Dissenting Views to Accompany
H.R. 748, "Child Interstate Abortion Notification Act"

We strongly dissent from H.R. 748. This legislation will increase health risks to young women who choose to have an abortion, is anti-family, anti-physician, and is clearly unconstitutional.

H.R. 748 consists of two dangerous and objectionable new criminal laws – proposed new 18 U.S.C. sections 2431 and 2432. The proposed new section 2431 – the Travel Provision – contains the provisions of the bill previously known as the "Child Custody Protection Act," which would impose criminal (including up to one year in prison) and civil penalties upon a person other than a parent – including a grandmother, aunt, sibling, or clergy member – who helps a teen cross certain state lines for an abortion unless the teen had already fulfilled the requirements of her home state's law restricting teens' abortions.[1]

The proposed new section 2432 – the Federal Notification Provision – would create a sweeping new parental notification requirement on young women who need abortion services in a state where they do not reside, by imposing criminal (up to one year in prison) and civil penalties on physicians that do not provide at least a 24 hours notice to the parent, even where the parent brings his or her child to the physician.[2] Significantly, neither the Travel Provision (section 2431) nor the Federal Notification Provision (section 2432) contain any exception for when an abortion may be necessary to protect a teen's health, in violation of Supreme Court precedent.

In effect, H.R. 748 will make those state laws that the Majority prefers (those requiring involvement of a parent or guardian) controlling in states with laws that it does not like (those allowing other adults to receive notice or provide consent or with no parental involvement requirements). This is an unprecedented Congressional intrusion into what has traditionally been

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[1]The proposed law would not require that the defendant know that the state's parental involvement law has not been satisfied, or that the defendant intend to aid in its circumvention. At the subcommittee markup, Representative Chabot offered an amendment that eliminated a possible affirmative defense in the original bill that the physicians could use any information or "compelling facts" from the minor herself in order to not comply with this bill. The amendment changed the bill to only allow for actual evidence from the parents or reasonable documentation from a court as affirmative defenses.

[2]If the physician is in a state where no parental consent or notification law or where a more reasonable parental consent or notification law is in force, this section requires that a doctor or a member of his staff provide "actual notice" to the parents of a patient in person at least 24 hours before the doctor provides the abortion. If the doctor is unable to provide actual notice after making a reasonable effort, then the doctor must provide 48 hours "constructive notice" instead.

an arena in which each state regulates its own citizens.

It is important to note that twenty-seven states and the District of Columbia either have no parental involvement laws or a law more lenient than the bill's definition of a "parental involvement law." Thus, within those states, representing approximately 57% of the United States population, H.R. 748 will impose the laws of the other twenty-three states, representing just 43% of the population.[3]

The legislation is opposed by a wide variety of groups that are committed to reducing teenage pregnancy and protecting a woman's right to choose, such as Planned Parenthood, NARAL Pro-Choice America, the American Civil Liberties Union, and the Center for Reproductive Rights.[4] In addition, major medical associations, including the American Medical

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[3] Fewer than half of the states enforce a requirement for notification or consent of a parent:

- Twenty-three states have laws that appear to match the Teen Endangerment Act's restrictive definition of a "parental involvement law:" Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

- Ten states have parental involvement laws that do not limit the notification or consent requirement to a parent exclusively, but allow involvement of some other adult, such as a grandparent or other relative, or allow a physician to waive the parental involvement requirement in certain situations: Colorado, Delaware, Iowa, Maine, Maryland, North Carolina, Ohio, South Carolina, West Virginia, and Wisconsin.

- Eleven states have enacted parental involvement laws that are not enforced within the state because the laws are legally defective, as established by court rulings or Attorney General opinions: Alaska, California, Florida, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, New Mexico, and Oklahoma.

- The District of Columbia and the other six states -- Connecticut, Hawaii, New York, Oregon, Vermont, and Washington -- have not enacted forced parental involvement laws.

