NLWJC - Kagan

DPC - Box 001 - Folder 011

Abortion - Child Custody Act [2]

Abortion-child custody act

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S.1645 raises a number of serious policy concerns, in addition to the substantial legal problems outlined by OLC. These policy issues may be grouped in two categories: encroachments on basic principles of federalism and practical problems with enforcement.

A. Encroachments on Federalism

"Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. . . . The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues."[1] The articulation of this fundamental federalism principle in the recently promulgated Executive Order on Federalism reflects the celebrated notion of the States as laboratories, free to devise and implement their own individual approaches to common policy problems. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); United States v. Lopez, 514 U.S. 549, 580 (Kennedy, J., concurring).

As written, S.1645 threatens this fundamental principle. The Supreme Court has held that states may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. States have responded with a myriad of policy approaches. Twenty-two States have opted to require parental consent to a minor's decision to terminate a pregnancy.[2] Seventeen States have opted for the lesser requirement of notice to parents. The remaining 11 states require neither parental consent nor notice.[3] The thrust of S.1645 is to use the coercive power of the federal criminal law to trump the policy determinations of those States that have

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[1] 63 FR 27651 (May 14, 1998). See also Executive Order 12612, revoked by id. (1987 order promulgated by President Reagan and employing language nearly identical to that quoted in text).

[2] The data in this paragraph concerning state parental consent and notice laws come from studies undertaken by the National Abortion and Reproductive Rights Action League (NARAL).

[3] The extent of diversity in states' approaches is evident even among those states with parental consent or notice laws. For example, six states require notice to or consent of two parents rather than one. In addition, some states allow physicians or other health care professionals to waive notice or consent in certain circumstances, and others allow notice to or consent by adult siblings, grandparents or stepparents. Finally, there are further differences based on factors such as judicial bypass mechanisms and the form of consent or notice required.

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opted not to implement a consent or notice requirement. Under S.1645, a State that has determined that minors within its sovereign reach may obtain an abortion without parental consent or notice is overridden by a federal law that elevates to federal policy the determination of a sister State. If state A chooses to require parental consent or notice and state B chooses not to, or chooses to require a different form of parental consent or notice than State A, it is hard to see what interest of the national government, consistent with federalism, supports taking sides with state A and undermining state B's policy choice.

By extending the reach of a state's policy choice into neighboring states, S.1645 also 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 State A decides that no abortions should occur in its boundaries without parental notification or consent, it nonetheless defers to the sovereignty of sister States and recognizes that its citizens may go elsewhere for those services. Under S.1645, State A's decision as to conduct within its territorial borders is given extraterritorial reach that it likely was not intended to have (even assuming, which is dubious, that it could constitutionally do so consistent with the right to travel and other constitutional checks on States' powers to impose policy determinations on sister States).

There is, moreover, a significant difference from the standpoint of federalism between S.1645 and familiar statutes, such as the Violence Against Women Act (VAWA) and the Gun Free School Zones Act, that make it a crime to cross state lines or otherwise engage in interstate commerce and then undertake certain conduct in a neighboring state: S.1645 criminalizes acts that are lawful in the state where committed.[4] Thus, VAWA, for

[4] This feature of S.1645 appears to be, for all practical purposes, unprecedented. The only possible exception would be the Mann Act, which makes it a federal crime to transport an individual in interstate commerce with the intent that the individual engage in prostitution or any unlawful sexual activity. Even allowing for the theoretical possibility of a prosecution under the Mann Act for conduct that is lawful in the State where it is undertaken, S.1645 is considerably more problematic as a matter of policy. First, in contrast to the Mann Act, which might permit prosecution of lawful conduct in a very few marginal cases, S.1645 categorically federalizes conduct that is by definition and in all cases lawful in the State in which it is committed. Second, prostitution, as well as the other sexual crimes at issue in the Mann Act, is nearly universally disapproved throughout the Nation. By contrast, whether to require parental consent for a minor's abortion is the kind of middle-ground policy issue as to which the diverse

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example, criminalizes acts of violence that are proscribed in all 50 States. In such circumstances, there is no (or at most a slight) sense in which the federal criminal law undermines the policy judgments of the State in which the ultimate conduct occurs. Cf. Lopez, 514 U.S. at 581 (Kennedy, J., concurring)("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal."). Even as to these statutes, our consistent policy has been to insist on there being some distinctive federal interest in getting at the unlawful conduct: we have defended VAWA and other similar statutes on the basis of a national interest in the underlying problem, and, conversely, have opposed proposed statutes, such as the D'Amato amendment (that would have made it a federal offense to use a gun that had passed in interstate commerce in any crime of violence), that would have federalized conduct that was criminal in all States but that we did not perceive a special federal need to address. It is difficult to identify a legitimate federal interest in ensuring that, notwithstanding state protections to the contrary, minors do not have abortions without parental consent. It is particularly difficult to frame such a federal interest given that the Court has determined that the Constitution requires State consent provisions to include judicial bypass mechanisms, and thus forbids making parental consent an absolute prerequisite to a minor's obtaining an abortion.

Finally, in its operation, S.1645 would blur the lines of accountability between the State and Federal governments -- one of the evils that federalism doctrine is designed to prevent. See New York v. United States, 112 S.Ct., at 2417-22. To what government is objection to criminal sanction for otherwise lawful conduct properly directed? The formulation of S.1645 suggests that the federal government is merely vindicating the policy of the state of origin (a government, moreover, in which a defendant in a S.1645 action may be unrepresented). The state of origin in turn looks to have no responsibility for the criminal penalty for which its policy serves as a trigger; that penalty is a determination of the federal government. The potential result is an "inability to hold either branch of government answerable to the citizens" for a controversial and highly coercive policy. Lopez, 514 U.S. at 577 (Kennedy, J., concurring).

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practices of the States demonstrate that "the best solution is far from clear." See Lopez, 514 U.S. at 581 (Kennedy, J., concurring) (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973).

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B. Practical Problems with Enforcement

Enforcement of S.1645 would present a variety of practical problems. Compared with violations of other federal criminal statutes, violations of S.1645 would be difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources.

First, the principal targets of S.1645 are likely to be adult and teenage relatives and friends of young women seeking abortions.[5] 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 overkill.

A few likely scenarios of prosecutions under S.1645 illustrate the point. Thus, for example, under the proposed bill, a grandmother who is raising her granddaughter but is not the legal guardian could be prosecuted for accompanying her granddaughter to a nearby state for an abortion, even if she were unaware of parental consent requirements or if the minor's parents could not be located or were unfit. Similarly, the sixteen-year old best friend of the minor could be criminally liable for accompanying her friend to the nearest clinic to provide support or for loaning her friend a car to go to the nearest clinic.

In some circumstances, the law also could criminalize behavior on the part of the parents of a minor themselves. A mother could be prosecuted for taking her daughter to a neighboring state for an abortion where the home state requires consent by two parents and makes no exception for a parent who has not been involved in his daughter's life, cannot be located or is abusive. The parents of a minor in a state that requires written parental consent could be liable for taking their daughter to the closest abortion provider, which happens to be in a neighboring state where consent need not be in writing.

It is, moreover, possible for individuals to be subject to prosecution (and thus to investigation) on an accomplice theory for acts short of taking the minor to have an abortion, for example giving her money or helping to arrange the abortion. It

[5] Proponents of the bill frequently invoke scenarios in which prosecution looks quite reasonable and promising, for example where a young woman is coerced into traveling across state lines to have an abortion by an adult male who has impregnated the teenager, or by someone acting on his behalf. In actuality, data from the Department of Health and Human Services' National Center for Health Statistics indicate that most young teens who get pregnant have teenage partners.

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is even conceivable that abortion providers could risk liability (or become targets of an investigation) if they know that the minor is from out-of-state. It can certainly be expected that extreme anti-abortion advocates would pressure federal authorities to investigate and prosecute cases involving abortion providers.

Second, investigations and prosecutions under S. 1645 would be likely to impose a greater than ordinary burden on federal authorities. Interjurisdictional crimes are inherently more difficult to investigate and generally have required the deployment of specially constituted task forces. S.1645, however, would pose special problems because it would criminalize 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. (Compare in this regard statutes such as VAWA, in which the assault would be subject to investigation and prosecution by state authorities.) Federal investigators could still rely on complaints from private citizens, but in the charged context of the abortion debate, this route carries its own drawbacks and practical problems. The bill could easily foment vigilantism and invasions of privacy. One can imagine, for example, the prospect that activists, asserting the sanction of the federal criminal law, will stand in front of clinics and write down out-of-state license plates, or follow and harass out-of-state cars.

The intent requirement of S.1645 will present an additional investigative hurdle: federal investigators will need to establish, typically with little or no assistance from other witnesses or local law enforcement, that the target knew and intended that the minor would obtain an abortion.

In addition, the key witness in these cases is likely to be the teenager herself. Because she will have sought the abortion and support from the alleged perpetrators, she is likely to be a hostile witness when she finds those loved ones who helped her subject to criminal investigation. Moreover, the trauma of being forced to participate in an investigation and trial will add to any trauma she already may have suffered.

Third, the investigative and prosecutorial challenges, and the substantial outlay of federal resources, that S.1645 would entail are unnecessary to counteract the main problems cited by the bill's proponents. 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 that proponents point to in making the case for a federal criminal solution. Indeed, according to testimony presented to the Senate Judiciary Committee, in one of the cases frequently cited by proponents in

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justification of S.1645, the State effectively used its custody laws to address the misconduct. In that case, the mother of a thirteen-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 custody of children statute.[6] The existence of this and other state tools makes it more difficult to justify the significant outlay of federal resources that S.1645 would require.

[6] The case against the mother was remanded for a new trial, however, due to an error in jury instruction.

