States,

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[3]See *Saenz v. Roe*, 119 S. Ct. 1518, 1525-1527 (1999) (describing the various components of the right to travel and their constitutional derivation).

> intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." *Paul v. Virginia*, 8 Wall. 168, 180 (1869). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v.Orbeck*, 437 U.S. 518 (1978), to procure medical services, *Doe v. Bolton*, 410 U.S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948).

Saenz, 119 S. Ct. at 1525-1526 (footnotes and parenthetical omitted). *Doe v. Bolton*, 410 U.S. 179 (1973), which was decided over a quarter century ago, and to which the *Saenz* court referred, specifically held that, under Article IV of the Constitution, a state may not restrict the ability of visiting non-residents to obtain abortions on the same terms and conditions under which they are made available by law to state residents. "[T]he Privileges and Immunities Clause, Const. Art. IV, §2, protects persons . . . who enter [a state] seeking the medical services that are available there." Id. at 200.

Thus, in terms of protection from being hobbled by the laws of one's home state wherever one travels, nothing turns on whether the interstate traveler intends to remain permanently in her destination state, or to return to her state of origin. Combined with the Court's holding that, like the states, Congress may not contravene the principles of federalism that are sometimes described under the "right to travel" label, *Saenz* reinforces the conclusion, if it were not clear before, that even if enacted by Congress, a law like H.R. 1218 that attempts by reference to a state's own laws to control that state's resident's out-of-state conduct on pains of criminal punishment, whether of that resident or of whoever might assist her to travel interstate, would violate the federal Constitution. See also *Shapiro v. Thompson*, 394 U.S. 618, 629-630 (1969) (invalidating an Act of Congress mandating a durational residency requirement for District of Columbia residents seeking to obtain welfare assistance).

Last month, this Committee heard testimony from Professor Lino Graglia of the University of Texas School of Law. An opponent of abortion rights, he candidly conceded that the proposed law would "make it . . . more dangerous for young women to exercise their constitutional right to obtain a safe and legal abortion." Testimony of Lino A. Graglia on H.R. 1218 before the Constitution Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, May 27, 1999 at 1. He also concluded, however, that "the Act furthers the principle of federalism to the extent that it reinforces or makes effective the very small amount of policymaking authority on the abortion issue that the Supreme Court, an arm of the national government, has permitted to remain with the States." Id. at 2. He testified that he supported the bill because he would support "anything Congress can do to move control of the issue back into the hands of the States." Id. at 1.

Of course, as the description of H.R. 1218 we have given above demonstrates, that proposed statute would do nothing to move "back" into the hands of the states any of the control over abortion that was precluded by *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. The several states already have their own distinctive regimes for regulating the provision of abortion services to pregnant

minors, regimes that are permitted under the Supreme Court's abortion rulings. That, indeed, is the very premise of this proposed law. But, rather than respecting federalism by permitting each state's law to operate within its own sphere, the proposed federal statute would contravene that essential principle of federalism by saddling the abortion-seeking young woman with the restrictive law of her home state wherever she may travel within the United States unless she travels unaided. Indeed, it would add insult to this federalism injury by imposing its regime *regardless of the wishes of her home state*, whose legislature might recoil from the prospect of transforming its parental notification laws, enacted ostensibly to encourage the provision of loving support and advice to distraught young women, into an obstacle to the most desperate of these young women, compelling them in the moment of their greatest despair to choose between, on the one hand, telling someone close to them of their situation and perhaps exposing this loved one to criminal punishment, and, on the other, going to the back alleys or on an unaccompanied trip to another, possibly distant state. This federal statute would therefore violate rather than reinforce basic constitutional principles of federalism.[4]

The fact that the proposed law applies only to those assisting the interstate travel of *minors* seeking abortions may make the federalism-based constitutional infirmity somewhat less obvious – while at the same time rendering the law more vulnerable to constitutional challenge because of the danger in which it will place the class of frightened, perhaps desperate young women least able to travel safely on their own. The importance of protecting the relationship between parents and their minor children cannot be gainsaid. But in the end, the fact that the proposed statute involves the interstate travel only of minors does not alter our conclusion.

No less than the right to end a pregnancy, the constitutional right to travel interstate and to take advantage of the laws of other states exists even for those citizens who are not yet eighteen. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nonetheless, the Court has held that, in furtherance of the minors' best interests, government may in some circumstances have more leeway to regulate where minors are concerned. Thus, whereas a law that sought, for example, to burden *adult* women with their home state's constitutionally acceptable waiting periods for abortion (or with their home state's constitutionally permissible medical regulations that may make abortion more costly) even when they traveled out of state to avoid those waiting periods (or other regulations) would *obviously* be unconstitutional, it might be argued that a law like the proposed one, which seeks to force a young woman to comply

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[4]Although the failure of H.R. 1218 to exempt states that would not opt to give their parental involvement laws extraterritorial effect certainly aggravates its violation of federalism, this proposed statute would, as we have shown, violate federalism principles even if it permitted states to opt out. Just as Congress may not license the state of destination of an interstate traveler to hobble the new resident, even temporarily, with the laws of her former state of residence (even with respect to mere benefits that the state of destination is free to limit to its own residents), see *Saenz v. Roe*, 119 S. Ct. at 1528-1529, so Congress may not license an interstate traveler's home state, during the time of that traveler's sojourn in other states, to hobble her with its laws.

with her home state's parental consent laws regardless of her circumstances, is, because of its focus on minors, somehow saved from constitutional invalidity.

It is not, for at least two reasons. First, the importance of the constitutional right in question for the pregnant minor too desperate even to seek judicial approval for abortion in her home state – either because of its futility there,[5] or because of her terror at a judicial proceeding held to discuss her pregnancy and personal circumstances[6] – means that government's power to burden that choice is severely restricted. As Justice Powell wrote over two decades ago:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. . . . A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of

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[5]In this regard, the Subcommittee on the Constitution has heard the testimony of Billie Lominick, a 63-year old grandmother who helped a pregnant minor from a physically and sexually abusive household cross state lines to obtain an abortion after she was unable to find any judge in her home state of South Carolina who would hear her judicial bypass petition. There is also evidence that the rate at which some state judges grant these petitions is disproportionately low, something that appears to reflect their own personal views about abortion rather than the legal standards they are supposed to apply: For example, in 1992 the director of a woman's clinic in Indianapolis reported that in six years she had never known of any minor successfully obtaining a judicial bypass in that city. See Lewin, Parental Consent to Abortion: How Enforcement Can Vary, *The New York Times*, May 28, 1992 at A1. In Ohio, one 17 1/2 year old had a petition denied by a judge who concluded that she had "not had enough hard knocks in her life." *Id.*

[6]For a description of the emotional trauma that may be involved in judicial bypass proceedings, see *Hodgson* v. *Minnesota*, 497 U.S. 417, 441-442 and n. 29 (1990). Although bypass procedures are required by the Constitution in order to *prevent* imposition by parental consent or notification laws of a substantial obstacle in the path of a pregnant minor who wishes to have an abortion, in at least some states "[t]he court [bypass] experience [itself] produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to 'forego the bypass option and either notify their parents or carry to term.' " *Hodgson*, 497 U.S. at 441-442 (quoting the unchallenged finding of the district court). Indeed, rather than undergo the judicial bypass process, some girls have apparently been driven to obtain unlawful abortions, which has led to the death of at least one 17 year old, Becky Bell. See Lewin, supra.

> majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti v. *Baird* (*Bellotti II*), 443 U.S. 622, 642 (1979) (plurality opinion) (citations omitted).

Second, the fact that the penalties on travel out of state by minors who do not first seek parental consent or judicial bypass are triggered *only* by intent to obtain a lawful abortion and *only* if the minor's home state has more stringent "minor protection" provisions in the form of parental involvement rules than the state of destination, renders any protection-of-minors exception to the basic rule of federalism unavailable.

To begin with, the proposed law, unlike one that evenhandedly defers to each state's determination of what will best protect the emotional health and physical safety of its pregnant minors who seek to terminate their pregnancies, simply defers to states with *strict* parental control laws and subordinates the interests of states that have decided that legally-mandated consent or notification is not a sound means of protecting pregnant minors. The law does *not* purport to impose a uniform nationwide requirement that all pregnant young women should be subject to the abortion laws of their home states and only those abortion laws wherever they may travel. Thus, under H.R. 1218, a pregnant minor whose parents believe that it would be both destructive and profoundly disrespectful to their mature, sexually active daughter to require her by law to obtain their consent before having an abortion, and who live in a state whose laws reflect that view, would, despite the judgment expressed in the laws of her home state, *still* be required to obtain parental consent should she seek an abortion in a neighboring state with a stricter parental involvement law – something she might do, for example, because that is where the nearest abortion provider is located. This substantively slanted way in which H.R. 1218 would operate fatally undermines any argument that might otherwise be available that principles of federalism must give way because this law seeks to ensure that the health and safety of pregnant minors are protected in the way their home states have decided would be best.[7]

In addition, the proposed law, again unlike one protecting parental involvement generally, selectively targets one form of control: control with respect to the constitutionally protected procedure of terminating a pregnancy before viability. The proposed law does not do a thing for parental control if the minor is being assisted into another state (or, where the relevant regulation is

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[7]Nor does this law even purport to be justified as a reflection of Congress's *own* vision of what would best protect the pregnant minor. This law does not impose a federal parental involvement standard either nationwide or, assuming it would be constitutionally permissible, upon all pregnant minors engaged in interstate travel for purposes of having an abortion. For Congress to decide to apply its parental involvement regime only when minors travel from more restrictive to less restrictive states, and for it to do so without itself determining what level of parental involvement is appropriate – as is the case with H.R. 1218 – is incompatible with either a protection-of-minors purpose or a federalism-promoting purpose.

local, into another city or county) for the purpose of obtaining a tattoo, or endoscopic surgery to correct a foot problem, or laser surgery for an eye defect. The law is activated only when the medical procedure being obtained in another state is the termination of a pregnancy. It is as though Congress proposed to assist parents in controlling their children when, and only when, those children wish to buy constitutionally protected but sexually explicit books about methods of birth control and abortion in states where the sale of such books to these minors is entirely lawful.