[4] Memorandum from the American Civil Liberties Union, to Members of the House Committee on the Judiciary (Mar. 2, 2005) (on file with the minority staff of the House Judiciary Committee); Memorandum from Planned Parenthood, to Members of the House Committee on the Judiciary (Apr. 12, 2005) (on file with minority staff of the House Judiciary Committee); Memorandum from National Abortion and Reproductive Rights Action League, to Members of the House Committee on the Judiciary (Apr. 12, 2005) (on file with the minority staff of the House Judiciary Committee); American Medical Association, Ethics Op. 2.015 (1994)

Association, the American College of Obstetricians and Gynecologists, the American College of Physicians, and the American Public Health Association – have longstanding policies opposing mandatory parental-involvement laws, such as H.R. 748, because of the dangers they pose to young women and the need for confidential access to physicians. The American Academy of Pediatrics and Society for Adolescent Medicine oppose the legislation because it increases the risk of harm to adolescents by delaying or denying access to appropriate medical care.

We believe the bill denies young women facing unintended pregnancies the assistance of trusted adults, endangers their health, and violates their constitutional rights. For these reasons, and the reasons set forth below, we dissent from H.R. 748.

I. Legislation Endangers Young Women

Both the Travel Provision (section 2431) and the Federal Notification Provision (section 2432) will operate to endanger the lives and health of young women.

With regard to the Travel Provision, we would note that although an abortion is generally very safe, it is still far preferable and safer to permit a trusted friend or family member to drive a woman home from this surgical procedure.[5] Moreover, responsible health care providers do not provide these services unless they are confident the patient has someone who will accompany them and assist them following the procedure. Unfortunately, under the Travel Provision, teenagers who are unable to satisfy a state parental involvement law--either because they cannot tell one parent (or in some states, both parents) about their pregnancy or because they have no fair chance of obtaining a judicial bypass--will be forced to travel alone across state lines to obtain an abortion.

(discussing mandatory parental consent for minors seeking an abortion); National Abortion Federation, Teen Endangerment Act Repackaged: A Menacing Maze for Young Woman, Their Families, and Their Doctors (2005) *available at* http://www.prochoice.org/policy/national/teen_endangerment.html; Center for Reproductive Rights, The Teen Endangerment Act: Harming Young Women Who Seek Abortions, (April 2005) *available at* http://www.reproductiverights.org/pdf/pub_bp_tea.pdf. For organizations opposed to nearly identical federal parental consent legislation, see also Letter from American Academy of Pediatrics, American College of Obstetricians and Gynecologists; American Medical Women's Association, Society for Adolescent Medicine, to Members of the House of Representatives (Apr. 2, 2001).

[5] Many teenagers seeking an abortion must travel out-of-state to obtain the procedure, either because the closest facility is located in a neighboring state or because there is no in-state provider available. In fact, currently 86% of counties--home to 32% of women of childbearing age--lack an physician. *See* Stanley K. Henshaw, *Abortion Services in the United States, 1995 and 1996*, 30 FAM. PLAN. PERSP. 262, 266 (1998).

As much as we would prefer the active and supportive involvement of parents in young people's major decisions, it is not always realistic to expect them to seek parental involvement willingly in the sensitive area of abortion. Where a child is unwilling or unable to seek parental consent, the results can be tragic. The testimony of Bill and Mary Bell before the Constitution Subcommittee during consideration of predecessor legislation in the 105th Congress is telling in this regard.[6]

The Bells were the parents of a daughter who died after an illegal, unsafe abortion that she sought instead of telling her parents about her pregnancy, notwithstanding Indiana's parental notice law. A Planned Parenthood counselor in Indiana informed Becky that she would have to notify her parents or petition a judge in order to obtain an abortion. Becky responded that she did not want to inform her parents because she did not want to hurt them. She also replied that if she could not tell her parents, with whom she was very close, she would not feel comfortable asking a judge she did not even know. Instead of traveling 110 miles away to Kentucky, Becky opted to undergo an illegal abortion close to her home. Tragically, Becky developed serious complications from her illegal abortion that caused her death. It is unlikely that H.R. 748 could have changed this outcome or would have convinced Becky to confide in her parents about her pregnancy. In fact, the new restrictions and liabilities imposed on health care providers under this bill would undoubtedly make such situations even worse.