Abortion - child custody act

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
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STAFF DIRECTOR — DEPUTY GENERAL COUNSEL
JULIAN EPSTEIN
MINORITY STAFF DIRECTOR

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

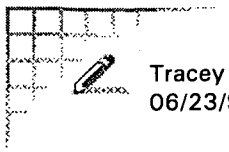
Robert Wexler

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

#hw tic - child custody



Tracey E. Thornton
06/23/98 05:56:39 PM

Record Type: Record

To: Ann F. Lewis/WHO/EOP, John Podesta/WHO/EOP, Sylvia M. Mathews/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: Child Custody

okay gang, here's where i think we are at this point in Senate Judiciary:
D's have a series of message amendments to be offered similar to what was done in the House, all of which will fail. All the D's will vote for them. We will probably lose a coupla D's on final passage. Specter will be absent and we won't get his proxy. The Committee may not get to this tomorrow or thursday though because of other business.

Message Copied To:

William P. Marshall/WHO/EOP
lisa m. brown/ovp @ ovp
Maria Echaveste/WHO/EOP
Ruby Shamir/WHO/EOP
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Peter G. Jacoby/WHO/EOP
Janelle E. Erickson/WHO/EOP
Marjorie Tarmey/WHO/EOP
Leslie Bernstein/WHO/EOP
Elena Kagan/OPD/EOP

Abortion-child custody

Robert J. Pellicci
06/23/98 03:03:00 PM

Record Type: Record

To: Elena Kagan

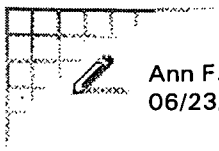
cc:
Subject: House Committee Action on HR 3682

Message Creation Date was at 23-JUN-1998 15:03:00

FYI --

The House Committee on the Judiciary voted 17-10, along party lines, in favor of HR 3682, the child custody/abortion rights bill. A vote by the full House is expected after Congress returns from its Fourth of July recess.

Newton - child custody



Ann F. Lewis
06/23/98 02:55:08 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Child Custody

Did I just read that House Judiciary specifically refused to exempt Grandma ? I guess they don't want a bill. Peter, does that help with our legislative strategy ?

Message Sent To:

Tracey E. Thornton/WHO/EOP
William P. Marshall/WHO/EOP
lisa m. brown/ovp @ ovp
Maria Echaveste/WHO/EOP
Ruby Shamir/WHO/EOP
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Leslie Bernstein/WHO/EOP
Elena Kagan/OPD/EOP

Abortion - child custody

Robert J. Pellicci
06/23/98 01:46:00 PM

Record Type: Record

To: Elena Kagan

cc:
Subject: Senate Markup of S. 1645

Message Creation Date was at 23-JUN-1998 13:46:00

FYI --

On Thursday June 25th, the Senate Committee on the Judiciary is scheduled to markup S. 1645, the child custody/abortion bill. This bill is almost identical to HR 3682, which is currently being marked up in the House. Did a copy of the Chief-of-Staff's June 17th letter go to Senator Hatch? If not, are we planning to send the Senate Committee a letter prior to Thursday's markup? Thanks.

Alaska - child custody act

This memorandum provides the views of the Department of Justice concerning House bill H.R. 3682, the Child Custody Protection Act of 1998, as marked up by the Subcommittee on the Constitution of the Committee on the Judiciary on June 11, 1998.

If enacted, the bill would establish a new criminal law, 18 U.S.C. § 2401(a), prohibiting the knowing transportation of a minor across a state line with the intent that such individual obtain an abortion, where the minor has not "met" the "requirements" of her home state's law requiring parental involvement in her abortion decision. In addition, the bill would establish a civil liability provision, 18 U.S.C. § 2401(c), authorizing "[a]ny parent who suffers legal harm from a violation of subsection (a)" to "obtain appropriate relief in a civil action."[1]

In our view, the bill's criminal and civil liability provisions are overbroad. The scope of the bill's coverage should be narrowed to ensure that family members, physicians, counselors, and medical personnel are not exposed to liability; and the civil liability provision should be eliminated or narrowed significantly.

Just refer to P's letter

We also have serious constitutional concerns. The proposal would constitute a novel form of federal legislation in that it would restrict travel for lawful purposes in a context that implicates a constitutionally protected right. It therefore raises difficult constitutional issues for which there is little direct precedent. Nevertheless, under the legal framework that governs the constitutionality of parental notification/consent laws, see, e.g., Hodgson v. Minnesota, 497 U.S. 417 (1990); Planned Parenthood v. Casey, 505 U.S. 833, 899-900 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.), proposed § 2401(a) would appear to be unconstitutional as applied to minors where the law of their state of residence does not itself establish a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements, or for bypassing those requirements, when an abortion is to be performed out of state. The provision also would seem to operate unconstitutionally to the extent that it would -- in order for the criminal prohibition not to apply -- in effect require the minor to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion.

We have three additional concerns. First, because of the highly technical nature of the proposed statute, it should be amended to provide for criminal liability only of those persons who "willfully violate" the statute. Second, enactment of H.R. 3682 would be inconsistent with basic principles of federalism that Presidential Orders in effect since 1987 commit the executive branch to uphold. Third, we are concerned that violations of the criminal provision would be difficult to investigate and prosecute, and would require a large outlay of federal law enforcement resources for what will likely be few successful prosecutions.

NO

[1] We understand that the full Committee is in the process of amending the bill, but we have not attempted in this memorandum to address any such amendments. We would be pleased to provide additional analysis as the bill is amended.

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.[2]

H.R. 3682 would not create a uniform nationwide consent or notice regime, nor prohibit altogether the interstate transport of minors for the purpose of obtaining abortions without parental notice or consent (or "bypass" of such notification or consent). Compare 18 U.S.C. § 2421 (1994) (uniformly prohibiting interstate transportation of persons with the intent that such persons engage in unlawful sexual activity). Instead, the restriction on interstate transport would be triggered only where the law in the state where the minor

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[2] 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."

resides would impose some sort of parental notice or consent prerequisite before that minor could obtain an abortion in the state of her residence.[3] 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 for a hypothetical abortion 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.[4]

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

We appreciate the concerns of H.R. 3682's sponsors about fostering parental and family involvement to ensure that a minor's decision to obtain an abortion is knowing, intelligent, and deliberate, and about preventing overbearing adults from improperly influencing minors to choose an abortion. However, we believe that proposed § 2401(a) would reach broadly and unreasonably beyond the circumstances that implicate these concerns. We would recommend narrowing the scope of proposed § 2401(a) at least to exempt from liability members of the minor's family, physicians, counselors, and medical personnel. [In addition, the problems with § 2401(a)'s broad scope are compounded by the civil liability provision, § 2401(c), which we would recommend eliminating entirely or restricting substantially.]

Refer to P's letter

No

A. Members of the Minor's Family

Take out - just refer to letter

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. Under the statute, for example, a grandmother who is raising her granddaughter but is not her legal guardian could be prosecuted for having accompanied her granddaughter to a nearby state for an abortion. Similarly, the minor's aunt, uncle, or sibling could be criminally culpable or civilly liable for accompanying her to the nearest clinic.

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

[4] 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).

It would be impractical and inequitable to impose liability on members of a minor's family. Imposing criminal and civil sanctions on family members for helping their relatives would not tend to promote healthy family communications. To the contrary, enforcement of the criminal provision is likely to require family members to testify against one another, while the civil provision raises the prospect of lawsuits by one family member against another. In either scenario, the federal law could undercut, rather than encourage, family cohesion. Moreover, family members are not likely to fit the paradigm scenario of adults acting with disregard for the minor's best interests. Family members also would generally be difficult to investigate and convict. 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 would recommend that § 2401(a) incorporate an exception for family members who transport the minor.

B. Physicians, Counselors, and Medical Personnel

Delete whole section

Although § 2401(a) would expressly single out for liability the person who knowingly transports a minor, additional criminal law theories would operate to expand its reach beyond the transporter. In particular, the threat of accessory liability under the statute could be used against individual doctors, clergy, counselors, and others who advertise or otherwise provide information concerning the availability of abortion and other medical services, counsel and refer patients, or make other routine communications. The possibility of such applications of the statute would be likely to chill speech and impair the ability of physicians, clergy, counselors, and their staffs to care for both minors and adults. In addition, the bill could encourage private citizens to invade the privacy of patients in order to generate complaints of criminal conduct.

Physicians, counselors, medical personnel, and others who provide information or counseling to a minor are also likely targets of the extraordinarily open-ended civil liability provision, § 2401(c). The provision does not define the "legal harm" it seeks to redress, does not limit the class of persons or entities against whom a civil action may be brought or tie such an action to a finding of criminal liability, and does not indicate what relief might be "appropriate." Moreover, unlike the criminal prohibition, the operation of this provision would not be constrained by prosecutorial discretion and policy.

The civil liability provision also could serve as a ready tool to tax the financial resources of those who provide medical services. It is, for example, not difficult to imagine the use of H.R. 3682's civil liability provision to orchestrate individual and class action lawsuits that involve harassing discovery requests and seek broad injunctive relief and sizeable monetary judgments. In addition, that civil action provision would impose an unnecessary burden on the federal courts, which are forums of limited resources.

In sum, the civil liability provision is unnecessary, a potential drain of federal court resources, and susceptible to abuse. For these reasons, we first would urge that the provision be dropped from H.R. 3682. In the alternative, we would at a minimum urge that

it be reformulated to constrain its great potential for abuse, for example, by limiting it to claims against individuals convicted under the criminal provision or to claims against individuals who actually transport the minor.

To address the risk of civil or criminal liability for physicians or others who provide information, counseling, and medical services to minors, 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.

III. CONSTITUTIONAL AND RELATED 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, 497 U.S. at 450; 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 Casey, 505 U.S. at 877 ("[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]

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, 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

[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).

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.

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

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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).

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 or 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]

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.

any kind? how clear if different consent rule?