The basic constitutional principle that such laws overlook is that the greater power does not necessarily include the lesser. Thus, for example, even though so-called "fighting words" may be banned altogether despite the First Amendment, it is unconstitutional, the Supreme Court held in 1992, for government selectively to ban those fighting words that are racist or anti-semitic in character. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391-392 (1992). To take another example, Congress could not make it a crime to assist a minor who has had an abortion in the past to cross a state line in order to obtain a lawful form of cosmetic surgery elsewhere if that minor has not complied with her state's valid parental involvement law for such surgery. Even though Congress might enact a broader law that would cover all the minors in the class described, it could not enact a law aimed only at those who have had abortions. Such a law would impermissibly single out abortion for special burdens. The proposed law does so as well. Thus, even if a law that were properly drawn to protect minors could constitutionally displace one of the basic rules of federalism, the proposed statute can not.[8]

Lastly, in oral testimony before the Subcommittee on the Constitution, Professor John Harrison of the University of Virginia, while conceding that ordinarily a law such as this, which purported to impose upon an individual her home state's laws in order to prevent her from engaging in lawful conduct in one of the other states, would be constitutionally "doubtful," argued that the constitutionality of *this* law is resolved by the fact that it relates to "domestic relations," a sphere in which, according to Professor Harrison, "the state with the primary jurisdiction over the rights and responsibilities of parties to the domestic relations is the state of residence. . . and not the state where the conduct" at issue occurs. See transcript of the Hearing of the Constitution Subcommittee of the House Judiciary Committee on the Child Custody Protection Act, May 27, 1999.

This "domestic relations exception" to principles of federalism described by Professor Harrison, however, does not exist, at least not in any context relevant to the constitutionality of H.R. 1218. To be sure, acting pursuant to Article IV, § 1, Congress has prescribed special state obligations to accord full faith and credit to judgments in the domestic relations context — for example, to child custody determinations and child support orders. 28 U.S.C. §§ 1738A, 1738B. These provisions also establish choice of law principles governing modification of domestic relations

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[8]We have not raised any objection that H.R. 1218 would exceed Congress's affirmative Commerce Clause authority under *Lopez* v. *United States*, 514 U.S. 549 (1995). We do not believe such an objection would be well-taken. Of course, to the extent an affirmatively authorized federal requirement of parental involvement in interstate surgical trips would unduly burden the abortion rights of minors, it would be unconstitutional.

orders. In addition, in a controversial provision whose constitutionality is open to question, Congress has said that states are *not* required to accord full faith and credit to same-sex marriages. *Id.* at § 1738C.

But the special measures adopted by Congress in the domestic relations context can provide no justification for H.R. 1218. There is a world of difference between provisions like §§ 1738A and 1738B, which prescribe the full faith and credit to which state *judicial decrees and judgments* are entitled, and proposed H.R. 1218, which in effect gives state *statutes* extraterritorial operation — by purporting to impose criminal liability for interstate travel undertaken to engage in conduct lawful within the territorial jurisdiction of the state in which the conduct is to occur, based solely upon the laws in effect in the state of residence of the individual who seeks to travel to a state where she can engage in that conduct lawfully.

The Supreme Court has always differentiated "the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663 (1998). For example, while a state may not decline on public policy grounds to give full faith and credit to a judicial judgment from another state, *see, e.g., Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908), a forum state has always been free to consider its own public policies in declining to follow the legislative enactments of other states. *See Nevada v. Hall*, 440 U.S. 410, 421-24 (1979). In short, under the Full Faith and Credit Clause, a state has never been compelled "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). In fact, the Full Faith and Credit Clause was meant to prevent "parochial entrenchment on the interests of other States." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). A state is under no obligation to enforce another state's statute with which it disagrees.

But H.R. 1218 would run afoul of that principle. It imposes the restrictive laws of a woman's home state wherever she travels, in derogation of the usual rules regarding choice of law and full faith and credit.

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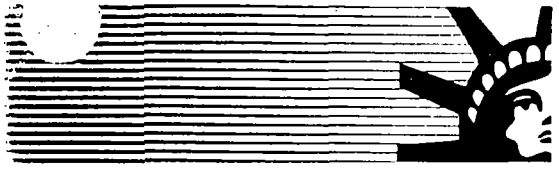

THE "CHILD CUSTODY PROTECTION ACT" AND THE INADEQUACY OF JUDICIAL BYPASS PROCEDURES

The so-called "Child Custody Protection Act" introduced in Congress in 1998 and amended during committee consideration would make it a federal crime for any person other than a parent to knowingly transport a minor across state lines for the purpose of obtaining an abortion if the young woman has not complied with the state of origin's law requiring parental involvement. Anyone, including a grandparent, aunt or religious counselor, could be convicted under the proposed statute.

The bill, if enacted, will have serious and harmful consequences for young women; consequences that are not fully ameliorated by judicial bypass procedures. The Supreme Court has stated that, in order to be constitutional, a state statute requiring parental involvement must have some sort of bypass procedure, such as a judicial bypass.[1] No one person may have an absolute veto over a minor's decision to have an abortion.[2] The Supreme Court has articulated four criteria for a judicial bypass procedure: first, the statute must allow the minor to show that she is mature enough to make her own decision regarding abortion; second, the minor must be allowed to show that, even if she cannot make the decision by herself, the abortion is in her best interests; third, the bypass procedure must ensure the minor's anonymity and confidentiality; and fourth, the bypass procedure must be conducted expeditiously.[3]

Notwithstanding these procedural requirements, judicial bypass proceedings pose formidable obstacles to young women facing crisis pregnancies. Some young women cannot maneuver the legal procedures required, or cannot attend hearings scheduled during school hours. Others do not go or delay going because they fear that the proceedings are not confidential or that they will be recognized by people at the courthouse. Furthermore, many young women do not want to reveal intimate details of their personal lives to strangers.[4] The time required to schedule the court proceeding may also result in a delay of a week or more, thereby increasing the health risks of the abortion.[5]

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Some young women who manage to arrange a hearing face judges who are vehemently anti-choice and who routinely deny petitions, despite rulings by the U.S. Supreme Court that a minor must be granted a bypass if she is mature, or if an abortion is in her best interests. As a result, some minors in states with parental involvement laws travel to a neighboring state to obtain an abortion instead of trying to obtain a judicial bypass.[6] The following examples gathered from studies and appellate court review of lower court decisions demonstrate the difficulties caused by judicial bypass proceedings. The principal difficulties, as this paper outlines, are limited access to providers, anti-choice judges, delays, and loss of confidentiality throughout the bypass procedure.

ACCESS TO THE COURTS AND TO PROVIDERS IS DIFFICULT FOR MINORS.

- Access to abortion providers in the United States is limited. Eighty-four percent of counties do not have an abortion provider.[7] For some women, a reproductive health facility in another state may be the closest to their home or the only one with the necessary services. In North Dakota, for example, one doctor keeps the state's sole abortion clinic open only on Wednesdays.[8]

- One study found that courts in Massachusetts, Minnesota and Rhode Island are not open in the evenings or on weekends, which are times that minors could attend bypass procedures without missing school or arousing suspicions.[9]

ANTI-CHOICE JUDGES OFTEN IGNORE THE STANDARDS SET FORTH BY THE SUPREME COURT.

- In his dissent in *Hodgson v. Minnesota*, Justice Marshall commented, "it is difficult to conceive of any reason, aside from a judge's personal opposition to abortion that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will."[10]

- In Indiana, lawyers and clinics routinely refer teenagers out of state because local judges either refuse to hold hearings or are widely known to be anti-choice.[11]

- A 1983 study found that a number of judges in Massachusetts refuse to handle abortion petitions or focus inappropriately on the morality of abortion and are insulting and rude to the minors and their attorneys.[12] The Supreme Court found that in Minnesota, many judges refuse to even hear bypass proceedings.[13]

- After denying a bypass petition to a 15-year-old Florida girl who was in high school, participated in extracurricular activities, worked 20 hours a week, and baby-sat regularly for her mother, the judge suggested that he, as a representative of the court, had standing to represent the state's interest when the minor appealed the denial.[14]

- A 17-year-old Ohio girl who testified that her father beat her was denied a judicial bypass. At the time, she was senior in high school with a 3.0 average who played team sports, worked 20-25 hours a week, and paid for her automobile expenses and medical care.[15]

- In denying the petition of one young woman, a Missouri judge stated: "Depending upon what ruling I make I hold in my hands the power to kill an unborn child. In our society it's a lot easier to kill an unborn child than the most vicious murderer. . . . I don't believe that this particular juvenile has sufficient intellectual capacity to make a determination that she is willing to kill her own child."[16]

- A judge in Toledo, Ohio denied permission to a 17 ½-year-old woman, an "A" student who planned to attend college and who testified she was not financially or emotionally prepared for college and motherhood at the same time, stating that the girl had "not had enough hard knocks in her life."[17]

- In Louisiana, a judge denied a 15-year-old's bypass petition after asking her a series of inappropriate questions including what the minor would say to the fetus about her decision. Her request was granted only after a rehearing by six appellate court judges.[18]

- A North Carolina Superior Court denied a bypass petition of a mature 16-year-old girl who did well in school, participated in extracurricular activities, and had a part-time job. Despite the judge's findings of her maturity, informed consent, and awareness of the abortion procedure, he concluded that the petitioner was not "well-informed enough" to make the abortion decision on her own. The appellate court eventually reversed the lower court decision, but this extra delay increased the medical risks of the abortion.[19]

JUDICIAL BYPASS PROCEDURES DELAY MINORS' ACCESS TO ABORTION, THEREBY INCREASING THE HEALTH RISKS.

- Many teens recognize the physical signs of pregnancy later than do older women and thus might not discover their pregnancy until the second trimester.[20]

- While a first or second trimester abortion is far safer than childbirth, the risk of death or major complications significantly increases for each week that elapses after eight weeks.[21] The American Medical Association concluded in a 1992 study that parental consent and notice laws "increase the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure."[22]

- A Minnesota district court found that "scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the

hearing of their petitions. This delay may combine with other factors to result in a delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedure to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvenience, and medical risk."[23]

- A Montgomery teenager who sought a judicial bypass petition to obtain an abortion without her mother's consent was granted the petition after it was too late to get an abortion in Montgomery County. The only clinic that could perform the abortion in Alabama was in Birmingham. Because the court order was only valid in Montgomery County, the minor had to repeat the court process, which caused another week to pass before she was able to terminate pregnancy. As a result of the delay, the procedure was riskier and more costly then it would have been when she first sought the abortion.[24]

MINORS FEAR THAT THE JUDICIAL BYPASS PROCEDURE IN FACT LACKS THE NECESSARY CONFIDENTIALITY.