Some young women justifiably fear that they would be physically abused if forced to disclose their pregnancy to their parents. Nearly one-third of minors who choose not to consult with their parents have experienced violence in their family, feared violence, or feared being forced to leave home.[7] Enacting this legislation and forcing young women in these circumstances to notify their parents of their pregnancies will only exacerbate the dangerous cycle of violence in dysfunctional families. This is the lesson of Spring Adams, an Idaho teenager who was shot to death by her father after he learned she was planning to terminate a pregnancy

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[6] *See Hearing on H.R. 3682: The Child Custody Protection Act before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 17 (May 28, 1998) (statement of Bill and Mary Bell, submitted for the record); *See also* THE NATIONAL ABORTION FEDERATION, THE TRUE VICTIMS OF S. 1645/H.R. 3682 THE TEEN ENDANGERMENT ACT (1998) (describing the case of Keishawn, an eleven year old from Maryland, who was impregnated by her step-father, and sought an abortion with the assistance of her aunt, Vicky Simpson, who was awaiting an order granting her custody of Keishawn. Upon learning of the pregnancy, Keishawn's doctors in Maryland recommended that Keishawn have anesthesia during the abortion procedure, but none of the hospitals in Maryland would allow the abortion to be provided at their facility. As a result, Keishawn's aunt sought the attention of a specialist practicing in a neighboring state, who agreed to provide the abortion. Under H.R. 748, Vicki could have been federally prosecuted for helping her young niece cope with this pregnancy resulting from incest).

[7] *See* Henshaw, *supra* note 10, at 196.

caused by his acts of incest.[8] It is clear that when a young woman believes that she cannot involve her parents in her decision to terminate a pregnancy, the law cannot mandate healthy, open family communication.

We are well aware of proponents' claims that the travel provision would protect the rights of minors who cannot obtain parental consent because they have the option to appear before judges and obtain a judicial bypass for any parental involvement laws. While bypasses may have some theoretical benefits, in many cases it is difficult if not impossible for troubled young women to obtain them. Some teenagers live in regions where the local judges consistently refuse to grant bypasses, regardless of the facts involved. For example, one study found that a number of judges in Massachusetts either refuse to handle abortion petitions or focus inappropriately on the morality of abortion.[9] Other young women may live in small communities where the judge may be a friend of the parents, a family member, or even the parent of a friend. Still others may live in regions where the relevant courts are not open in the evenings or on weekends, when minors could seek a bypass without missing school or arousing suspicion.[10]

The difficulties in obtaining a judicial bypass were clearly illustrated by Ms. Billie Lominick during her testimony before the Subcommittee on the Constitution. Ms. Lominick was a 63-year old grandmother who helped a pregnant minor from a physically and sexually abusive household cross state lines to obtain an abortion.[11] Ms. Lominick testified that her assistance was essential because the minor was unable to find any judge in her home state of South Carolina who would hear her judicial bypass petition.[12]

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[8] *See* Maggie Boule, *An American Tragedy*, SUNDAY OREGONIAN, Aug. 27, 1989.

[9] *See* Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259 (1983); *see also Hodgson* v. *Minnesota,* 487 U.S. 417, 476 (1990) (finding that in Minnesota, many judges refuse even to hear bypass proceedings); *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) (describing how a judge in Florida, after denying a bypass petition to a teenage girl who was in high school, participated in extracurricular activities, worked 20 hours a week, and baby-sat regularly for her mother, suggested that he, as a representative of the court, had standing to represent the state's interest when the minor appealed the denial).

[10] The courts in Massachusetts, Minnesota, and Rhode Island are not open in the evenings or on weekends. *See* Donovan, *supra*, at 259.

[11] *See Hearing on H.R. 1218 `The Child Custody Protection Act' before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 23 (May 27, 1999) (statement of Billie Lominick).

[12] *Id.*

Moreover, reliance on the judicial bypass system as an effective alternative to parental consent understates the intimidating effect of seeking a court-sanctioned abortion. Many minors fear that the judicial bypass procedure lacks the necessary confidentiality. The American Medical Association has noted that "because the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. . . . The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973."[13]

Many young women, faced with the violation of confidentiality or the prospect of embarrassment and social stigma would resort to drastic measures rather than undergo the humiliation of revealing intimate details of their lives to a series of strangers in a formal, legal process. Young women's concerns about confidentiality are especially acute in rural areas. For example, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.[14]

With respect to the Federal Notification Provision, the section requires a 24-hour or more waiting period and written notification, with no medical emergency exception, even if a parent accompanies his or her daughter to an out-of-state physician and consents to the abortion services. In such cases, this requirement acts as a built-in mandatory delay, imposing logistical and financial hardships on functional families who are trying to support their daughters. Even in a health emergency, this bill robs a parent of his or her ability to authorize immediate care. For example, if a parent and daughter were vacationing together in California and the parent brought her daughter to a hospital for emergency abortion services, this provision would needlessly require a doctor to wait 24 hours before providing that care.