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

e.g., 2-parent → 1-parent

C. Mens Rea Problem

Proposed § 2401(a) would penalize "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." This provision should be revised to require that an individual must have "willfully violated" the federal statute to be subject to liability. [As the Supreme Court has recently observed, certain federal criminal statutes require such willfulness and thereby "'carv[e] out an exception to the traditional rule' that ignorance of the law is no excuse and require that the defendant have knowledge of the law." Congress has adopted a standard of willfulness as requiring knowledge of the law for "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." Bryan v. United States, No. 96-8422, slip op. at 10, (U.S. June 15, 1998) (discussing caselaw); see, e.g., Ratzlaf v. United States, 510 U.S. 135 (1994) (applying willfulness requirement in statute prohibiting currency transactions in violation of federal reporting requirements); Cheek v. United States, 498 U.S. 192, 193-94 (1991) (applying willfulness requirement in federal felony and misdemeanor tax statutes); cf. Bryan, (construing federal criminal willfulness requirement respecting sales of firearms without a license). The Child Custody Protection Act would be such a statute, and adoption of the "willfulness" standard is critical if the Act is to reach only persons who should be subject to criminal sanction.[9]

Criminal liability turns 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 have 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, although lawful in the state in which it occurs, is unlawful in another state.

These concerns are compounded by the fact that many of the people a minor will likely turn to for help -- people such as her grandmother, her aunt, her cleric, her teenaged best friend -- will often be people with little or no experience with abortion or knowledge of

what's saying here? accurate or not?

[9] As the Court noted in Bryan, "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." Bryan, slip op. at 6 (quoting Spies v. United States, 317 U.S. 492, 497 (1943)). In Bryan, the Court defined willfulness differently than in Cheek in Ratzlaf, where willfulness was held to require knowledge of the law, and held that "willfulness" meant that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." Id., slip op. at 6-7, but not that the defendant acted with knowledge that his conduct violated the particular federal law at issue. While given the technical nature of the Child Custody Protection Act and the nature of the behavior criminalized, the more rigorous definition of "willfulness" used in Cheek and Ratzlaf is appropriate, even the less rigorous definition of "willfulness" would redress the problems identified in the text.

the relevant law, let alone its finer points. Seeking to aid her, they might well engage in "apparently innocent conduct" -- 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. Completely unwittingly, they will violate a federal criminal law and expose themselves to criminal and civil sanction.

To avoid such a result, 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.

IV. FEDERALISM CONCERNS

"Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. . . . The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues." Exec. Order No. 13083, 63 Fed. Reg. 27,651 (1998). This fundamental federalism principle -- which Presidential Orders in effect since 1987 commit the executive branch to uphold[10] -- reflects the celebrated notion of the states as laboratories, free to devise and implement their own individual approaches to common policy problems. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

As written, H.R. 3682 appears to be inconsistent with this fundamental principle. The Supreme Court has held that a state may require parental notice or consent under certain circumstances as a prerequisite to a minor's abortion. States have responded with a myriad of policy approaches. A number of states have enacted laws requiring or encouraging parental involvement in a minor's decision to terminate a pregnancy, and these laws have taken a variety of forms. Many other states have elected not to require parental involvement. In addition, some states allow physicians or other health care professionals to waive notice or consent in certain circumstances, and others allow notice to or consent by adult siblings, grandparents or stepparents. There are further differences with respect to factors such as the form of consent or notice required. The thrust of proposed § 2401(a) would be to use the coercive power of the federal criminal law to trump the policy determinations of those states that have opted not to implement a notice or consent requirement for abortions performed in that state. Under H.R. 3682, the policy of a state that has determined that minors within its borders may obtain an abortion without parental consent or notice would effectively be overridden by a federal law that elevates to federal policy the determination of a sister state.

H.R. 3682 thus would directly undermine the ability of a state to vindicate its own policy determinations within its own borders. In this respect, H.R. 3682 is unlike federal statutes that supplement already existing state criminal prohibitions in areas of particular

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[10] See also Exec. Order No. 12612, 52 Fed. Reg. 41,685 (1987 order promulgated by President Reagan and employing language nearly identical to that quoted in text), revoked by Exec. Order 13083.

federal interest by making it a crime to engage in interstate transport or commerce for the purpose of acting unlawfully 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. The civil liability provision of H.R. 3682 raises similar federalism concerns, because it would create an additional means of enforcing parental involvement laws in states that have chosen not to adopt such measures.

Moreover, 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.

There is, moreover, a significant difference from the standpoint of federalism between H.R. 3682 and familiar statutes, such as the Violence Against Women Act (VAWA) and the Gun Free School Zones Act, that make it a crime to cross state lines or otherwise engage in interstate commerce and then undertake certain conduct in a neighboring state: proposed § 2401(a) would criminalize travel for the purpose of engaging in conduct that is lawful in the state in which it occurs. Thus, VAWA, for example, criminalizes acts of violence that are proscribed in all 50 states. Here the federal government would not be supplementing existing state criminal prohibitions in an area of particular federal interest. Rather, it would be imposing a criminal prohibition that would in many, and perhaps most, cases cut against the grain of the policy determination of the state in which the conduct occurs.[11]

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[11] This feature of H.R. 3682 would appear to be virtually unprecedented. The only possible exception would be the Mann Act, which, as presently codified, prohibits the interstate transportation of an individual "with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2421 (1994). We are aware of one Mann Act case in which a defendant was convicted for transporting a woman to Nevada, where prostitution was legal. See United States v. Pelton, 578 F.2d 701 (8th Cir.), cert. denied, 439 U.S. 964 (1978). Even allowing for the possibility of a rare prosecution under the Mann Act involving prostitution that is lawful in the state where it occurs, application of proposed § 2401(a) to cases involving otherwise lawful conduct would, for two reasons, be considerably more problematic as a matter of policy. First, whereas Mann Act cases almost always will involve travel for unlawful prostitution or for "any [other] sexual activity for which any person can be charged with a criminal offense," proposed § 2401(a) would criminalize travel for the purpose of facilitating conduct that almost invariably will be lawful in the state where it occurs. Second, whereas there is nearly universal condemnation of prostitution, there is no similar consensus here: the considerable diversity of practices among the various states amply demonstrates that whether the government should require parental notice or consent prior to a minor's abortion is a difficult policy question on which reasonable persons can and do differ.

Finally, in its operation, H.R. 3682 would blur the lines of accountability between the state and federal governments -- one of the evils that federalism principles are designed to prevent. H.R. 3682 suggests a federal interest in reinforcing the policy of the state of origin. The state of origin, however, has not enacted, and is not politically accountable for, the criminal penalty for which its policy serves as a trigger. The potential consequence is that neither government stands clearly accountable for a controversial policy determination. What is the consequence of all this?

V. 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.[12]

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.[13] 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'

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[12] 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).

[13] 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.

conduct unlawful and would only limit the persons who may assist them in engaging in travel for the purpose of obtaining lawful medical procedures.

Abortion - custody act

William P. Marshall
06/11/98 07:45:17 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Charles F. Ruff/WHO/EOP
Subject: Child Cust re-draft. Please rview by 11:00 AM Friday

The attached draft incorporates changes suggested by DOJ and HHS after the original was circulated by OMB. The re-draft does not satisfy all DOJ and HHS concerns but it does accomodate some. (DOJ, in particular, would like to add at the end of the fourth paragraph the line: "The Department also has some practical enforcement concerns that it would be pleased to detail for the members and staff." HHS would like to eliminate the suggestion that we would want to work to fix the legislation.)

Please send comments ASAP but no later than 11:00 Am on Friday. Thanks.

CCPALET2.W

Message Sent To:

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Dear

The Administration appreciates the concerns of the sponsors of S. 1645 about fostering parental and family involvement in a minor's decision to obtain an abortion and their concerns about overbearing and sometimes predatory adults who improperly influence minors' abortion decisions. The Administration believes, however, that changes must be made to ensure that S. 1645 is appropriately tailored to achieve these important goals. The Administration would support properly crafted legislation that would make it illegal to transport minors across state lines for the purposes of avoiding parental involvement requirements, but strongly opposes S.1645 unless these changes are made.

First, S. 1645 must be amended to exclude close family members from criminal and civil liability. Under the legislation, grandmothers, aunts, and adult siblings could face criminal prosecution for coming to the aid of a relative in distress. Even a mother or father could be exposed to criminal penalty if she or he resides in a state that has a two parent notice or consent law. Imposing criminal and civil sanctions on family members for helping their relatives, however, would not further the interests of healthy family communications. Subjecting family members to criminal or civil sanction, moreover, would also further isolate the minor by discouraging her from seeking advice and counsel from those closest to her. Finally, creating a civil action that permits family members to sue each other when a minor within that family has an abortion would not serve the goal of fostering strong families.

Second, S. 1645 must be amended to ensure that persons who only provide information, counseling, referral, or medical services to the minor cannot be subject to liability. The bill as written, for example, could potentially subject a telephone receptionist, physician, or counselor to civil or criminal liability merely for informing an unnamed caller or patient about the availability of abortion services. Exposing such persons to criminal or civil liability, however, would not further the interests in promoting family communication, would not deter those who would inappropriately transport minors across state lines to obtain abortions, and might provide an unintended basis for vexatious litigation against individuals and organizations.

Finally, S. 1645 must be amended to address constitutional concerns that the Department of Justice has identified in particular provisions of the legislation. The Department will forward their concerns subsequently and would be pleased to work with the sponsors in crafting legislation that remedies those defects and the other matters noted above.

The Administration is concerned that S. 1645, as written, raises novel and 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 towards punishing non-relatives who transport minors across state lines for the purposes of avoiding parental involvement requirements, would minimize the federalism concerns.

S/

Abortion - child custody act

THE WHITE HOUSE

WASHINGTON

June 10, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Charles F. C. Ruff, Counsel to the President
William Marshall, Associate Counsel to the President

SUBJECT: The Child Custody Protection Act

I. THE CHILD CUSTODY PROTECTION ACT

Congress is currently considering S. 1645, the Child Custody Protection Act -- a bill which would impose civil and criminal liability on any person who knowingly transports a minor across a state line to obtain an abortion in cases in which the minor has not satisfied her home state's laws regarding "parental involvement" (i.e. laws requiring parental consent or parental notification).