- The American Medical Association noted that "[b]ecause the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a 'back alley' abortion, or resort to a self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973."[25]

- Young women's concern about confidentiality is especially acute in rural areas. For instance, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.[26]

- In Minnesota, judicial bypass petitions have been moved to the courthouse bathroom in order to maintain the minor's anonymity.[27]

- A California social worker testified that adolescents perceive the court as a place where criminals go and that the intimate details they reveal to the judge will be used against them in the future.[28]

- Because "even a perceived lack of confidentiality in health care regarding sexual issues deters them [minors] from seeking services," the American Academy of Pediatrics criticizes parental involvement statutes for delaying medical care to pregnant minors.[29]

12/21/98

Notes:

1. *Hodgson v. Minnesota*, 497 U.S. 417, 420 (1990) (requiring a bypass procedure for a two parent notification statute); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (requiring bypass procedures for parental consent statutes).
2. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).
3. *Akron*, 497 U.S. at 511-13.
4. *Hodgson v. Minnesota*, 648 F. Supp. 756, 763-64 (D. Minn. 1986).
5. *Hodgson*, 648 F. Supp. at 763.
6. Charlotte Ellertson, "Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana," *American Journal of Public Health*, vol. 87, no. 8 (Aug. 1997): 1371-72; Virginia G. Cartoof and Lorraine V. Klerman, "Parental Consent for Abortion: Impact of the Massachusetts Law," *American Journal of Public Health*, vol. 76, no. 4 (Apr. 1986): 397-400.
7. Stanley K. Henshaw and Jennifer Van Vort, "Abortion Services in the United States, 1991 and 1992," *Family Planning Perspectives*, vol. 26, no. 3 (May/June 1994): 103.
8. Jack Hitt. "Who Will Do Abortions Here?," *N.Y. Times Magazine*, Jan. 18, 1998, p. 20.
9. Patricia Donovan, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," *Family Planning Perspectives*, vol. 15, no. 6 (Nov./Dec. 1983): 259.
10. *Hodgson*, 497 U.S. at 475.
11. Tamar Lewin, "Parental Consent to Abortion: How Enforcement Can Vary," *New York Times*, May 28, 1992, p. A1.
12. Donovan, "Judging Teenagers," 259.
13. *Hodgson*, 497 U.S. at 475.
14. *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989).
15. *In re Jane Doe 1*, 57 Ohio St. 3d 135, 135 (Ohio 1991).
16. *T.L.J. v. Webster*, 792 F. 2d 734, 738-39 n.4 (1986) (reversing the decision of the St. Charles County Juvenile Court).
17. Tamar Lewin, "Parental Consent," p. B8.
18. National Abortion Federation (NAF) and the National Women's Law Center, "The Judicial Bypass Procedure Fails to Protect Young Women," (no date) (factsheet).
19. *In re Doe*, No. COA97-323 at 2-3 (N.C. Ct. App. June 3, 1997).
20. Jeannie Rosoff, Stanley Henshaw, and Jennifer Van Vort, "What's Happening to Abortion Rates?" *Sexuality and American Social Policy*, 1996: xvii.
21. Willard Cates, Jr. and David Grimes, "Morbidity and Mortality of Abortion in the United States," *Abortion and Sterilization*, Jane Hodgson, ed. (New York: Grune and Stratton, 1981), 158; Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for*

America? (New York: Alan Guttmacher Institute (AGI), 1990), 29-30.

22. American Medical Association (AMA), "Induced Termination of Pregnancy Before and After *Roe v. Wade*, Trends in the Mortality and Morbidity of Women," *Journal of the American Medical Association (JAMA)*, vol. 268, no. 22 (Dec. 1992): 3238.

23. *Hodgson*, 648 F. Supp. at 763.

24. NAF & Planned Parenthood Federation of America, "Undue Burdens: the States' Experiences," 1993 (factsheet).

25. Council on Ethical and Judicial Affairs, AMA, "Mandatory Parental Consent to Abortion," *JAMA*, vol. 269, no. 1 (Jan. 6, 1993): 83.

26. *Memphis Planned Parenthood v. Sundquist*, No. 3:89-0520, slip op. at 13 (M.D. Tenn. Aug. 26, 1997).

27. Donovan, "Judging Teenagers," 264.

28. *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 845 (Cal. 1997).

29. Committee on Adolescence, American Academy of Pediatrics (AAP), "The Adolescent's Right to Confidential Care When Considering Abortion," *Pediatrics*, vol. 97, no. 5 (May 1996): 749.

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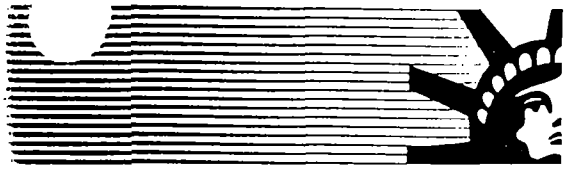

THE "CHILD CUSTODY PROTECTION ACT" THREATENS YOUNG WOMEN'S HEALTH

Legislation entitled the "Child Custody Protection Act" was introduced in Congress in 1998 and amended during committee consideration that would prohibit anyone other than a parent, including a grandparent, aunt, or religious counselor from taking a young woman across state lines for an abortion if it would violate the home state's parental involvement law. Similar legislation is expected to be introduced in 1999.

Adolescents should be encouraged to seek their parents' advice and counsel when facing difficult choices regarding abortion and other reproductive health issues. Indeed, most young women do involve one or both parents when considering abortion. Even in states that enforce no mandatory parental consent or notice requirements, 61 percent of parents knew of their daughters' pregnancy.[1] The government, however, cannot mandate healthy family communication where it does not already exist.

When a young woman cannot involve a parent, public policies and medical professionals should encourage her to involve a trusted adult. Indeed, one study found that more than half of all young women who did not involve a parent did involve an adult, including 15 percent who involved a step-parent or adult relative.[2] However, if the so-called "Child Custody Protection Act" is enacted, it could endanger young women's lives and health by isolating those who believe they cannot involve a parent. Rather than making abortion more difficult and dangerous for young women, Congress should do more to create the conditions that enable women to make true choices by providing comprehensive sexuality education and ensuring that women have access to a range of effective contraceptives.

<u>This Legislation Would Further Isolate Those Young Women Who -- For Good Reasons -- Do Not Involve A Parent In Their Decision To Have An Abortion.</u>

Most young women find love, support and safety in the home. Many, however, justifiably fear that they would be physically or emotionally abused if forced to disclose their pregnancy. Often young women who do not involve a parent come from families where government-mandated disclosure could have devastating effects.

- Approximately 3.2 million cases of child abuse were reported in 1997. Young women considering abortion are particularly vulnerable

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because family violence is often at its worst during a family member's pregnancy.[3]

- Among minors who did not tell a parent of their abortion, 30 percent had experienced violence in their family or feared violence or being forced to leave home.[4]

- In Idaho, a 13-year-old sixth grade student named Spring Adams was shot to death by her father after he learned she was to terminate a pregnancy caused by his acts of incest.[5]

- In addition to fear of violence, some minors do not involve a parent because they believe that the knowledge would damage their relationship with the parent, they fear that it would escalate conflict or coercion, or they want to protect a vulnerable parent from stress and disappointment.[6]

When a young woman believes that she cannot involve a parent, the law cannot mandate healthy, open family communication. Indeed there is no evidence that laws like the "Child Custody Protection Act" will do anything but isolate young women who believe -- for valid reasons -- that they cannot involve a parent. Instead of encouraging young women to involve a trusted adult who may be able to offer much needed assistance, this law will cause some young women to face these decisions alone, without any help.

<u>This Legislation Would Endanger Young Women's Health.</u>

Young women who determine that they cannot involve a parent often seek help and guidance from other important and trusted people in their lives such as grandparents, aunts or ministers. Such adults can provide a minor with valuable advice, counsel and assistance. However, this bill would discourage young women from seeking such help or assistance and would further isolate them in their decision. As a result, the legislation could force some young women to turn to illegal or self-induced abortion or to delay the procedure.

- By discouraging -- in fact, criminalizing -- people who help young women in crisis pregnancies, the law could expose young women to increased health risks. In one study, 93 percent of the minors who did not involve a parent in their decision to obtain an abortion were nonetheless accompanied by someone to the abortion clinic.[7] Such company is important to provide assistance to a minor before and after the abortion. However, this legislation will force some minors to have an unaccompanied abortion and potentially to drive themselves long distances, thereby exposing them to greater health risks.

- When faced with parental involvement laws, young women who feel they cannot involve a parent take drastic steps:

- The American Medical Association noted that "[b]ecause the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a 'back alley' abortion, or resort to self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973."[8]

- In Indiana, Rebecca Bell, a young woman who had a very close relationship with her parents, died from an illegal abortion because she did not want her parents to know about her pregnancy. Indiana law required parental consent before she could have a legal abortion.[9]

- Obstacles such as parental involvement laws increase the health risks to women by increasing the gestational age at which young women obtain abortions. The American Medical Association concluded in a 1992 study that parental consent and notice laws "increase the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure."[10] Although a first or second trimester abortion is far safer than childbirth, the risk of death or major complications significantly increases for each week that elapses after eight weeks.[11] This legislation could lengthen the delays for young women seeking abortion, causing them to get later abortions.

- This legislation could require young women to travel farther to obtain needed abortion services. Access to abortion providers in the United States is limited. Eighty-six percent of counties do not have an abortion provider.[12] For some women, a reproductive health facility in another state may be the closest to their home. For instance, a reproductive health clinic in Duluth, Minnesota serves women from Minnesota, Wisconsin, Michigan and Ontario, Canada.[13] Under this legislation, a grandmother could be subject to criminal charges for taking her granddaughter to an out-of-state facility, even if the out-of-state facility was the closest to the young woman's home.

Because A Judicial Bypass Is Not A Realistic Option, Some Young Women Obtain Abortions in Neighboring States.