We would also observe that the Federal Notification Provision's very limited exceptions provide no safety net for the most vulnerable teens. For example, the section's "exception" for teen victims of certain forms of abuse only applies if the young woman "declares in a signed written statement that she is the victim of abuse." This "exception" ignores the painful reality that most abused teens are too afraid to tell anyone that they are being abused. Moreover, because the bill requires the doctor to notify the authorities of the abuse before the abortion is performed, many teens will not report the abuse for fear that their parents will discover the abuse report. As Justice O'Connor aptly stated in *Hodgson* v. *Minnesota*, an "exception to notification

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[13] *See* Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, JAMA, Jan. 6, 1993, at 83.

[14] *See Memphis Planned Parenthood* v. *Sundquist*, No. 3:89-0520, slip op. at 13 (M.D. Tenn. Aug. 26, 1997); *See also* Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. TIMES, May 29, 1992, at A1 (describing how a judge in Toledo, Ohio denied permission to a 17 ½ year old woman, an 'A' student who planned to attend college and who testified she was not financially or emotionally prepared for college and motherhood at the same time, stating that the girl had "not had enough hard knocks in her life").

for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents."[15] Morever, "[t]he combination of the abused minor's reluctance to report sexual or physical abuse . . . with the likelihood that invoking the abuse exception for the purpose of avoiding notice will result in notice, makes the abuse exception less than effectual."[16]

II. *Legislation is Anti-Family*

H.R. 748 is also overtly hostile to families. Despite the proponents' belief that the bill would enforce parents' right to counsel their daughters, the reality is that it is impossible to legislate complex family relationships. Studies reveal that more than half of all young women who do not involve a parent in a decision to terminate a pregnancy choose to involve another trusted adult, who is very often a relative.[17]

Although the Travel Provision (section 2431) exempts parents from criminal and civil liability, non-parent adults who are raising a child will be swept in by the bill's prohibitions. This is because the exception is excessively narrow and refers only to a parent or guardian; a legal custodian; or a person designated by a state's parental involvement law as a person to whom notification, or from whom consent, is required.[18] Several amendments were offered during the markup to ameliorate these harsher consequences of section 2431. Representative Nadler offered an amendment that would have exempted the minor's grandparent or adult sibling.[19] Similarly, Representative Jackson-Lee offered an amendment exempting clergy, godparents, aunts, uncles, or first cousins that was rejected by a vote of 13 to 20.[20]

The bill also illogically sanctions the criminal activity of a parent by authorizing lawsuits to be brought by parents suffering "legal harm" against any person assisting a minor in obtaining

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[15]497 U.S. 417, 460 (1990) (O'Connor, J. concurring) (noting that an abuse report "requires the welfare agency to immediately 'conduct an assessment;'" if the "agency interviews the victim, it must notify the parent of the fact of the interview" and the parent has the right to access te investigation record).

[16]*Id*.

[17]*See* Henshaw, *supra*, at 207.

[18]H.R. 748, § 2 (proposed 18 U.S.C. § 2431(e)(2)).

[19]*Child Interstate Abortion Notification Act: Markup of H.R. 748 Before the House Comm. on the Judiciary*, 109th Cong. 37S38 (2005) (statement of Rep. Nadler).

[20]*Id.* at 76, 81 (2005) (statement of Rep. Jackson-Lee).

an abortion across state lines.[21] The private civil remedy aspect of both the Travel and Federal Notification Provisions are so broad that even a father who committed rape or incest against his own daughter would be empowered to bring a lawsuit seeking compensation under the legislation. If the pregnancy of the minor is a result of incest with her father, the minor must still comply with any parental consent or notification law in the state of her residence under this bill unless she signs a written statement and agrees to allow the physician to notify the authorities about the sexual abuse.[22] If the minor decides not to sign a written statement or notify the authorities and is accompanied by her grandmother across state lines to a doctor in another state for abortion services, the father who committed the incest can bring a civil action against the grandmother and the doctor, effectively profiting from his own criminal wrongdoing.[23]

Representative Waters offered an amendment at markup that would have provided an exception to this civil liability if the pregnancy was the result of sexual contact with the parent or any other person that had permanent or temporary custody of the minor.[24] Representative Waters also offered an additional amendment that would only provide an exception if the pregnancy resulted directly from acts of incest.[25] Both amendments were defeated.