The bill constitutes a novel form of federal legislation in that it prohibits persons from traveling across state lines to engage in conduct that is legal in the second state.[1] It also uniquely conditions liability upon the law of the state where the person comes from rather than the law of the state in which the conduct occurs.

As described by its sponsors, the bill is designed to protect the rights of parents to participate in their minor child's abortion decision against those who would encourage her to have a "secret" abortion -- a category which, according to the sponsors, includes out-of-state

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[1] The only possible exception to this is the Mann Act which may arguably be read as prohibiting transporting women across state lines for prostitution to a state where prostitution is legal.

abortion clinics who advertise the availability of abortions without parental involvement[2] and adult males who impregnate minors and then attempt to erase the consequences of their actions by transporting the minors out of state for the abortion procedures.

Politically, however, the bill is more easily characterized as an attempt to provoke controversy on a sensitive and divisive issue than as an effort to address a legitimate area of federal interest. Substantively, the bill raises troublesome policy, constitutional, and practical law enforcement concerns and is counterproductive to its asserted goals.

II. BACKGROUND -- PARENTAL INVOLVEMENT REQUIREMENTS

Currently twenty-two states require parental consent for a minor to terminate her pregnancy while seventeen states have opted for the lesser requirement of parental notification. Six of these states require notice to or consent from both parents, while four states would allow the notification or consent requirements to be satisfied by persons other than the minor's parents (such as a grandparent or an adult sibling.) Eleven states have no parental involvement requirements.

The constitutionality of parental involvement requirements has generally been upheld by the Supreme Court. Although holding that pregnant minors have a constitutional right to choose whether to terminate a pregnancy, the Court has determined that a state may require parental notice or consent in the interest of ensuring that the minor's decision to terminate her pregnancy is "knowing, intelligent, and deliberate." The parental involvement requirements, however, may not impose an "undue burden" upon a minor who is capable of giving an informed consent to the abortion procedure. States must also provide a judicial "bypass" mechanism which allows the minor to avoid the parental involvement requirements if she establishes either 1) that she is sufficiently mature and well-informed to make the abortion decision independently or 2) that an abortion without parental involvement would be in her best interests. [3]

III. ANALYSIS

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[2] The law does not explicitly prohibit advertising. The sponsors might, however, envision extending liability to advertisers through some application of accomplice liability. See Part III, below.

[3] The Supreme Court has ruled that bypass procedures are constitutionally mandated in states that require the consent or notification of both parents; but the Court has not had occasion to rule on whether bypass procedures are required in a one parent state.

S. 1645 represents a dramatic incursion into the traditional understanding of federalism. Federalism presumes that a citizen is free to take advantage of favorable laws in other states and that states have the right to regulate matters within their own boundaries (unless the matter is directly regulated by the federal government.) S. 1645, however, is unique in that it attempts, by force of federal law, to enforce one state's laws in the territory of another. As such, it sets a dangerous precedent for federal interference with such matters as gaming, alcohol, tobacco, guns and other items whose regulation varies significantly from state to state.

Despite the seriousness of the federalism concerns, however, S. 1645 is not clearly unconstitutional on those grounds. Because the approach taken by the sponsors is so novel, there is virtually no Supreme Court precedent, on either side, from which to take direction. Accordingly, while constitutional arguments against the legislation can be made based upon general federalism principles (or upon right to travel or privilege and immunities grounds), a definitive constitutional assessment cannot be offered with any degree of certainty. The federalism objection, therefore, is best characterized as a policy, and not as a constitutional, concern.

There is also no constitutional abortion rights argument that would support invalidating the bill as whole. DOJ has indicated that the bill would be unconstitutional as applied in certain circumstances (for example when the law would require the minor to satisfy the parental involvement laws of two separate states) but the constitutional concerns noted by DOJ, although serious, can be remedied by re-drafting the legislation.

The strongest objections to the legislation are based on policy, rather than on constitutional, grounds. The bill's first and most glaring weakness is that it subjects family members to criminal and civil liability. Under the terms of the legislation, grandmothers, aunts, and adult siblings may be prosecuted for coming to the aid of a minor relative in distress. Even a mother or father may be criminally sanctioned if she or he resides in a state that requires the involvement of both parents. Obviously, subjecting family members to criminal and civil sanctions for helping their relatives does not further the interest of healthy family communication. Exposing family members to the possibility of criminal or civil sanction is also counterproductive in that it would further isolate the minor by discouraging her from seeking advice and counsel from those closest to her. Finally, creating a civil action which allows family members to sue each other when a minor within that family has an abortion does not serve the goal of fostering strong families.

Second, the bill could inappropriately impose liability on persons who merely provide information, advertising, counseling, referrals, or medical services to the minor. Through rules of accomplice liability, the bill could subject a telephone receptionist to criminal liability, for example, merely for informing an unnamed caller about the availability of abortion services. The bill's creation of a private cause of action is, from this perspective, even more problematic. A civil action would be a ready tool for those who wish to harass, intimidate, or bankrupt service providers.

Third, the bill imposes criminal liability on persons who may not realize they are violating the law (as when the minor falsely informs the transporter that she has parental consent.) This is because the bill predicates liability on the intent to help the minor obtain an abortion rather than on the intent to help the minor avoid the application of a state's parental notification requirements.

Finally, the bill raises numerous practical law enforcement concerns. These include the use of scarce FBI resources to prosecute violations, the need for federal law enforcement authorities to interrogate family members and close teenage friends in order to pursue violations, and the fact that the defendants in some cases are likely to be minors.

IV. RECOMMENDATION

There would be little advantage in opposing this bill in its entirety. The sponsors' example of the adult male impregnating the female minor and taking her across state lines for an abortion without parental involvement is likely to be politically compelling and, as noted above, there is no definitive case to be made that imposing federal civil and criminal sanctions for this activity is unconstitutional. At the same time, the bill, as written, significantly overreaches and affirmatively harms important policy and constitutional interests.

At this point, it is unclear whether the sponsors are interested in fixing the legislation to meet legitimate objections or whether they are merely interested in provoking confrontation. In either case, we believe that our best action is to announce that the Administration would support narrowly tailored legislation but, for policy and constitutional reasons, is opposed to the bill as currently drafted. The first step in this process would be to submit a letter from the EOP highlighting two specific issues -- the need to exempt family members and the need to exclude from potential liability those persons whose only connection to the abortion is the provision of information, advertising, or a medical, referral, or counseling service. This letter would also indicate that a letter containing constitutional issues would be subsequently forwarded by DOJ and that you have instructed the Department to work with the sponsors in crafting final legislation that meets Administration concerns.

This strategy is not without its difficulties. First, anything short of complete opposition to the bill is likely to raise objections from our allies. Second, the bill's sponsors might accept our objections and submit a bill that you would be obligated to sign. Third, and most troublesome, the sponsors might accept some of our objections and refuse others. This would place you in the position of either signing a bill with seriously objectionable provisions or continuing to oppose a bill that has had some of its more egregious provisions excised, an action that would both potentially weaken the possibility of sustaining a veto and engender the criticism that you are being overly rigid. We believe, however, that unless you would be willing to take the position that you oppose legislation that would make it illegal for adult males to transport minors they impregnate across state lines for abortions without parental consent, the best available course is that outlined in this memorandum.

6-5 Abortion - Child Custody Act

Exclusion for adviser, counseling, providing info (accomplice liab)

Elim of civil liab

Rape + incest exceptions

Const: Double state regs

Impossible to comply if state's

have no extra-territ effect

Intent

How many issues do we have to get through?
4 + tactics!

Why is General a deputies mtg? Isn't that cheating?

THIS is a combo principals/dcps mtg
Also, Gene has strong views

Abortion - child custody act

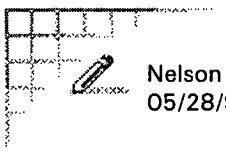
June G. Turner

05/28/98 11:57:34 AM

Record Type: Record

To: Nelson Reyneri/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Action Items from today's Child Custody Protection Act

Sylvia cannot do at 10am on June 4. If June 5 is ok with everyone I will reserve a room at 10am.
Nelson Reyneri



Nelson Reyneri
05/28/98 11:44:49 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: June G. Turner/WHO/EOP, Sylvia M. Mathews/WHO/EOP
Subject: Action Items from today's Child Custody Protection Act

From today's meeting (please contact me if I missed anything)

1. Secure more intelligence *(Leg Affairs)*
   A. Senate member count
   B. Republican member who would speak out on our side, e.g. Snowe?

2. Check with DOJ regarding technicalities *(Bill Marshall)*

3. Identify our real life example *(Robin Leeds)*
   B. *Sylvia Mathews* to contact her sister for ideas

4. What do we need for outreach? (*Janelle Erickson, Robin Leeds, Ann Lewis)*
   A. Among constituency groups
   B. Among members

5. Reconvene same time next week (*Nelson Reyneri, June Turner*)
   A. June 4 @ 10AM, Roosevelt Room

Abortion - child custody act

Robin Leeds 05/28/98 05:08:42 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: "Child Custody Protection Act"
Statistics on Relevant Issues

---------- Forwarded by Robin Leeds/WHO/EOP on 05/28/98 05:07 PM ----------

Robin Leeds 05/27/98 02:43:00 PM

Record Type: Record

To: Nelson Reyneri/WHO/EOP

cc: Audrey T. Haynes/WHO/EOP
Subject: "Child Custody Protection Act"
Statistics on Relevant Issues

1. **Numbers of minors getting abortions** - In 1996, the Alan Guttmacher Institute (AGI) estimated that 1.4 million abortions took place. 22% of these abortions were performed on teenage girls, while 33% were performed on women aged 20-24. In general, 55% of the 1.4 million abortions performed were on women under the age 25 .