Twenty-eight states that require parental consent or notice laws provide a judicial bypass through which a young woman can seek a court order allowing an abortion without parental involvement.[14] For young women, it can be overwhelming and at times impossible to manage the judicial bypass procedures. Some young women cannot maneuver the legal procedures required, or cannot attend hearings scheduled during school hours. Others do not go or delay going because they fear that the proceedings are not confidential or that they will be recognized by people at the courthouse. Many young women do not want to reveal intimate details of their personal lives to strangers.[15] The time required to schedule the court proceeding may result in a

delay of a week or more, thereby increasing the health risks of the abortion.[16]

Some young women who manage to arrange a hearing face judges who are vehemently anti-choice and who routinely deny petitions, despite rulings by the U.S. Supreme Court that a minor must be granted a bypass if she is mature or if an abortion is in her best interests. As a result, minors in states with parental involvement laws frequently go to a neighboring state to obtain an abortion instead of trying to obtain a judicial bypass.[17]

- In Indiana, lawyers and clinics routinely refer teenagers out of state because local judges either refuse to hold hearings or are widely known to be anti-choice.[18]

- Young women's concern about confidentiality is especially acute in rural areas. For instance, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.[19]

- The Ohio Supreme Court upheld the denial of a petition of a 17-year-old girl who testified that her father beat her. At the time, she was a senior in high school with a 3.0 average who played team sports, worked 20-25 hours a week, and paid for her automobile expenses and medical care.[20]

The Legislation Contains Legal Deficiencies.

The legislation contains several legal weaknesses that could render it unconstitutional.

- Under this legislation, a young woman who determined that she could not involve her parents may have to go through a judicial bypass in two states. For instance, if the young woman lived in a state with one parent consent law, but the closest clinic was in a state that also had a one parent consent law, the minor would have to go through the judicial bypass in her state of residence as well as in the state that she obtained the abortion. Requiring a minor to juggle judicial bypasses in two different states could constitute an unconstitutional undue burden.[21]

- Under the legislation, a person could be prosecuted for taking a minor to a neighboring state, even if that person does not intend -- or even know -- that the parental involvement law of the state of residence has not been followed. Such a result would violate the due process rights of a person who assists a minor facing a crisis pregnancy by creating a strict liability statute.[22]

- The "life" exception is unconstitutionally narrow. First, the "life" exception impermissibly limits the situations that would qualify under it by enumerating certain circumstances -- but not others. As the Supreme Court has recognized, life exceptions cannot pick and choose among life-threatening circumstances.[23] Second, the legislation contains no exception at all to protect a woman's health.

As the Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[24]

Making Abortion Less Necessary Among Teenagers Requires A Comprehensive Effort to Reduce Teen Pregnancy.

Abortion among teenagers should be made less necessary, not more difficult and dangerous. A comprehensive approach to promoting adolescent reproductive health and reducing teen pregnancy will require an array of components, including: age-appropriate health and sexuality education; life options programs that offer teens practical life skills and the motivation to delay sexual activity; programs for pregnant and parenting teens that teach parenting skills and help ensure that teens finish school; increased information about emergency contraception pills; and access to confidential health services, including family planning and abortion.

1/6/99

Notes:

1. Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," *Family Planning Perspectives*, vol. 24, no. 5 (Sept./Oct. 1992): 197, 199-200.

2. Henshaw and Kost, "Parental Involvement," 207.

3. Ching-Tung Wang and Deborah Daro, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1997 Annual Fifty State Survey* (Chicago: National Committee to Prevent Child Abuse, 1998); H. Amaro, et al., "Violence During Pregnancy and Substance Abuse," *American Journal of Public Health*, vol. 80 (1990): 575-579.

4. Henshaw and Kost, "Parental Involvement," 207.

5. Margie Boule, "An American Tragedy," *Sunday Oregonian*, Aug. 27, 1989.

6. American Academy of Pediatrics, Committee on Adolescence, "The Adolescent's Right to Confidential Care When Considering Abortion," *Pediatrics*, vol. 97, no. 5 (May 1996): 748.

7. Henshaw and Kost, "Parental Involvement," 207.

8. American Medical Association, Council on Ethical and Judicial Affairs, "Mandatory Parental Consent to Abortion," *Journal of the American Medical Association*, vol. 269, no. 1 (Jan. 6, 1993): 83.

9. Rochelle Sharpe, "Abortion Law: Fatal Effect?" Gannett News Service, Nov. 27, 1989; CBS, "60 Minutes," Feb. 24, 1991 (videotape on file with NARAL).

10. American Medical Association, "Induced Termination of Pregnancy Before and After *Roe v. Wade*, Trends in the Mortality and Morbidity of Women," *JAMA*, vol. 268, no. 22 (Dec. 1992): 3238.

11. Willard Cates, Jr. and David Grimes, "Morbidity and Mortality of Abortion in the United States," *Abortion and Sterilization*, Jane Hodgson, ed. (New York: Grune and Stratton, 1981), 158; Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* (New York: Alan Guttmacher Institute, 1990), 29-30.

12. Stanley K. Henshaw, "Abortion Incidence and Services in the United States, 1995-1996," *Family Planning Perspectives*, vol. 30, no. 6 (Nov./Dec. 1998): 263.

13. *Hodgson v. Minnesota*, 648 F. Supp. 756, 761 (D. Minn. 1986).

14. The NARAL Foundation/NARAL, "Restricting Minors' Access to Abortions," *Who Decides? A State-By-State Review of Abortion and Reproductive Rights, 1999*, 8th Edition (Washington, D.C.: The NARAL Foundation/NARAL, 1999), 252.

15. *Hodgson*, 648 F. Supp. at 763-64.

16. *Hodgson*, 648 F. Supp. at 763.

17. Charlotte Ellertson, "Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana," *American Journal of Public Health*, vol 87, no. 8 (Aug. 1997): 1371-72; Virginia G. Cartoof and Lorraine V. Klerman, "Parental Consent for Abortion: Impact of the Massachusetts Law," *American Journal of Public Health*, vol. 76, no. 4 (April 1986): 397-400.

18. Tamar Lewin, "Parental Consent to Abortion: How Enforcement Can Vary," *New York Times*, May 28, 1992, A1.

19. *Memphis Planned Parenthood v. Sundquist*, No. 3:89-0520, slip op. at 13 (M.D. Tenn. Aug. 26, 1997).

20. *In re Jane Doe 1*, 57 Ohio St.3d 135 (1991).

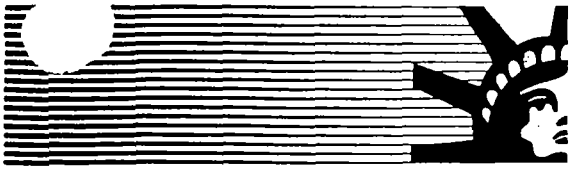
21. Under *Planned Parenthood v. Casey*, a restriction that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion is an unconstitutional undue burden. 505 U.S. 833 (1992).

22. *Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979); *Liparota v. United States*, 471 U.S. 419, 423-428 (1985).

23. *Casey*, 505 U.S. at 879.

24. *Casey*, 505 U.S. at 880 (citations omitted).

NARAL *Promoting Reproductive Choices*



MYTHS AND FACTS
ABOUT THE "CHILD CUSTODY PROTECTION ACT"

- **Myth: Enactment of the "Child Custody Protection Act" (CCPA) would promote healthy family communication and family values.**

  - **Fact:** *Even in states that do not enforce mandatory parental involvement laws, 61 percent of parents know of their daughters' pregnancy. For the minority of young women who do not involve a parent, the law cannot mandate healthy family communication where it doesn't already exist. Laws do not provide appropriate remedies for every social problem, such as poor family communications.*

    For women who cannot speak with their parents about having an abortion, this bill would endanger family relationships. Many young women who feel they cannot seek the counsel of their parents turn to other trusted family members when they face a crisis pregnancy. Indeed, 93 percent of minors who don't involve a parent are accompanied by someone to the reproductive health facility. This bill would ***criminalize*** *the conduct of a grandmother who helps her granddaughter in time of need. Aunts and other trusted family members would face* ***imprisonment*** *if they take a young relative across state lines without complying with her home state's parental involvement law. The bill, in sum, would isolate young women from supportive family members.*

- **Myth: Parents will always be helpful in assisting teenagers facing a crisis pregnancy.**

  - **Fact:** *As the Supreme Court has recognized, there are circumstances that preclude minors from involving their parents when they face crisis pregnancies. For some teenagers, the pregnancy may be a result of incest, as in the case of thirteen-year-old Spring Adams. Spring Adams was murdered by her father the night before she was scheduled to terminate the pregnancy that had resulted from his criminal acts of incest. Other teenagers may correctly suspect that telling a parent would trigger abuse. And some young women, like Becky*

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Bell, have good relations with their parents, but desire so much to avoid hurting their parents or losing their parents' esteem that they will take drastic measures to avoid parental involvement. In Becky Bell's tragic case, she sought an illegal abortion, which resulted in her death.

- **Myth: The bill protects minors who cannot tell their parents because minors can appear before judges and bypass any parental involvement law.**

  - **Fact:** *It is not even clear, as a practical matter, that this bill would permit a teenager to use a bypass order from her home state in another state, or that it would permit a doctor to rely on a bypass order from another jurisdiction without further resort to judicial proceedings.*

    Moreover, judicial bypass procedures often pose formidable obstacles to young women facing crisis pregnancies. Some anti-choice judges routinely deny minors' petitions. Bypass procedures, including their appeals, often delay abortions, thus increasing the risk and sometimes the cost of the procedure. Moreover, the most vulnerable teenagers may be too intimidated by the bypass procedure; they might rather resort to traveling alone or obtaining an illegal abortion than appear before a judge to discuss intimate matters. Young women's concern about the confidentiality of bypass proceedings is particularly acute in rural areas. One young woman discovered that her bypass hearing would be conducted by her former Sunday school teacher.

    To give an example of the inadequacy of bypass procedures: a judge in Toledo, Ohio denied permission to a 17 ½-year-old woman, an "A" student who planned to attend college and who testified that she was not financially or emotionally prepared for motherhood at the same time. The judge stated that the young woman had "not had enough hard knocks in her life."

- **Myth: This bill would promote the health of minors because parents know their teenager's medical history and need to know about an abortion.**

  - **Fact:** *On the contrary, this bill is detrimental to young women's health. First, legal abortions, particularly early in pregnancy, are very safe. Second, studies demonstrate that minors are capable of making competent medical decisions without parental involvement.*

    Finally, although abortion is very safe, it is still advisable to have someone else drive a woman home from a surgical abortion. Thus, this bill would jeopardize the health of young women, who would obtain abortions without help from trusted adults or friends. More minors might attempt to drive themselves to clinics, or in desperation, some might resort to illegal abortions.