III. *Legislation is Dangerously Over Broad*

Supporters of this bill claim the Travel Provision merely targets predatory individuals who force and coerce a minor into obtaining an abortion. However, the net cast by this section is far broader and more problematic. The Travel Provision includes a criminal penalty against persons who "knowingly transport an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion."[26] In other words, this provision would make it a *federal crime* to assist a pregnant minor to obtain an abortion that would be lawful in the state in which it was provided. The bill does not require proof of any intent to avoid state parental consent laws. Anyone simply transporting a minor--a bus driver, taxi driver, family member or friend--could be jailed for up to a year or fined or both. The same applies to emergency medical personnel who may be aware they are taking a minor across state lines to obtain an abortion but would have no choice if a medical emergency were occurring.

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[21]H.R. 748, § 2 (proposed 18 U.S.C. § 2431(d)).

[22] Id. § 3 (proposed 18 U.S.C. § 2432(b)(3)).

[23]*Id.* (proposed 18 U.S.C. § 2432(c)).

[24]*Child Interstate Abortion Notification Act: Markup of H.R. 748 Before the House Comm. on the Judiciary*, 109th Cong. 17S18 (2005) (statement of Rep. Waters).

[25]*Id.* at 24S25.

[26]H.R. 748, § 2 (proposed 18 U.S.C. § 2431(a)(1)).

Similarly, a nurse at a clinic providing directions to a minor or her driver could be convicted as an accessory under this legislation. A doctor who procures a ride home for a minor and the person accompanying her because of car troubles coupled with the minor's expressed fear of calling her parents for assistance could be convicted as an accessory after the fact. A sibling of the minor who merely agrees to transport a minor across state lines without any knowledge of any intent to evade the resident state's parental consent or notification laws could be thrown in jail and convicted of a conspiracy to violate this statute.

The supporters of this bill inaccurately compare it to the Mann Act, which prohibits the transport of "any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the U.S., with intent that such individual engage in prostitution, or in a sexual activity for which any person can be charged with a criminal offense. . . ."[27]

The Mann Act, like most other criminal laws, contains a specific *mens rea* component, that requires that criminally liable individuals have an intention to break the law.[28] A person convicted of possessing stolen property, for example, must know or have reason to know that the property they possess is stolen. The Travel Provision has no such specific intent requirement and, therefore, imposes strict criminal liability for anyone in violation.[29] Where the Mann Act purports to guard against corruption of minors, a laudable but not constitutionally-protected purpose, the Travel Provision imposes significant restrictions on a constitutionally-protected right to an abortion. Moreover, the Mann Act requires that the minor be transported across state lines for the purpose of engaging in an act that is illegal, while this legislation would impose civil and criminal liability for the act of taking a minor across state lines to engage in an activity which is legal in that second state, and constitutionally protected.[30]

In an attempt to clarify who would face criminal or civil liability, Representative Scott offered two amendments to the Travel Provision. The first would have exempted taxicab drivers, bus drivers, and others in the business transportation profession from the criminal provisions of this statute.[31] This amendment was defeated by a vote of 13 to 17.[32] Representative Scott also offered an amendment that would have limited criminal liability to persons who had committed

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[27]18 U.S.C. § 2421 (2000).

[28]*Id.*

[29]The affirmative defense available in H.R. 748 does not address this problem.

[30] Id.

[31]*Child Interstate Abortion Notification Act: Markup of H.R. 748 Before the House Comm. on the Judiciary*, 109th Cong. 49S51 (2005) (statement of Rep. Scott).

[32]*Id.* at 61.

the crimes in the first degree, excluding potential defendants who had helped the minor after the fact, or individuals with a tangential role in the act.[33] The amendment was defeated by a vote of 12 to 18.

IV. Legislation Imposes Convoluted and Complex Legal Requirements.

Both the Travel and Federal Notification Provisions operating separately and in conjunction, serve to impose an impossibly complex patchwork of legal requirements, on both young women and physicians. In essence, the legislation creates a Byzantine system of parental notification mandates that would impose extra hurdles on some teens and leave others with no options and expose physicians to new and unprecedented legal liability.

For example, under the Travel Provision, many young women would have to comply with two states' teen abortion laws. Thus, a minor who travels with assistance from Missouri to Kansas for an abortion must comply with both Missouri's law and Kansas's law. A young woman who is unable to involve her parents in her abortion decision, and thus pursues a court waiver, must therefore obtain a judicial bypass in *both* her home state and the provider's state before she can obtain an abortion.