According to a 1994 AGI study, 110,890 young women between age 15 and 17 had abortions, and 12,150 young women under the age of 15 had abortions. In 1992 AGI estimated there were about 308,000 abortions among teens. In 1988, AGI estimated that 172,000 young women aged 17 or younger obtained an abortion.

2. **Other relevant statistics** -

- 28 states currently enforce parental consent or notification laws for a minor seeking an abortion: AL, AR, DE, GA, IN, KS, KY, LA, MD, MA, MI, MN, MS,MO, MT, NE, NC,ND, OH, PA, RI, SC, SD, UT,VA, WV, WI and WY.

- In 1991, AGI estimated that 61% of minors who have abortions do so with at least one parent's knowledge; 45% of parents are told by their daughter. Even in states that enforce no mandatory parental consent or notice requirements, more than 75 percent of minors under 16 involve one or both parents. An AGI study found that more than half of all young women who did not involve a parent in considering an abortion did involve an adult, including 15 percent who involved a step-parent or adult relative. Among minors who did not tell a parent of theirs, 30 percent had experienced violence in their family or feared violence or being forced to leave home. The majority

of parents support their daughter's decision to have an abortion.

- These health care professional organizations have opposed parental consent laws mainly due to concerns about preserving patient/provider confidentiality and reducing access barriers to reproductive health care for young women: College of American Academy of Family Physicians, American Academy of Pediatrics, American Obstetricians, NAACOG, Organizations of Obstetric, Gynecological and Neonatal Nurses, National Medical Association, American Medical Women's Association, American Nurses Association, American Medical Association, American Psychiatric Association, American Psychological Association, and American Public Health Association.

- Data on the number of illegal abortions is largely non-existent. By it's very nature this data would not be reported by patients or providers.

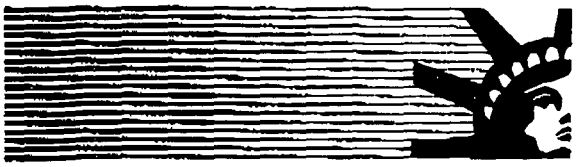
- Data on the use of judicial bypass could be collected from state courts, but there is no central source that has compiled this data. A number of the pro-choice organizations are in the process of collecting this data in certain states, but this process will take some time.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
William P. Marshall/WHO/EOP
Maria Echaveste/WHO/EOP
Audrey T. Haynes/WHO/EOP
Peter G. Jacoby/WHO/EOP
Ann F. Lewis/WHO/EOP
Elena Kagan/OPD/EOP
Tracey E. Thornton/WHO/EOP
Lisa M. Brown/OVP @ OVP
Nelson Reyneri/WHO/EOP

Abortion - child custody act

NARAL *Promoting Reproductive Choices*



FAX COVER SHEET

DATE: May 13, 1998

TO: Elena Kagan, Deputy Assistant to the President

OFFICE: Domestic Policy Council

FAX: 456-2878

FROM: Betsy Cavendish, Legal Director, NARAL

PHONE: (202) 973-3012 **FAX:** (202) 973-3030

THIS IS PAGE ONE OF 28 **TOTAL PAGES**

COMMENTS: Elena, I spoke briefly with your assistant, Laura. Attached are materials on the Child Custody Protection Act. The Senate Judiciary Committee is holding hearings on the bill on May 20 and the House just announced that they will hold hearings the following day. In short, the bill is moving fast and we need to stop the train.

Opponents are limited in witnesses, but of course, DOJ would be a "free" witness and its voice would be of huge assistance to reproductive rights. I have spoken to Dawn about this possibility and have not received a final response.

I also include for your information a letter to the editor of the WSJ we wrote last week in response to Mary Ann Glendon's piece, in which we dispute her erroneous claim that the President has never wavered from supporting unrestricted abortion rights up to and including birth.

It would be nice to see you soon! Betsy

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NARAL *Promoting Reproductive Choices*

TO: Reproductive Choice & Judiciary Committee Staff
FROM: Allison Herwitt, Acting Director for Government Relations
DATE: April 16. 1998
RE: ***Senate Judiciary Hearing on S. 1645, the so-called "Child Custody Protection Act"***

As early as the week of April 27, 1998, the Senate Judiciary Committee may hold a hearing on S. 1645, legislation that would make it a federal crime to transport a young woman across state lines for an abortion. The bill, sponsored by Senator Spencer Abraham, would prohibit anyone, including a step-parent, grandparent or religious counselor, from taking a young woman across state lines for an abortion if it would violate the state's parental involvement law.

While NARAL strongly believes that adolescents should be encouraged to seek their parent's advice and counsel when facing difficult choices regarding abortion and other reproductive health issues, the government cannot mandate healthy, open family communication where it does not already exist. Most young women do involve one or both parents when considering abortion. In states that enforce no mandatory parental consent or notice requirements, more than 75 percent of minors under 16 involve one or both parents. However, when a young woman cannot involve a parent, public policies and medical professionals should encourage her to involve a trusted adult.

Instead of encouraging young women to involve a trusted adult who may be able to offer much needed assistance, this bill will cause some young women to face these decisions alone, without any help. Should S. 1645 be enacted, it could endanger young women's lives and health by isolating young women who believe they cannot involve a parent.

Attached is a fact sheet on S. 1645 to help you prepare for the upcoming hearing. Please do not hesitate to call me if you have additional questions. I can be reached at 973-3047.

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NARAL *Promoting Reproductive Choices*

S. 1645/H.R. 3682 IS A THREAT TO YOUNG WOMEN'S HEALTH

Legislation was recently introduced in the House and Senate that would prohibit anyone, including a step-parent, grandparent or religious counselor, from taking a young woman across state lines for an abortion if it would violate the state's parental involvement law.

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, more than 75 percent of minors under 16 involve one or both parents.[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 S. 1645/H.R. 3682, the so-called "Child Custody Protection Act" is enacted, it could endanger young women's lives and health by isolating young women 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 which 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.

NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE

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- There were approximately 3.1 million cases of child abuse reported in 1996. Young women considering abortion are particularly vulnerable 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 where it does not already exist. Indeed there is no evidence that laws like S. 1645/H.R. 3682 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 people 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 these 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, under this legislation, minors will be forced to go by themselves and potentially to drive long distances by themselves, 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 but Indiana law required parental notice 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 exacerbate the time delays for young women seeking abortion and could cause young women to get later abortions.

A Parent Could Be Prosecuted Under This Legislation For Helping A Daughter Facing A Crisis Pregnancy.

Under this legislation, a parent, step-parent or grandparent could be jailed for taking his or her daughter to a neighboring state for an abortion.

- Access to abortion providers in the United States is limited. Eighty-four percent of counties do 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 parent of a pregnant minor who lives in a state that requires the written consent of a parent could be subject to criminal charges for taking her minor daughter to an out-of-state facility if the parent failed to comply with the written consent of the state of residence, even if the out-of-state facility was the closest to the parent's home.

- Six states (AR, ID, MN, MS, ND, UT) have laws that require both parents to be involved in a minor's decision to terminate a pregnancy.[14] Some of these statutes do not provide an exception when the parents are divorced or separated, where the non-custodial parent has not been involved in the minor's life, or where one parent fears abuse from the other parent. A parent's perception in a dysfunctional family that there will be violence if the non-custodial parent learns of the daughter's pregnancy is likely to be accurate.[15]

    - If S. 1645/H.R. 3682 goes into effect, a parent in these states would be prohibited from taking his or her daughter to a neighboring state to obtain an abortion. For instance, in Mississippi, where the state requires that both parents consent to a minor's abortion, a parent could not take a daughter to Alabama or Louisiana even if the parent complied with the one parent consent law in Alabama or Louisiana.[16]

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

Many 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. 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.[17] 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.[18]

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.[19]

- 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.[20]

- 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.[21]

- 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.[22]

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.[23]

- 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.[24]

- 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.[25] Second, there is no exception at all for when a woman's health would be endangered. As the Court noted in *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."[26]

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; access to confidential health services, including family planning and abortion; life options programs that offer teens practical life skills and the motivation to delay sexual activity; and programs for pregnant and parenting teens that teach parenting skills and help ensure that teens finish school.

March 1998

Notes:

1. Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," *Family Planning Perspectives*, vol. 24, no. 5 (Sept./Oct. 1992): 200, table 3.

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 1996 Annual Fifty State Survey* (Chicago: National Committee for Prevention of Child Abuse, 1997); 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," 196.

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 and Jennifer Van Vort, "Abortion Services in the United States, 1991 and 1992," *Family Planning Perspectives*, vol. 26, no. 3 (May/June 1994): 103.

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

14. Ark. Code Ann. § 20-16-801 to -808 (Michie 1991); Idaho Code § 18-609(6) (1987); Minn. Stat. § 144.343 (West 1989); Miss. Code Ann. §41-41-51 to -55 (1993); N.D. Cent. Code § 14-02.1-03.1 (1991); Utah Code Ann. § 76-7-304(2) (1995).

15. *Hodgson*, 648 F. Supp. at 769.

16. *See, e.g.*, Stanley K. Henshaw, "The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi," *Family Planning Perspectives*, vol. 27, no. 3 (May/June 1995): 122.

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

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

19. 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.

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

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

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

23. 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).

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

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

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

PETER J. RUBIN
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April 23, 1998

MEMORANDUM OF LAW

To: Laurie Rubiner
From: Peter Rubin Peter PR
Re: Constitutionality of the proposed Child Custody Protection Act

You have asked me to review and comment upon the constitutionality of the proposed Child Custody Protection Act, which would criminalize transporting a woman under the age of 18 across state lines for purposes of obtaining an abortion if the parental notification or consent laws of the state in which the woman resides have not been met before she obtains the abortion.