- **Myth: Federal intervention into matters traditionally regulated by the states is warranted here because young women are being coerced into having abortions out of state.**

  - **Fact:** *NARAL strongly believes that no one should be coerced when making reproductive health decisions. One safeguard against coercion is a bedrock principle of medical ethics and medical malpractice law, informed consent. Medical personnel* ***must*** *obtain a woman's informed consent before performing an abortion.*

- **Myth: Existing laws are inadequate in protecting young women from undue influence of adults.**

  - **Fact:** *Laws protecting young women -- such as prohibitions against kidnaping and statutory rape -- are already on the books. The one case proponents of this measure cite, Commonwealth v. Rosa Marie Hartford, is actually being resolved under existing laws.*

    The scenarios described by proponents of this legislation -- focusing on coercion and undue influence -- cover only a very narrow range of the conduct that the CCPA would actually prohibit. Also swept in by the bill is the vital support provided by caring family members, friends, and religious counselors who accompany young women to clinics.

- **Myth: This bill would ensure that state laws on parental involvement are not evaded.**

  - **Fact:** *As a factual matter, many young women seek abortions out of state because they want to go to the closest clinic or to protect their confidentiality -- not to evade state law. In addition, the CCPA contains no requirement that the person accompanying the minor have an intent to evade state law; it only requires the intent to transport a minor to obtain an abortion.*

    As a legal matter, to our knowledge, the states that have enacted parental involvement laws have not attempted to ensure that their laws apply to their citizens outside their home states. This fact undermines the assertions of proponents of the CCPA, who suggest that Congress would simply be ensuring enforcement of state parental involvement laws by enacting the CCPA.

    Most importantly, if Congress enacts this proposal, the federal government would infringe upon the rights and expectations of Americans that they may avail

themselves of services offered in various states. Enacting this law would be akin to telling citizens in a dry state that if they traveled over state lines for a beer, they could be prosecuted. It would resemble federal criminalization of gambling vacations to Las Vegas or Atlantic City for citizens of states that prohibit gambling. Enacting the CCPA is as unimaginable and un-American as telling citizens of states that prohibit the discharge of firearms that they can't go on hunting trips or go target practicing in states that allow such activities.

- **Myth: Enacting this bill would be a routine exercise of Congressional commerce clause jurisdiction.**

  - **Fact:** *The CCPA is hardly routine business. Congress would take a dramatic and perhaps unprecedented step if it criminalizes interstate travel for a lawful -- even constitutionally protected -- purpose. Congress has previously prohibited the interstate transport of fugitive felons and prostitutes. Transporting a vulnerable minor seeking an abortion who cannot involve her parents in her decision is wholly dissimilar to previous exercises of Congressional authority.*

Sept. 1998

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

FAX COVER SHEET

DATE: 6/15/99

TO: Jenny Luray

PHONE NO. _____

FAX NO. 456-7311

FROM: PATTY FIRST

PHONE NO.: 202/514-4810

FAX NO. 202/514-9149

NO. OF PAGES: 2 (EXCLUDING COVER)

COMMENTS: Here's what we sent. The Committee did not get to the bill.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 15, 1999

The Honorable Henry Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hyde:

We understand the Committee on the Judiciary is marking up H.R. 1218, "The Child Custody Protection Act of 1999". The Administration's position on this bill is contained in the Statement of Administration Position of July 14, 1998 (copy enclosed).

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 14, 1998
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 3682 - Child Custody Protection Act
(Rep. Ros-Lehtinen (R) FL and 136 others)

The Administration strongly opposes enactment of H.R. 3682 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers would recommend that he veto it.

As stated in recent letters from White House Chief-of-Staff Erskine Bowles to the House and Senate Committees on the Judiciary, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 3682, as reported by the House Committee on the Judiciary, fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

- Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.

- Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.

- Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998.

The Administration is concerned that H.R. 3682 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 3682 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

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Total Pages: 14

LRM ID: RJP99

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

URGENT

Monday, June 14, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Robert J. Pellicci
E-Mail: Robert_J._Pellicci@omb.eop.gov
PHONE: (202)395-4871 FAX: (202)395-6148

SUBJECT: **JUSTICE Report on HR1218 Child Custody Protection Act**

DEADLINE: **5:30 p.m. Monday, June 14, 1999**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: House Judiciary Committee markup is scheduled for tomorrow morning, June 15th. DEADLINE IS FIRM.

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LRM ID: RJP99 SUBJECT: JUSTICE Report on HR1218 Child Custody Protection Act

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RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: **Robert J. Pellicci Phone: 395-4871 Fax: 395-6148**
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ **(Date)**

_____ **(Name)**

_____ **(Agency)**

_____ **(Telephone)**

The following is the response of our agency to your request for views on the above-captioned subject:

_____ **Concur**

_____ **No Objection**

_____ **No Comment**

_____ **See proposed edits on pages** _____

_____ **Other:** _____

_____ **FAX RETURN of** _____ **pages, attached to this response sheet**

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

The Honorable Henry Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand the Committee on the Judiciary is marking up H.R. 1218, "The Child Custody Protection Act of 1999". For the reasons stated in our letter to you of June 24, 1998 (copy enclosed) on H.R. 3682, an almost identical bill, we oppose the enactment of this legislation as drafted.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

June 24, 1998

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

As was stated in the June 17, 1998 letter from White House Chief of Staff Erskine Bowles, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. The Administration appreciates the concerns of the sponsors of H.R. 3682, the "Child Custody Protection Act," about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overbearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning H.R. 3682, as marked up by the Subcommittee on the Constitution of the Committee on the Judiciary on June 11, 1998. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF H.R. 3682

H.R. 3682 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a) would read as follows:

> Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains

the abortion, shall be fined under this title or imprisoned not more than one year, or both.[1]

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.[2] As we construe the provision, it appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not

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[1] The referenced exception in proposed § 2401(b) would provide that "[t]he prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself."

Subsection (d)(1) would define the operative phrase "a law requiring parental involvement in a minor's abortion decision" as:

> a law--
>
> (A) requiring, before an abortion is performed on a minor, either--
>
> (i) the notification to, or consent of, a parent of that minor; or
>
> (ii) proceedings in a State court; and
>
> (B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (d)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (d)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

[2] In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

seek to impose such restrictions on out-of-state abortions.[3]

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, H.R. 3682 would create a civil cause of action: proposed 18 U.S.C. § 2401(c) would provide that "[a]ny parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action."

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, H.R. 3682 must be amended to exclude close family members from civil and criminal liability. The defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(c), could well be a member of the minor's own family. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor from seeking the advice and counsel of those closest to her. We therefore recommend that H.R. 3682 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that H.R. 3682 must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

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[3] There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law, Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

To address the risk of civil or criminal liability for persons who provide information, counseling, or referral or medical services, we would propose adding a provision with language along the following lines:

> This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.[4]

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a State may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

> [t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions – such as parental notice or consent requirements – are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson v. Minnesota, 497 U.S. 417, 450 (1990); see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the

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[4] Given § 2401(c)'s open-endedness and broad potential for unintended abuse, we recommend eliminating the provision from the bill or, in the alternative, limiting the provision to suits against persons who have been convicted under the criminal liability provision of § 2401(a).

interest in potential life must be calculated to inform the woman's free choice, not hinder it.").[5] The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A State that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity.[6]

B. Constitutional Problems Raised by H.R. 3682

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements of her home state's parental involvement law, even when the requirements of that law would not apply to out-of-state abortions. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases,

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[5] All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

[6] The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1990). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when, for example, a minor's parents in a "parental consent" state would have provided consent, or the minor would have been able to obtain a judicial bypass, had mechanisms for manifesting such consent or obtaining such a bypass for an out-of-state abortion been available. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state. The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack jurisdiction under state law to provide a legal bypass for an abortion to be performed out of state.[7]

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

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[7] In Montana, for example, the legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." Mont. Code Ann. § 50-20-212(2)(a) (1997). The "notice requirement," in turn, is imposed upon the "physician" who is to perform the abortion (who may, however, rely upon notice given by the "referring physician"). Id. § 50-20-204 (1997). And "physician," in turn, is defined to mean "a person licensed to practice medicine under [Montana law]." Id. § 50-20-203 (1997). Therefore, in the case of an out-of-state abortion, there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of the requirement.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. See, e.g., S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). It therefore would not be at all clear how a minor seeking an out-of-state abortion could satisfy even the consent portion of such a home-state law in a manner that would permit a "transporter" of that minor to avoid criminal liability under proposed § 2401(a).

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id. at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," id. (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.[8]

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[8] In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. Cf. id. (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes).

Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will often be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. Seeking to aid her, they might well engage in conduct they reasonably believe to be lawful -- driving a minor who is a granddaughter, a niece, a parishioner, or a friend across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

In addition, Congress has employed a willfulness standard where the criminal statute incorporates complex elements. Criminal liability under 2401(a) would turn in large part on whether the state of residence's statutory requirements concerning parental consent, notification and judicial bypass when a minor seeks an abortion had been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as previously noted, it is novel to tie federal criminal liability to conduct that is lawful in the state in which it occurs.

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challenge to a congressional enactment such as H.R. 3682.

To avoid these problems, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

D. Federalism Concerns

H.R. 3682 raises novel and important federalism issues. First, H.R. 3682 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, H.R. 3682 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances, the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, H.R. 3682 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under H.R. 3682, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

Enforcement of proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, supra, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under

the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. H.R. 3682 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of H.R. 3682 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

Fifth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that statute would require, of making the federal government appear overzealous and heavyhanded.[9]

Sixth, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools – including laws against battery, kidnapping, and false imprisonment, and custody laws – to prevent and punish the abduction or mistreatment of minors.[10] The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that H.R. 3682 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means – for example, hitchhiking or traveling alone – of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

* * * * *

Thank you for the opportunity to comment on this important matter. If we may be of additional assistance, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

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[9] A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

[10] Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 14, 1998
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 3682 - Child Custody Protection Act
(Rep. Ros-Lehtinen (R) FL and 136 others)

The Administration strongly opposes enactment of H.R. 3682 in its current form. If a bill is presented to the President that fails to address the concerns that are described below, the President's senior advisers would recommend that he veto it.