This proposed legislation violates the Constitution in at least two ways and raises at least substantial constitutional concerns in a third. First, even if the statutory ends were permissible — even if it did not violate any constitutional provision for the federal legislature to prohibit pregnant minors who wish to do so from obtaining out of state abortions without complying with regulations imposed by their home states — the means chosen in this bill to achieve those ends are unconstitutional. Government may not attempt to deter a minor from engaging in a particular activity by making it more dangerous. See *Carey* v. *Population Services International*, 431 U.S. 678 (1977). Here the proposed statute does not actually prohibit pregnant adolescents from obtaining out of state abortions without complying with the parental notification or consent laws of their states of residence. It seeks, rather, to deter them from doing so by denying them the assistance of any compassionate or caring adult, including family members such as grandparents, aunts and uncles, etc. Under the Due Process Clause of the Fourteenth Amendment this is not a permissible means of achieving even an otherwise legitimate governmental end.

Next, the proposed statute violates the undue burden test for abortion regulation adopted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 877 (1992). Under the analytical approach articulated by the Court in that case, the proposed statute has the unconstitutional purpose and would have the unconstitutional effect of placing a "substantial obstacle" in the path of pregnant adolescents seeking to exercise their right to choose to terminate a pregnancy. In addition, the statute as now drafted lacks a required exception for the health of the pregnant woman.

Finally, the statute raises substantial federalism concerns. Although the law in this area is less well defined, the statute appears to be unique, both in prohibiting interstate travel for a lawful purpose, in working a discrimination among citizens in the applicability of local law based only on their state of residence, and in requiring citizens to carry with them legal restrictions imposed by their state of residence regardless of where they travel within the nation.

Background

1. The Proposed Law

The proposed Child Custody Protection Act would amend the Criminal Code to add a provision, 18 U.S.C. § 2401, imposing criminal penalties for "Transportation of minors to avoid certain laws relating to abortion." The proposed statute provides that

> 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, if the requirements of a law requiring parental involvement in a minor's abortion decision, in the State in which the individual resides, are not met before the individual obtains the abortion, shall be fined under this title, imprisoned not more than 1 year or both.

Proposed 18 U.S.C § 2401(a).[1] In addition to these criminal penalties, the law also provides a civil cause of action for a parent or guardian who "suffers legal harm" from a violation of subsection (a). See proposed 18 U.S.C. § 2401(c). The law provides an exception "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." Proposed 18 U.S.C. § 2401(b).

2. The State Laws With Which the Statute Seeks to Compel Compliance

Constitutional assessment of this law requires an examination of its practical effects. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 886-887 (1992) (assessment even of the facial validity of a statute turns on evidence in the record). This in turn requires a description of the legal background against which it has been proposed and particularly of the state statutes with which it seeks to compel compliance.

Over twenty years ago the Supreme Court held that pregnant minors as well as pregnant adults have a constitutional right to choose whether to terminate a pregnancy. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976). The Court has of course acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults," *id.* at 74-75, but it has also explained that the decision to terminate a pregnancy may not be regulated as freely as other decisions a minor may wish to make for herself:

> 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.
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> Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education,

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[1] As drafted, the statute makes no exceptions for circumstances where the perpetrator believes in good faith that the pregnant adolescent has notified her parents or otherwise complied with the laws of her state of residence.

> 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 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).

Consequently, since 1976 legal restrictions on the availability of abortions have been impermissible if they "impose undue burdens upon a minor capable of giving an informed consent." *Bellotti* v. *Baird* (*Bellotti I*), 428 U.S. 132, 147 (1976). In application of this standard, the Court has held that the interests of parents in their minor daughter's pregnancy does not outweigh the daughter's constitutional right to choose whether to terminate her pregnancy. "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth*, 428 U.S. at 75. It has also held that the states may legislate concerning parental involvement in the abortion decision only as a means "to protect the minor's welfare." *Hodgson* v. *Minnesota*, 497 U.S. 417, 455 (1990).

The decision of the Supreme Court in *Casey*, 505 U.S. at 878, reaffirmed these principles. There the Court held that "[r]egulations which do no more than create a structural mechanism by which . . . the parent or guardian of a minor[] may express profound respect for the life of the unborn are permitted," but only "if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877 (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

Under the undue burden test, laws that may "in fact amount to [an] 'absolute, and possibly arbitrary, veto'" over the decision of the pregnant young woman are invalid, *Bellotti II*, 443 U.S. at 644, including laws that absolutely mandate either parental consent or parental notification before a pregnant minor can obtain an abortion. See *Danforth*, 428 U.S. 52 (striking down consent law that would by its terms give parents the power to veto a pregnant minor's abortion decision); *Bellotti II*, 443 U.S. 622 (striking down statute effectively requiring a pregnant woman "consul[t] or notif[y]" her "available" parent or parents because it would effectively give them a veto over her decision); *Hodgson*, 497 U.S. 417 (striking down two-parent notification law). As Justice Powell wrote for the Court in 1983, state abortion laws must make "provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her right to choose an abortion." *Akron* v. *Akron Center For Reproductive Health* (*Akron I*), 462 U.S. 416, 441 n. 31 (1983).

Parental consent and notification laws — including all the laws with which the proposed statute seeks to compel compliance — thus must provide what has come to be called a "judicial bypass" proceeding. At this proceeding the pregnant adolescent must be allowed to show either

that she is "mature enough and well enough informed" to make her own abortion decision without notifying or seeking the consent of her parents, or that "the desired abortion would be in her best interests." *Bellotti II*, 443 U.S. at 643-644. The bypass is a safety valve that prevents notification and consent laws from being an undue burden. And even a notification or consent law *with* a judicial bypass provision will be invalid if it presents a "substantial obstacle" to obtaining an abortion. See *Bellotti II*, 443 U.S. at 647 (striking a judicial bypass provision that imposed an undue burden on minors' right to seek an abortion); *Casey*, 505 U.S. at 899 (parental consent laws must have an "adequate" bypass procedure).

Thus, although subsection (a) of the proposed law purports to dictate compliance with statutes that "requir[e] parental involvement in a minor's abortion decision," in fact the state laws to which it refers do not *require* such involvement. See § 2401(a). And indeed, this is acknowledged in another subsection of the proposed statute which defines "law requiring parental involvement in a minor's abortion decision" to mean a law "requiring before an abortion is performed on a minor, either the notification to, or consent of, a parent or guardian of that minor; or proceedings in a state court." Proposed 18 U.S.C. §2401(d).

3. The Circumstances in Which A Pregnant Minor Will Seek An Out-of-State Abortion

This leads to an obvious question: Since a pregnant minor cannot be forced to notify or obtain the consent of her parents before obtaining an abortion, but may under all notification and consent laws in the country obtain judicial consent to her abortion — and since these judicial bypass procedures are themselves invalid if they present a "substantial obstacle" to a pregnant minor's exercise of her right to choose — why would any pregnant minor seek to cross state lines in order to avoid these laws?

The answer is that, in practice, the judicial bypass does not always work as required by the Supreme Court's rulings. Indeed, the Court itself recently recognized this problem. To begin with, not all judges will apply the law conscientiously. To give but one example, the Supreme Court in *Hodgson* v. *Minnesota* described unchallenged judicial findings that "a number of counties [in Minnesota] are served by judges who are unwilling to hear bypass petitions." *Hodgson*, 497 U.S. at 440. 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.*

In addition, although bypass procedures are required by the Constitution in order to *prevent* imposition 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 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, something from which at least one 17 year old, Becky Bell, has died. *Lewin, supra.*

One Minnesota judge who adjudicated bypass petitions "testified that minors found the bypass procedure '"a very nerve-wracking experience,"'" *Hodgson*, 497 U.S. at 441 n. 29. "[A]nother testified that the minor's'"level of apprehension is twice what I normally see in court."' A Massachusetts judge who heard similar petitions in that State expressed the opinion that 'going to court was "absolutely" traumatic for minors . . . "at a very, very difficult time in their lives."'" *Id.* (citations omitted). In *Hodgson*, a Minnesota doctor who performs abortions "testified that when her minor patients returned from the court process, 'some of them are wringing wet with perspiration. They're markedly relieved, many of them. They — they dread the court procedure often more than the actual abortion procedure. And it — it's frequently necessary to give them a sedative of some kind beforehand.'" *Id.*

For purposes of assessing its constitutionality, then, it must be remembered that this statute operates on some of the most vulnerable, scared and desperate young women and girls in our society. These may well not be the majority of pregnant minors to whom the law would apply. Undoubtedly many pregnant women cross state lines to obtain abortions because the nearest abortion provider is not in their home state. Among minors crossing state lines for this reason, many may have consulted their parents and involved them in their decision. Others would likely not object to the application of the Child Custody Protection Act. But, as the Supreme Court's decision in *Casey* makes clear, the constitutional assessment of the statute begins not with this latter group of pregnant minors, but with those who do not wish to notify their parents or to undergo their home state's judicial bypass regime. See *Casey*, 505 U.S. at 895 (facial validity of husband-notification law is determined by assessing the law's effect on those "married women who do not wish to notify their husbands of their intentions" to get abortions). Unable to tell their parents of their pregnancies these are young women and girls would rather seek the assistance of another adult, perhaps a close relative, in travelling out of state to obtain an abortion, than comply with the bypass provisions of the state in which they reside.

Analysis

1. *The Statute Fails to Use Reasonable Means To Achieve Its Ends In Violation of the Due Process Clause*

To begin with, even if it were permissible for the government to prevent the pregnant minors affected by this statute from crossing state lines in order to obtain out of state abortions without complying with the laws of their home state, the means used in this statute to achieve those ends violate Due Process which requires government to use only "reasonable" means to achieve even its legitimate ends. See *Hodgson* v. *Minnesota*, 497 U.S. at 450.

This law does not prohibit pregnant minors themselves from crossing state lines nor does it purport to criminalize their conduct in obtaining abortions in other states without complying with the laws of their state of residence. Rather it punishes any adult who provides them

assistance by transporting them across state lines. And it covers *all* adults, including relatives to whom a desperate, frightened pregnant adolescent might turn.