As stated in recent letters from White House Chief-of-Staff Erskine Bowles to the House and Senate Committees on the Judiciary, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. Unfortunately, H.R. 3682, as reported by the House Committee on the Judiciary, fails to address a number of the critical concerns raised by the Administration. Specifically, the bill must be amended to:

- Exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and minor and adult siblings could face criminal prosecution for coming to the aid of a relative in distress.

- Ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability.

- Address constitutional and other legal infirmities that the Department of Justice has identified in particular provisions of the legislation. These concerns were transmitted to the House Committee on the Judiciary on June 24, 1998.

The Administration is concerned that H.R. 3682 raises important federalism issues, including the rights of States to regulate matters within their own boundaries. The Administration believes, however, that legislation that addresses the concerns noted above, and that is carefully targeted at punishing non-relatives who transport minors across State lines for the purpose of avoiding parental involvement requirements, would mitigate the federalism and the Administration's other concerns.

Pay-As-You-Go Scoring

H.R. 3682 could affect both direct spending and receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is zero.

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

FAX COVER SHEET

DATE: 6/14/99

TO: Jennifer Luray

PHONE NO. 456-7300
FAX NO. 456-7311

FROM: PATTY FIRST

PHONE NO.: 202/514-4810

FAX NO. 202/514-9149

NO. OF PAGES: a bunch (EXCLUDING COVER)

COMMENTS: I just noticed that last year's SAP says we "strongly oppose". An argument in our favor!!

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

The Honorable Henry Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand the Committee on the Judiciary is marking up H.R. 1218, "The Child Custody Protection Act of 1999". For the reasons stated in our letter to you of June 24, 1998 (copy enclosed) on H.R. 3682, an almost identical bill, we oppose the enactment of this legislation as drafted.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

June 24, 1998

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

As was stated in the June 17, 1998 letter from White House Chief of Staff Erskine Bowles, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding parental involvement requirements. The Administration appreciates the concerns of the sponsors of H.R. 3682, the "Child Custody Protection Act," about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overbearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning H.R. 3682, as marked up by the Subcommittee on the Constitution of the Committee on the Judiciary on June 11, 1998. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF H.R. 3682

H.R. 3682 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a) would read as follows:

> Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent such individual obtain an abortion, if in fact the requirements of a law, requiring parental involvement in a minor's abortion decision, in the State where the individual resides, are not met before the individual obtains

the abortion, shall be fined under this title or imprisoned not more than one year, or both.[1]

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.[2] As we construe the provision, it appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not

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[1] The referenced exception in proposed § 2401(b) would provide that "[t]he prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself."

Subsection (d)(1) would define the operative phrase "a law requiring parental involvement in a minor's abortion decision" as:

> a law--
>
> (A) requiring, before an abortion is performed on a minor, either--
>
> (i) the notification to, or consent of, a parent of that minor; or
>
> (ii) proceedings in a State court; and
>
> (B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (d)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (d)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

[2] In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

seek to impose such restrictions on out-of-state abortions.[3]

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, H.R. 3682 would create a civil cause of action: proposed 18 U.S.C. § 2401(c) would provide that "[a]ny parent or guardian who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action."

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, H.R. 3682 must be amended to exclude close family members from civil and criminal liability. The defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(c), could well be a member of the minor's own family. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor from seeking the advice and counsel of those closest to her. We therefore recommend that H.R. 3682 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that H.R. 3682 must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

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[3] There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law, Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

To address the risk of civil or criminal liability for persons who provide information, counseling, or referral or medical services, we would propose adding a provision with language along the following lines:

> This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.[4]

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a State may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

> [t]he abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson v. Minnesota, 497 U.S. 417, 450 (1990); see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the

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[4] Given § 2401(c)'s open-endedness and broad potential for unintended abuse, we recommend eliminating the provision from the bill or, in the alternative, limiting the provision to suits against persons who have been convicted under the criminal liability provision of § 2401(a).

interest in potential life must be calculated to inform the woman's free choice, not hinder it.").[5] The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A State that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity.[6]

B. Constitutional Problems Raised by H.R. 3682

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements of her home state's parental involvement law, even when the requirements of that law would not apply to out-of-state abortions. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases,

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[5] All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

[6] The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1990). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when, for example, a minor's parents in a "parental consent" state would have provided consent, or the minor would have been able to obtain a judicial bypass, had mechanisms for manifesting such consent or obtaining such a bypass for an out-of-state abortion been available. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack jurisdiction under state law to provide a legal bypass for an abortion to be performed out of state.[7]

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

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[7] In Montana, for example, the legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." Mont. Code Ann. § 50-20-212(2)(a) (1997). The "notice requirement," in turn, is imposed upon the "physician" who is to perform the abortion (who may, however, rely upon notice given by the "referring physician"). Id. § 50-20-204 (1997). And "physician," in turn, is defined to mean "a person licensed to practice medicine under [Montana law]." Id. § 50-20-203 (1997). Therefore, in the case of an out-of-state abortion, there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of the requirement.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. See, e.g., S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). It therefore would not be at all clear how a minor seeking an out-of-state abortion could satisfy even the consent portion of such a home-state law in a manner that would permit a "transporter" of that minor to avoid criminal liability under proposed § 2401(a).

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id, at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," id, (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.[8]

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[8] In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. Cf. id. (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes).

Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help – people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will often be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. Seeking to aid her, they might well engage in conduct they reasonably believe to be lawful – driving a minor who is a granddaughter, a niece, a parishioner, or a friend across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

In addition, Congress has employed a willfulness standard where the criminal statute incorporates complex elements. Criminal liability under 2401(a) would turn in large part on whether the state of residence's statutory requirements concerning parental consent, notification and judicial bypass when a minor seeks an abortion had been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as previously noted, it is novel to tie federal criminal liability to conduct that is lawful in the state in which it occurs.

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challenge to a congressional enactment such as H.R. 3682.

To avoid these problems, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

D. Federalism Concerns

H.R. 3682 raises novel and important federalism issues. First, H.R. 3682 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, H.R. 3682 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances, the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, H.R. 3682 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens – should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under H.R. 3682, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

Enforcement of proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, supra, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under

the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. H.R. 3682 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of H.R. 3682 would fall entirely to the FBI – in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

Fifth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that statute would require, of making the federal government appear overzealous and heavyhanded.[9]

Sixth, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws -- to prevent and punish the abduction or mistreatment of minors.[10] The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that H.R. 3682 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

* * * * *

Thank you for the opportunity to comment on this important matter. If we may be of additional assistance, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

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[9] A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

[10] Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

July 8, 1998

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

As was stated in the June 17, 1998, letter from White House Chief of Staff Erskine Bowles to Chairman Hyde of the House Judiciary Committee, the Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purpose of avoiding laws respecting parental involvement in a minor's decision to obtain an abortion. The Administration appreciates the concerns of the sponsors of S. 1645, the Child Custody Protection Act of 1998, about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about preventing overbearing and sometimes predatory adults from improperly influencing minors to choose an abortion.

This letter provides the views of the Department of Justice concerning the amendment in the nature of a substitute to S. 1645, which we understand may be proposed by Senator Abraham. Although, in our view, the bill's civil and criminal provisions, as drafted, are overbroad and raise serious constitutional, legal, and law enforcement concerns, we believe that legislation could be crafted that would appropriately target non-relatives who transport minors across state lines for the purpose of avoiding parental involvement requirements.

I. OPERATION OF S. 1645

S. 1645 would establish a new criminal prohibition to be codified as 18 U.S.C. § 2401(a). Proposed § 2401(a)(1) would read as follows:

> Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law, requiring parental involvement

in a minor's abortion decision, of the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.[1]

The restriction on interstate transport would be triggered if the law in the state where the minor resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.[2] Under proposed § 2401(a)(2), an "abridgement of the right of a parent" under such a law would occur if an abortion were performed on a minor in a state other than the state where she resides, "without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the [minor] resides." As we construe the provision, it

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[1] Proposed § 2401(b) would contain two exceptions. Under § 2401(b)(1), the prohibition of subsection (a) would not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Under § 2401(b)(2), "[a]n individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 [of Title 18] based on a violation of this section."

Subsection (e)(1) would define the operative phrase "a law requiring parental involvement in a minor's abortion decision" as:

> a law--
>
> (A) requiring, before an abortion is performed on a minor, either--
>
> (i) the notification to, or consent of, a parent of that minor; or
>
> (ii) proceedings in a State court; and
>
> (B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph.

Subsection (e)(2) would define "parent" as someone "who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required," and who also is "(A) a parent or guardian; (B) a legal custodian; or (C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides."

Subsection (e)(3) would define a "minor" as "an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision."

[2] In section III, below, we discuss the constitutional requirements for such a state notice or consent regime.

appears that it would be a federal crime to transport a minor across state lines for an out-of-state abortion if the statutory prerequisites that would have been applicable if the abortion had been performed in the minor's home state had not previously been satisfied. Proposed § 2401(a) in this way would restrict the ability of minors to obtain out-of-state abortions, even where their home states would not seek to impose such restrictions on out-of-state abortions.[3]

Violation of § 2401(a) would be punishable by fine and by up to one year in prison, making it a Class A misdemeanor. See 18 U.S.C. § 3559(a)(6) (1994). In addition, S. 1645 would create a civil cause of action: Proposed 18 U.S.C. § 2401(d) would provide that "[a]ny parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action." Under proposed § 2401(c), it would be an affirmative defense to prosecution or to a civil action

> that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

II. CONCERNS REGARDING THE SCOPE OF CIVIL AND CRIMINAL LIABILITY

As was stated in White House Chief of Staff Erskine Bowles's letter, the proposed legislation must be amended to exclude close family members from civil and criminal liability. While S. 1645 does exempt parents from liability, the defendant in many potential prosecutions under proposed § 2401(a), or in a civil action under § 2401(d), could well be another member of the minor's own family. The same considerations that support exempting parents from liability also support a somewhat broader exemption that would encompass other family members. Imposing criminal and civil sanctions on family members, requiring family members to testify against each other, and raising the prospect of lawsuits by one family member against another could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard of the minor's best interests. In addition, the prospect of criminal or civil action against family members would discourage a minor

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[3] There is a significant question whether and to what extent the Constitution would even permit states to impose their abortion laws extraterritorially with respect to their citizens' out-of-state abortions. See Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975); Seth F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451 (1992).

from seeking the advice and counsel of those closest to her. We therefore recommend that S. 1645 incorporate an exception for family members who transport the minor.