The law thus would deny pregnant minors fearful of telling their parents of their pregnancy — perhaps because of a history of abuse or even because their own father or another relative may be responsible for the pregnancy — the assistance of *any* compassionate or sympathetic adult, including any adult family member, at a time when they need it the most. These pregnant minors would still be permitted to attempt to obtain an out of state abortion, but the proposed law would require them to do so on their own.

The Court's cases make clear that such a brutal and harmful mechanism for achieving even a legitimate governmental purpose would violate the Constitution. Government may not attempt to deter a minor from engaging in a particular activity — here, obtaining an out of state abortion without complying with her home state's parental consultation or bypass law — by making it more hazardous. See *Carey* v. *Population Services International*, 431 U.S. 678, 694-695 (1977) (plurality opinion) (state may not restrict minors' access to contraceptives as a means of "deter[ing]" "minors' sexual activity" by "increasing the hazards attendant on it"); *id.* at 714-716 (Stevens, J., concurring in the judgment) (same principle); *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1973) (prohibiting distribution of contraceptives to the unmarried is an "unreasonable" way of achieving the goal of "discouraging premarital sexual intercourse").

Instructive in this regard is *Hodgson* v. *Minnesota*, in which the Court recently held that a two-parent notification provision — justifiable, like the proposed statute, only to the extent that it serves the best interests of the pregnant minor — did not "reasonably further any legitimate state interest." 497 U.S. 417, 450 (1990). The Court concluded that

> Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. . . . In [some] circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive.

497 U.S. at 450-451 (citations omitted). See also *id.* at 454 (the only permissible justification for "any rule requiring parental involvement in the abortion decision" is "the best interests of the child.").

The Court of course has recognized that it would be desirable for parents to be involved in the important decisions their children may make, including the decision whether to carry a pregnancy to term. However, the Court has also recognized that "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 II*, 443 U.S. at 642. Because the Child Protection Custody Act attempts to achieve its ends only be depriving the scared, pregnant minor of the assistance of any sympathetic adult, it violates the Constitution. As in *Hodgson*, the Due Process Clause requires government to "adopt less burdensome means to protect the minor's welfare." *Hodgson*, 497 U.S. at 455.

2. *The Proposed Law Unduly Burdens The Right of a Pregnant Minor to Obtain an Abortion*

Next, under the analytical approach recently articulated by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 883, 887 (1992), the proposed statute unconstitutionally imposes an "undue burden" upon the constitutional rights of those pregnant adolescents to whom it applies. See *Casey*, 505 U.S. 883, 887 (1992) (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (making clear that the right of a pregnant minor "to make the ultimate decision" cannot be unduly burdened).

As the Supreme Court explained in *Casey*, an undue burden exists, and therefore a provision of law is invalid, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 887. Because the proposed statute has both this purpose and this effect, it is unconstitutional.

a. First, the statute's *effect* will be to place a substantial obstacle in the path of the young women it targets who seek to exercise their constitutionally-protected right to choose. As described above, under *Casey*, the facial validity of the statute must be assessed by its impact upon those subject to the law "who do not wish" to comply with its requirements. *Casey*, 505 U.S. at 895. If "in a large fraction of" these cases the law would "operate as a substantial obstacle to a woman's choice to undergo an abortion," it is "an undue burden, and therefore invalid." *Id.* See also *Fargo Women's Health Center* v. *Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay and injunction) (reaffirming that this is the proper approach for determining the facial validity of a statute under *Casey*'s undue burden standard).

Here, then, the constitutionality of the Act must be measured by its impact upon the class of pregnant women and girls under eighteen who would rather seek the assistance of an adult in travelling out of state than notify their parents or undergo their home state's judicial bypass regime. These young women are willing to go to great lengths — seeking an abortion out of state — in order to avoid the practical effects of the laws of their home states.

The fact that they have chosen to go to such lengths to avoid the legal requirements imposed by their states of residence indicates that the proposed statute, which would force them to choose between, on the one hand, notifying their parents or going through their state's judicial bypass procedure, or, on the other, giving up their right to choose, will "in a large fraction of the cases . . . operate as a substantial obstacle to [their] choice to undergo an abortion," *id.*, effectively resulting in their carrying their pregnancies to term despite their desire to obtain an abortion.

Casey makes clear that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Where, however, a regulation, even one with a benign purpose, will "dete[r]" a "significant number of women . . . from procuring an abortion as surely as if the [government] had outlawed abortion," it imposes an undue burden and it cannot stand. See *Casey*, 505 U.S. at 894 (invalidating as an undue burden Pennsylvania's spousal notification law). See also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (statute is invalid if it would "intimidate women into continuing pregnancies").

Of course it could be argued that what leads to the creation of the "substantial obstacle" in this case is the flawed operation of certain states' judicial bypass regimes. If the bypass provisions were functioning properly, the pregnant minor could avoid the prohibitive effects of the proposed federal law by seeking a not-unduly-burdensome bypass in her state of residence.

Undoubtedly flaws in the implementation of some states' judicial bypass regimes are one of the but-for causes of the interference that the proposed statute will work with respect to the right to choose. However, so long as the proposed statute would in effect impose a substantial obstacle upon the pregnant minors it affects who seek out of state abortions without complying with the laws of their states of residence, it violates the constitution under *Casey*. That it might not be the only cause of this, or that some group of pregnant minors might also be able to obviate this effect by bringing an action challenging as an undue burden the operation of the notification and consent laws in their state of residence, is irrelevant. See *Casey*, 505 U.S. at 897 (striking down law that by its terms did nothing more than require women to notify their spouses of their intent to have an abortion because "[w]hether the prospect of the notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to [a] veto . . .").

b. Next, the statutory text demonstrates that the *purpose* of the law is to create a substantial obstacle that will prevent these minor women from obtaining abortions. The law contains an exception that reveals that its drafters intend that the law should act as an absolute prohibition on abortions. Under the statute, the restriction on transportation across state lines for purposes of obtaining an abortion 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." Proposed 18 U.S.C. § 2401(b).

Tellingly, this is *not* an exception for the performance in an emergency of a life-saving abortion. Such an exception would make sense if the law were truly intended merely to enforce compliance with laws in the pregnant minor's home state relating to parental consent or notification. This compliance process would take some time, and thus would not be appropriate in the case of a medical emergency.

Rather, this exception is designed to permit the pregnant woman to obtain an abortion *that she would otherwise be unable to obtain altogether*, whether she must do so on an emergency basis or not. Although in some sense this exception is broader than what might be expected in a law truly designed to compel notification or bypass, it reveals that the statute is *intended* not to foster effective compliance with state laws that themselves pose no substantial obstacle to the exercise of the right to choose, but to effectively require those young women afraid to comply with state laws to carry their pregnancies to term. Even if the law would not be effective in achieving this goal, because this is its purpose, it violates the Fourteenth Amendment to the Constitution.

c. Lastly, even aside from these infirmities, the proposed statute would still violate the Constitution under *Casey* because it lacks the required exception for the health of the pregnant woman. The Court in *Casey* made clear that "the essential holding of *Roe*," which it reaffirmed, "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

As currently written, the proposed statute contains no exception for the pregnant adolescent's health at all. As the Court explained in *Roe*'s companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), the constitution requires statutes that would restrict abortion to contain an exception for the preservation of the woman's "psychological as well as physical well-being." 410 U.S. at 192. Under *Doe*, such provisions will only be constitutionally adequate if they permit a doctor to assess the woman's health "in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Id.*

3. *The Statute Raises Substantial Federalism Concerns*

Finally, this statute raises substantial federalism concerns. The proposed law is unlike all other federal laws of which I am aware that prohibit the transportation of individuals across state lines. These laws ordinarily seek to make federal crimes out of crossing state lines for unlawful purposes. See, e.g., 28 U.S.C. § 2421 (prohibiting transportation in interstate commerce of "any individual . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"); 28 U.S.C. § 2423 (prohibiting transportation in interstate commerce of "any individual under the age of 18 years . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"). By contrast, the statute here prohibits the transportation of minors across state lines for a purpose that is *lawful*. Nor is it limited to adults who *coerce* individuals to crossing state lines for purposes of having an abortion. The pregnant adolescent will likely have consented to going out of state and, indeed, in the ordinary case may well have asked the adult for assistance in doing just that.

This law is also unusual — indeed, perhaps, unique — in that it seeks in effect to render the laws of the "destination" states inapplicable to some individuals based solely on their state of residence. Viewed from the other side, it seeks to subject the pregnant adolescent to the laws of her state of residence wherever she may travel within the United States.

The federalism concerns that restrict Congress's power to regulate the interstate movement of people and its power to impose any regime of "disparate treatment of residents and nonresidents" of a state, *Jones* v. *Helms*, 452 U.S. 412, 422 (1981), are reflected in the constitutional "right to travel." "Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by th[e Supreme] Court." *Id.* at 418. As the Court explained in *Shapiro* v. *Thompson*,

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):
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> > "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Shapiro v. *Thompson*, 394 U.S. 618, 629-630 (1969).

The right to travel protects against not only those laws that actually burden, restrict or deter movement across state lines, but those that "penalize" it as well. See *Dunn* v. *Blumstein*, 405 U.S. 330, 339-340 (1972). In this it imposes a restriction upon the enactment of laws that discriminate between residents and non-residents of each State, much in the same way as the Privileges and Immunities Clause of Article IV, which applies at least to state enactments.

That Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. Const. Art. IV, § 2.[2] Nothing in its text restricts its applicability only to state legislative enactments. And indeed, Justice O'Connor has argued that the right to interstate travel, which does restrict Congress, is itself rooted in the Privileges and Immunities Clause of Article IV. See *Zobel* v. *Williams*, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring in judgment). Nonetheless, because Justice Harlan concluded that it did not "limi[t] federal power," *Shapiro*, 394 U.S. at 666 (Harlan, J., dissenting), and because that argument finds some support in the Privileges and Immunities Clause's position in Article IV of the Constitution, I will describe the restrictions imposed upon states by the Clause primarily to shed light upon the probable scope of the at-least-closely-analogous protections provided by the right to travel.