Chief of Staff Bowles's letter also stated that the proposed legislation must be amended to ensure that persons who provide information, counseling, or referral or medical services to the minor are not subject to liability. Exposing such persons to the threat of criminal or civil sanctions would not further the interest of promoting family communication and would not deter those who inappropriately transport minors across state lines to obtain abortions. The threat of accessory liability against such persons, moreover, would likely impair the ability of physicians, clergy, counselors, and their staffs to care for and counsel both minors and adults. The bill also could provide an unintended basis for vexatious litigation against individuals and organizations, and could allow private citizens suing under the extraordinarily open-ended civil liability provision of the statute to inappropriately invade the privacy of patients.

To address the risk of civil or criminal liability for persons who provide information, counseling, or referral or medical services, we would propose adding a provision with language along the following lines:

> This section shall not give rise to liability of any person or entity based upon provision of information, advertising, counseling, provision of medical services, or referral for medical services.[4]

III. CONSTITUTIONAL AND OTHER LEGAL CONCERNS

A. Constitutional Principles Governing Parental Notification and Consent Laws

The Supreme Court has held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court further has held, however, that a state may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. See Hodgson, 497 U.S. at 436-37 & n.22 (collecting cases). Nevertheless, although a state has "somewhat broader authority to regulate the activities of children than of adults," Danforth, 428 U.S. at 74,

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by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (plurality opinion) ("Bellotti II"). Accordingly, restrictions on the availability of such abortions -- such as parental notice or consent requirements -- are impermissible if they "do[] not reasonably further any legitimate state interest." Hodgson v. Minnesota, 497 U.S. 417, 450 (1990); see also Bellotti v. Baird, 428 U.S. 132, 147 (1976) ("Bellotti I").

In accord with these principles, states may require parental involvement in a minor's decision whether to obtain an abortion, but only in a manner that serves to ensure that the minor's decision is, in fact, informed: to assure, that is, "that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450; accord Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").[5] The Court has reasoned that parental notice and consent requirements can be constitutional because of the "quite reasonable assumption that minors will benefit from consultation with their parents." Casey, 505 U.S. at 895.

A state that requires parental notification or consent may do so in a constitutional manner if it provides a "bypass" mechanism that allows the minor to bypass the notice or consent requirement if she establishes either (i) that she is sufficiently mature and well-informed to make the abortion decision independently or (ii) that an abortion without parental notice or consent would be in her best interests. The bypass procedure also must be expeditious and must ensure the minor's anonymity.[6]

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[5] All citations to Casey herein are to the joint opinion of Justices O'Connor, Kennedy, and Souter.

[6] The Court has held that such a bypass mechanism is required with respect to parental consent statutes. See Bellotti II, 443 U.S. at 643-44 (plurality opinion); id. at 655-56 (Stevens, J., concurring in the judgment); Lambert v. Wicklund, 520 U.S. 292, 117 S. Ct. 1169, 1171-72 (1997) (per curiam); see also Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 511-13 (1990). The Court also has held that such a bypass mechanism is required with respect to a two-parent notification statute. See Hodgson, 497 U.S. at 450-55; id. at 461 (O'Connor, J., concurring in the judgment); id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Supreme Court has not decided whether a bypass procedure is mandatory if the statute requires notification of only one parent (rather than notification of both parents or parental consent). See Lambert, 117 S. Ct. at 1171; Akron Ctr. for Reproductive Health, 497 U.S. at 510. However, the only appellate courts to have decided the issue have held that such bypass mechanisms are necessary in one-parent notification states. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458-60 (8th Cir. 1995), cert. denied, 517 U.S. 1174 (1996); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997). But cf. Planned Parenthood v. Camblos, 116 F.3d 707, 715-16 (Luttig, Circuit Judge, granting motion for stay of district court judgment pending appeal) (questioning whether five Justices on current Supreme Court would conclude that bypass procedures are constitutionally necessary in a one-parent notification setting), motion to vacate stay denied, 125 F.3d 884 (4th Cir. 1997).

B. Constitutional Problems Raised by S. 1645

For some minors, out-of-state abortions might be significantly safer or otherwise medically indicated. For others, the closest facilities will be out of state. Yet it appears that proposed § 2401(a) would require -- in order for the criminal prohibition not to apply -- that a minor satisfy the requirements that her home state law would have imposed had she obtained an abortion in her home state, even though the requirements of her home state's law would not apply to an out-of-state abortion. As a result of this unique feature, proposed § 2401(a) would appear to be unconstitutional in two respects.

First, proposed § 2401(a) would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases, the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when they would have been able to satisfy a constitutionally valid state parental involvement law. For example, the law of the minor's home state might not provide any means of obtaining a judicially authorized bypass in the case of an abortion to be performed out of state: The law of the state of residence might authorize state judges to provide a bypass from the state notice or consent requirements that otherwise apply, but not authorize such judges to entertain a request for a bypass for an out-of-state abortion as to which state law requirements would be inapplicable. In such cases, state judges might simply lack authority under state law to provide a legal bypass for an abortion to be performed out of state.[7]

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[7] Montana's parental involvement law illustrates the concern. In Montana, a "physician," defined as "a person licensed to practice medicine under [Montana law]," Mont. Code Ann. § 50-20-203 (1997), may not perform an abortion without notifying one of the minor's parents (unless a referring physician certifies that he has previously provided notice), id. § 50-20-204. The legal prerequisite for initiation of a youth-court bypass procedure is a "petition" by the minor "for a waiver of the notice requirement." Id. § 50-20-212(2)(a). Montana law does not purport to impose a notice requirement in connection with a minor's out-of-state abortion; there would appear to be no basis for a Montana state judge to entertain a request for a "waiver" of a "requirement" that does not apply. In the case of an out-of-state abortion, then, it is not clear that state law provides a means of obtaining a judicially authorized bypass.

Proposed § 2401(a) also would give rise to constitutional concerns where the specified procedure for manifesting parental notice or consent, as opposed to the judicial bypass, would not be effective for out-of-state abortions. If, for example, the parental consent portion of the home state's law is directed at state-licensed physicians, it would appear to be satisfied only when the patient provides proof of consent to one of those physicians. See, e.g., S.C. Code Ann. §§ 44-41-10, 44-41-31 (Law. Co-op 1985 and Supp. 1997) (defining "physician" as "a person licensed to practice medicine in this State" and providing that the attending or referring "physician" may perform an abortion on an unemancipated minor only after "secur[ing] the informed written consent, signed and witnessed," of a parent, legal guardian, grandparent, or a person who has been standing in loco parentis for at least 60 days). Thus, to the extent that proposed § 2401(a) is intended to require literal compliance with the home state's law, it would not be at all clear

Where the requirements of the state of residence could not be met for an out-of-state abortion, it would appear that proposed § 2401(a) -- unlike constitutionally permissible parental consent or notification laws -- could not be justified as a legitimate means of supporting "the authority of a parent who is presumed to act in the minor's best interest . . . and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." Hodgson, 497 U.S. at 450. As in Hodgson, the restriction would not appear to "reasonably further any legitimate [government] interest." Id.

In Hodgson, the Court held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families" that would not have been served by a requirement of one-parent notification with a bypass option. Id. at 450. The Court explained that the state's interest in ensuring that the minor's decision would be knowing, intelligent, and deliberate "would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision." Id. Similarly, it would appear that proposed § 2401(a) would be unconstitutional in states where there is no constitutionally adequate provision for securing consent or notice, and bypass, for out-of-state abortions. With respect to minors residing in such states for whom an abortion out of state might be safer, less expensive, or otherwise more accessible than an in-state abortion, proposed § 2401(a) would not "reasonably further any legitimate [government] interest," id. (emphasis added), at least insofar as the absence of available notice (or consent) and bypass mechanisms for out-of-state abortions under either federal or state law would preclude such minors from obtaining adult assistance in traveling interstate for abortions. In circumstances where no mechanism existed that would enable a minor seeking an out-of-state abortion to demonstrate that she had complied with the parental involvement requirements of her home state, proposed § 2401(a) could inhibit interstate travel for abortions even though such travel would have resulted from a knowing, intelligent, and deliberate choice of the minor.

Second, the provision would appear to operate unconstitutionally in many of the cases where both the minor's state of residence and the state in which the minor seeks to have the abortion performed have parental consent or notification laws. By the law of the state in which the abortion will be performed, the minor already will be required to satisfy certain parental involvement prerequisites. If proposed § 2401(a) were construed to require satisfaction of the parental involvement requirements of the minor's state or residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate

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how a minor seeking an out-of-state abortion could satisfy the consent portion of such a law in a manner that would permit a "transporter" of the minor to avoid criminal liability under proposed § 2401(a).

governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.[8]

The constitutional infirmities identified above could appropriately be alleviated (1) by creating an exemption for travel from states that have not established a constitutionally sufficient consent/notice and bypass mechanism for out-of-state abortions, and (2) by making clear that the prohibition effected by § 2401(a) would not apply in cases where the state in which the abortion is performed requires parental notice or consent.

C. Mens Rea

Proposed § 2401(a) should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. In other words, individuals should be subject to criminal sanction only if they know that they are acting unlawfully. As currently drafted, proposed § 2401(a) would target one who knowingly transports a minor across state lines to obtain an abortion, if "in fact" an abortion is performed on the minor in a state other than the minor's state of residence, "without the parental consent or notification, or the judicial authorization, that would have been required" by the law of the minor's state of residence had the abortion been performed in that state. Proposed § 2401(c) would create an affirmative defense for a defendant who "reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts" that the requirements of the state of residence had been met.

We agree that it is sensible and equitable not to impose criminal liability on persons who reasonably believe the law has been followed. In this regard, it is important to recognize that S. 1645 as written still could reach persons who had no reason to recognize that their conduct might have violated any state or federal law. As a general matter, citizens who engage in conduct that is legal in the state where they undertake it but not in their home state would not think that they are thereby violating the law of their home state or federal criminal law. As written, the affirmative defense would still permit the imposition of liability on those who are unaware that a federal statute has, in effect, given state law an extraterritorial reach, and who therefore reasonably believe they

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[8] In light of both of the types of constitutional infirmities discussed above, the statute might be facially invalid (i.e., inoperative nationwide) if, in "a large fraction of the cases in which [proposed § 2401(a)] is relevant," Casey, 505 U.S. at 895, the criminal prohibition effectively would preclude minors from obtaining adult assistance in traveling interstate for abortions. Cf. id. (holding provision to be "invalid" as an "undue burden" because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay); Jankiow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175-76 (1996) (opinion of Stevens, J., respecting the denial of cert.). The Casey standard for facial invalidity was developed in the context of state-law abortion restrictions. It is uncertain how that standard would be applied or modified in light of a facial challenge to a congressional enactment such as S. 1645.

are acting lawfully. In order to fulfill the apparent policy goals behind the affirmative defense, Congress should specify a willfulness standard in S. 1645.

Congress has used a willfulness standard in criminal statutes in a range of contexts. See, e.g., Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (sale of firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (currency transactions in violation of reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (felony and misdemeanor tax statutes). Congress has opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. See Bryan, slip op. at 10. Many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend -- will be people with little or no experience with abortion or knowledge of the relevant law, let alone its finer points. They might well engage in conduct they reasonably believe to be lawful -- seeking to aid a minor who is a granddaughter, a niece, a parishioner, or a friend by driving her across state lines to a place where she can legally have an abortion. In such circumstances, they would completely unwittingly violate a federal criminal law and expose themselves to criminal and civil sanction.

In addition, Congress has employed a willfulness standard where the criminal statute incorporates complex elements. Criminal liability under § 2401(a) would turn in large part on whether the state of residence's statutory requirements concerning parental consent or notification and judicial bypass when a minor seeks an abortion had been satisfied. The federal provision would give these state statutes an extraterritorial effect that even an individual aware of all requirements of his own state's abortion laws would not be able to discern from those laws. In addition, it might well require considerable legal sophistication to determine the meaning of the home state's statutes in this new federal context. Finally, as noted below, it is novel to tie federal criminal liability to conduct that is lawful in the state in which it occurs.

To avoid these problems, the proposed statute should be revised to require a "willful" violation to create liability. Thus revised, those who are acting to help the minor and are unaware of the statutory regime will not be subject to prosecution.

D. Federalism Concerns

S. 1645 raises novel and important federalism issues. First, S. 1645 would broadly undermine the ability of a state to vindicate its own policy determinations within its own borders. The thrust of the proposed bill would be to use the federal criminal and civil law to trump the policy determinations of those states that have opted not to implement a parental involvement requirement. In this respect, S. 1645 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular federal interest by making it a crime to engage in interstate transport or commerce for the purpose of carrying out proscribed conduct in a neighboring state. In such circumstances,

the federal criminal law does not undermine the policy judgments of the state in which the ultimate conduct occurs. In contrast, the proposed bill would make unlawful travel for the purpose of engaging in conduct that is lawful in the state in which it occurs.

Second, by extending the reach of one state's policy choice into neighboring states, S. 1645 may have an impact well beyond what that state originally intended in enacting its parental consent or notice law. It may well be that when a state decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister states as to conduct occurring in those neighboring states, and recognizes that citizens of the various states -- including its own citizens -- should be entitled to take advantage of the diversity of norms of conduct throughout the nation. The home state, in other words, may have no desire for its internal policy choice to serve as the trigger for a federal criminal penalty against out-of-state conduct. If so, then under S. 1645, that state's decision as to conduct within its territorial borders would, in effect, be given extraterritorial reach that the state itself did not intend it to have.

IV. PRACTICAL ENFORCEMENT PROBLEMS

Proposed § 2401(a) would present a myriad of serious enforcement problems. Compared with violations of other federal criminal statutes, violations of proposed § 2401(a) would be notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, for reasons discussed in section III-C, supra, we strongly recommend that proposed § 2401(a) be amended to expressly require proof that a defendant "willfully violated" the federal statute. In addition, it is not clear what constitutes "transport" under the statute. Often a transport requirement can be satisfied by a showing that the defendant caused the act to happen -- for example, by providing bus fare -- as opposed to actually having accompanied the minor.

Second, investigations and prosecutions under proposed § 2401(a) will impose a particular burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally require the deployment of specially constituted task forces. S. 1645 would pose special problems because it would criminalize travel for the purpose of facilitating behavior that is lawful in the state where it is undertaken. As a consequence, it would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction.

The detection and investigation of violations of S. 1645 would fall entirely to the FBI -- in stark contrast to the investigation of analogous federal crimes, in which local law enforcement begins investigating a crime and calls in the FBI if it looks as if there is

a federal element. Here, the ultimate conduct will not be a crime in the state in which it occurs, and will not have occurred in the home state with the parental consent or notice laws. (By contrast, under a statute such as the Violence Against Women Act, an assault would be subject to investigation and prosecution by state authorities.) This will place a great burden on the FBI. Reliance on complaints from private citizens poses its own prospect of taxing law enforcement resources: Given the bill's subject matter, there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints.

Third, the principal targets of proposed § 2401(a) are likely to be adult and teenage relatives and friends of young women seeking abortions. Such defendants would be highly sympathetic, and thus relatively difficult to investigate and to convict. Their prosecutions would also raise legitimate questions of fair use of federal power and give rise to charges of federal overreaching. Relatedly, a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system.

Fourth, the proof of the critical elements in these cases generally will have to come through either the defendant or the minor, both of whom would be extraordinarily problematic witnesses. To prove that the defendant had the requisite intent, the government in the run of cases would have to rely on either the minor or the defendant (who would of course have a constitutional right not to testify). Given that the minor will, in many if not most cases, have relied on the aid of the defendant, who may be her boyfriend, aunt, grandmother, sister, best friend, etc., she is likely to be a hostile and uncooperative witness. (Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.) This is in contrast to most other crimes, in which there is a victim who can provide testimony for the prosecution.

Fifth, the affirmative defense contained in the proposal is somewhat unwieldy. In typical cases in which a criminal statute incorporates a defense, the prosecution conducts its investigation with an eye toward ensuring that the defendant cannot raise the defense. Here, that will be difficult because it is unclear what the statute contemplates as "compelling facts." The reasonable belief standard also is framed in a way that is atypical of affirmative defenses in other criminal laws, which generally do not require that the belief be premised on "compelling facts" or on information from a specific source.

Sixth, state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes. Enforcing subpoenas against the backdrop of such state laws can take tremendous time and effort and provoke tension between the state and federal systems. It also would run the risk, as would many of the investigative and prosecutorial steps that the statute would require, of making the

federal government appear overzealous and heavyhanded.[9]

Seventh, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that § 2401(a) would entail are unnecessary to address important policy concerns animating the bill. The states have a number of effective legal tools -- including laws against battery, kidnapping, and false imprisonment, and custody laws – to prevent and punish the abduction or mistreatment of minors.[10] The existence of such state tools makes it more difficult to justify the significant outlay of federal resources that S. 1645 would require. Moreover, relying on state-law tools would ensure that federal law would not inadvertently encourage young women to seek unsafe means -- for example, hitchhiking or traveling alone -- of availing themselves of lawful out-of-state procedures. Such results are particularly likely in this context because the federal law would not make the minors' conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

Please let us know if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary

The Honorable Spencer Abraham

[9] A similar problem arises in the context of a civil action under the statute. Such an action would likely involve discovery requests for medical information. Those requests would be likely to conflict with state privacy and privilege laws concerning doctor-patient or counselor-client communications and medical records. The consequence will be either an unwelcome struggle between state and federal interests or an effective preemption of state privacy law (with the strain on federalism interests that entails).

[10] Thus, for example, in the much-cited case in which the mother of a 13-year-old girl alleged that her daughter had been raped by an 18-year-old and taken by the boy's mother to another state for an abortion, the 18-year-old pleaded guilty to two counts of statutory rape, and his mother was convicted of violating Pennsylvania's interference-with-the-custody-of-children statute. The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 26, 1998

The President
The White House
Washington, D.C. 20502

Dear Mr. President:

As Democratic Members of the House Judiciary Committee we are writing to urge you to veto H.R. 3682, the so-called "Child Custody Protection Act," if it reaches your desk.

This legislation will dramatically increase the dangers young women face in their decisions to terminate unwanted pregnancies. Since H.R. 3682 contains no prohibition against young women traveling across state lines to avoid a consent requirement, it will merely lead to more women traveling alone to obtain abortions or seeking illegal "back alley" abortions locally. To the extent young women continue to seek the involvement of close family members when they cannot confide in their parents – for example where the parent has committed incest or there is a history of child abuse – the legislation would result in the criminalization of grandparents and other relatives. Indeed at our hearings we learned of several tragic circumstances where young women who would not confide in their parents or trust the confidentiality of the judicial bypass process died as a result of illegal abortions. The number of these incidents can only be expected to multiply under H.R. 3682.

We can also inform you that none of the principal objections set forth in letters from your Chief of Staff and the Justice Department have been addressed during the Committee markup. Despite your Administration's objection to H.R. 3682's applying to close family members and persons providing counseling, referral or medical services, the legislation was not altered to respond to these concerns (other than to provide an exemption for parents). Indeed the Republican majority rejected several Democratic amendments to exempt relatives such as grandparents and siblings, and clinics from the scope of the bill. As a result, the bill continues to provide "an unintended basis for vexatious litigation against [these] individuals and organizations" as Mr. Bowles complained of in his letter.

In addition, the Majority refused to make any changes to provide exemptions for travel from states that have not established a constitutionally sufficient judicial bypass mechanism or to make clear that the bill does not mandate minors complying with the consent requirements of two separate states. As a result, H.R. 3682 would appear to be unconstitutional by the very terms laid out the by Justice Department and relevant Supreme Court precedent. Finally, we would note that the other serious problems laid out by the Justice Department, concerning the bill's overly broad strict liability requirements, federalism concerns, and enforcement difficulties, were are also not resolved in the Committee passed bill.

H.R. 3682 does nothing to prevent teen pregnancies, but it does make abortion far more dangerous. We appreciate the consistent and principled positions you have taken in the past on matters involving a woman's right to choose, and we therefore strongly urge you to veto this bill should it reach your desk.

Sincerely,

John Conyers, Jr.

Barney Frank

Charles E. Schumer

Howard L. Berman

Jerrold Nadler

Robert C. Scott

Melvin L. Watt

Zoe Lofgren

Sheila Jackson Lee

Maxine Waters

Martin T. Meehan

William D. Delahunt

Robert Wexler

Steven R. Rothman

cc: The Honorable Erskine Bowles
Chief of Staff to the President

The Honorable Larry Stein
Assistant to the President for Legislative Affairs