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[2] The Supreme Court has found that "the terms 'citizen' and 'resident' are 'essentially interchangeable'. . . for purpose of analysis of most cases under the Privileges and Immunities Clause." *Hicklin* v. *Orbeck*, 437 U.S. 524, n. 8 (1978) (citation omitted).

The Privileges and Immunities Clause, fundamental to the structure of our federal system, "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of state B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948). With very limited exceptions, *e.g.*, *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. 371 (1978) (Montana may charge non-residents more than residents for a hunting license), the Privileges and Immunities Clause prohibits laws that distinguish between residents and non-residents with respect to goods and opportunities (at least those that are not attributable to state programs or revenues). See L. Tribe, *American Constitutional Law*, § 6-35 at 540. What is legal for the residents of a state must be available within that state to residents of the other states as well.

This rule has been specifically held to apply to the legal terms under which one may obtain an abortion. In *Doe* v. *Bolton*, the Supreme Court invalidated a law that would have made abortions available in Georgia only to state residents. It held:

> Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward v. Maryland*, 12 Wall. 418, 430 (1871); *Blake v. McClung*, 172 U.S. 239, 248-256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer v. Witsell*, 334 U.S. 385, 396-397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

Doe v. *Bolton*, 410 U.S. 179, 200 (1973).

There can be little doubt that ordinarily a law that operates as the proposed one does would violate the constitutional right to travel. Congress could not forbid individuals to shop out of state on Sunday if they are residents of a state with blue laws that mandate Sunday store closures. It could not forbid individuals who are away from their home states to buy handguns without complying with the restrictive laws of their states of residence. Indeed, it could not forbid adult women from obtaining abortions out of state without complying with waiting periods imposed by their states of residence. These laws would be beyond congressional power under the federalism principles reflected in the right to travel. To saddle individuals with the laws of their home state wherever they travel in the land would not be permissible. Although the limited number of decisions in this area leave it an open issue, whether a law like the proposed one is permissible that has this structure but that affects only a class of minors presents at least a substantial constitutional question.

II

105TH CONGRESS
2D SESSION

S. 1645

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1998

Mr. ABRAHAM (for himself, Mr. LOTT, Mr. DEWINE, Mr. INHOFE, Mr. NICKLES, Mr. COVERDELL, Mr. HELMS, Mr. COATS, Mr. SESSIONS, Mr. ENZI, Mr. CRAIG, Mr. KYL, Mr. HATCH, Mr. FAIRCLOTH, Mr. BROWNBACK, Mr. SANTORUM, Mr. MCCONNELL, Mr. HUTCHINSON, Mr. BOND, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to prohibit taking minors across State lines to avoid 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 TO AVOID 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 TO AVOID CERTAIN LAWS RELATING TO ABORTION

"§ 2401. Transportation of minors to avoid certain laws relating to abortion

"(a) OFFENSE.—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.

"(b) EXCEPTION.—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.

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

"(d) 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 or guardian 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 '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

"(3) 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:

"117A. Transportation of minors to avoid certain laws relating to abortion ..... 2401.".

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NARAL ***Promoting Reproductive Choices***

May 8, 1998

Ned Crabb
Letters Editor
The Wall Street Journal
200 Liberty Street
New York, NY 10281

Dear Mr. Crabb:

Professor Mary Ann Glendon's diatribe against President Clinton and his stand against the "Mexico City" abortion gag rule displays an extraordinary lack of understanding of the issues and groups involved and of the current state of women's reproductive health around the world (On Abortion, It's Clinton vs. The U.N., May 5, 1998).

It is important for your readers to understand that the only reason the payment of U.N. dues is tied to the issue of abortion is because abortion opponents in Congress have inextricably linked the two. Anti-choice lawmakers are in effect holding hostage important foreign policy priorities of the Administration in an attempt to force the President to accept restrictive anti-family planning language. Glendon's piece also obscures the fact that, since the passage of the 1973 Helms Amendment, it has been illegal to use U.S. funds for abortion services overseas.

The language to which President Clinton objects would deny U.S. family planning assistance to any organization operating overseas that uses its ***own non-U.S. funds*** to provide abortion services or even advocate on abortion issues in its own country. According to Secretary of State Madeline Albright, the "lobby" ban is "basically a gag rule that would punish organizations for engaging in the democratic process in foreign countries and for engaging in legal activities that would be protected by the First Amendment if carried out in the United States."

Professor Glendon also appears to lack any understanding of the impact restrictive abortion policies have on women around the world. According to information presented at the recent World Bank Conference on Safe Motherhood, approximately seventy to eighty thousand women die each year from unsafe abortions and every minute of every day a woman dies of complications related to pregnancy and childbirth. *That's almost 600,000 deaths per year.* Abortion is a safe procedure when carried out legally under standard medical conditions, but under the threat of criminal prosecution or in substandard facilities, it becomes frighteningly unsafe. Restricting access to safe abortion and jeopardizing funding for family planning services only exacerbates this problem and further endangers women facing crisis pregnancies.

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Ms. Glendon's statement that President Clinton "has never wavered" from some "principle" of unrestricted access to abortion is also counterfactual and preposterous. President Clinton, like NARAL, supports *Roe v. Wade*, which allows states to restrict abortion after viability, so long as women's health and lives are protected. As Governor of Arkansas, Clinton even signed legislation banning post-viability abortions, with exceptions for life, health, rape and incest.

Finally, Ms. Glendon slurs family planning organizations by suggesting that much of their political advocacy work is aimed at population control through pressuring poor women into abortion and sterilization. Nothing could be further from the truth. Family planning organizations and pro-choice groups merely advocate that women need the full range of reproductive options available to them in order to responsibly manage their reproductive lives. That means access to safe abortion services, but also to the family planning services that help to reduce the need for abortion.

I would suggest that the Professor do more research on what happens to women when their reproductive options are limited or denied. She can start with the country of Nepal where abortion is prohibited under any circumstances, including rape, incest and the endangerment of the woman's life. It would be interesting to see how she "spins" the deaths of the women in that country who seek unsafe abortions despite the big hand of government and the threat of imprisonment. They do so because they have no choice and only limited options.

There is room for legitimate differences of opinion when it comes to the issue of abortion. But all parties suffer when inaccuracies and unsubstantiated assertions are presented as fact as they are in Ms. Glendon's piece.

Sincerely,

Kate Michelman

Kate Michelman
President

abortion - child custody act

Record Type: Record

To: Elena Kagan/OPD/EOP, Jennifer L. Klein/OPD/EOP, Katharine Button/WHO/EOP

cc: Cynthia Dailard/OPD/EOP
Subject: fyi --Child Custody Protection Act

This bill basically sanctions those who transport minors across state lines for the purposes of having an abortion if the minor does not meet the parental notification requirements of the state in which they reside. There is a life of the minor exception. The Republicans have this bill on a very fast track with hearings scheduled for this week. DOJ has not fully reviewed the legislation yet, but Bill Marshall's view is that there no strong constitutional grounds on which to oppose it. My understanding is that legislative affairs is considering sending a decision memo to the President shortly.

Abortion – child custody act

William P. Marshall
05/19/98 06:36:17 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Child Custody Protection Act Issues

The following is a quick list of the issues raised by this legislation. The 'A' list contains the ones that may have political traction. The 'B' list includes the more technical problems.

A. The 'A' List

1. The bill imposes criminal sanctions against family members.

2. The bill imposes criminal liability on persons who may not realize they are violating the law (as when the minor falsely informs the transporter that she has parental consent.) This is because the bill predicates liability on the intent to help the minor obtain an abortion rather than on the intent to help the minor avoid the application of a state's parental notification requirements.

Note -- When Senator Abraham introduced the bill, he described the offense as involving the intent to avoid parental involvement requirements. He did not describe the offense as it is written in his bill -- the intent to help the minor obtain an abortion.

3. The bill raises troublesome federal law enforcement concerns. Pursuing alleged violations would require the FBI to investigate a minor's family and close personal friends, raising serious privacy concerns. Enforcing this law would also raise federal enforcement resource issues. Should the federal government be expending its resources in conducting the types of investigations that this law would require, and, if not, would passage of the bill merely be a hollow gesture?

4. The bill represents a dramatic incursion into our traditional understanding of federalism. Federalism presumes that a citizen is free to take advantage of favorable laws in other states. This bill curtails that right.

B. The 'B' List

1. The bill may impose the undue burden of having the minor comply with two separate parental notification statutes -- her home state and the state of the provider.

2. The bill does not take into account that some states' parental involvement laws have no mechanism for extra-territorial application. For example, some states impose the duty to notify a parent on the in-state provider. Since, by definition there is no in-state provider in the case of an extra-territorial abortion, there is no person with legal authority to satisfy the state law's requirements. In such circumstances, the federal law would be a complete bar to the minor's ability to have an out-of- state abortion and, in those circumstances, might be constitutionally suspect.

3. The bill requires the minor to comply with the parental involvement laws of the state in

which she "resides." This could be a different than the state of her domicile (permanent residence) and if so, could lead to a result in which a transporter who takes the minor to have the abortion in the minor's home state could be held criminally liable. This may be particularly problematic in the case of a minor whose divorced parents reside in two different states.

4. There are serious statutory ambiguities. For example, state parental involvement statutes require taking the health and life of the mother into account, and, for that reason the fact the bill does not contain a health exception is permissible. But, because the bill does provide an exception for the mother's life, it could be read as pre-empting any other exceptions contained in state law (including health). Another ambiguity stems from the statute's definition of a law requiring parental involvement as one that requires the notification to, or consent of "a parent or guardian of that minor." Some states, however, allow other persons to provide consent, again raising the issue of whether the federal law pre-empts state law.

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