Likewise, the Federal Notification Provision also imposes complex and absurd requirements for physicianss and their patients. As noted above, section 2432 would require that the physician give 24 hours "actual notice" to a parent before performing an abortion on a minor from out-of-state. This provision would apply even if the minor came from a state that did not have a parental consent or notification law, and even if the parent went to the other state fully intending and approving of his or her child's abortion. The section defines "actual notice" as "the giving of a written notice directly, in person." This section would seem to require that the physician or a member of her staff travel out-of-state to visit the parents of the patient in person. The section would allow for the physician to give "constructive notice" to the patient's parents if it is not possible to provide them with "actual notice" after the physician has made a "reasonable effort" to do so. The section defines "constructive notice" as notice that is given by certified mail, to the last known address of the person being notified with delivery deemed to have occurred 48 hours following noon" on the day after the mailing occurred. The section does not define "reasonable effort."

Consider the incredible new burdens this provision imposes on physicians. Under the threat of civil and criminal penalties, the Federal Notification Provision requires doctors to make "reasonable" efforts to provide *in-person*, written notice of an out-of-state teen's parents. It provides no guidance to help a physician know what efforts suffice as "reasonable" to track down a parent in another state to provide this in-person written notice. This requirement places extremely burdensome, if not impossible, demands on doctors. Because many communities do

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[33] *Child Interstate Abortion Notification Act: Markup of H.R. 748 Before the House Comm. on the Judiciary*, 109th Cong. 63 (2005) (statement of Rep. Scott).

not have physicians, women often have to travel to a neighboring state to obtain an abortion; thus, doctors could routinely be forced to travel hundreds of miles out-of-state in order to comply with the bill's in-person notification mandate. This federal in-person notification requirement is more onerous than even the most stringent state laws. Moreover, because the bill operates differently depending on a teen's state of origin, it requires health care providers to be familiar with the legal regimes of all 50 states and to understand the interaction between these varying legal regimes and the local state laws of the provider.

The requirements on physicians if a young woman informs him or her that she is a victim of abuse are equally convoluted. Under Section 2432 such a conversation then triggers a new mandate on the doctor to not only notify the "authorities" of the parents' abuse, but to provide such notification in another state. Each state has its own legal requirements in this area, and its own agencies to which the behavior must be reported – and in some cases the reports must be filed in the county. Additionally, the Federal Notification Provision establishes no mechanism for this new type of cross-state reporting, and does not specify in what manner or with what level of detail the reporting must occur. This is far from being a mere bureaucratic headache; the legislation gives doctors no guidance about to whom or what detail the report must be made, and therefore they cannot be sure that even their most thorough and good-faith attempts to comply with the law will keep them from risking fines or a prison sentence.

It is important to note that these requirements will quite frequently come into play when young women are forced to cross state lines to obtain an abortion, not because of differing laws, but because of sheer availability. As of 2000, there were no known physicianss in 87 percent of the counties in the United States.[34] For many young women, the closest available physician is located in another state, and others may be unable to obtain an abortion anywhere in their home state.

V. Constitutional Concerns

By imposing substantial new obstacles and dangers in the path of a minor seeking an abortion, the Travel and Federal Notification Provisions raise at least three serious constitutional concerns.

First, the legislation raises numerous federalism and equal protection problems. It is impermissible to pass a law which has the effect of imposing one state's legal requirements on another state, as both section 2431 and 2432 do. In essence the bill imposes on states and physicians the laws of the states that have the most stringent requirements on abortion. Federalism dictates that one has the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in another state as delineated by the Privileges and

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[34]Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Perspectives on Sexual and Reproductive Health 6 (2003).

Immunities Clause of the Fourteenth Amendment.[35]

The Court held in *Saenz* that a state cannot discriminate against the citizen of another state when there is no substantial reason for the discrimination except for the fact that they are citizens of another state.[36] The Court has found that certain rights are protected by the Privileges and Immunities Clause of the Fourteenth Amendment if they bear "upon the vitality of the Nation as a single entity" or those rights that are deemed "fundamental."[37] The Court in *Saenz* specifically referred to *Doe v. Bolton* where it held that a state could not limit access to its medical care facilities for abortions to in-state residents.[38] A state must treat all that are seeking medical care within that state in an equal manner.[39] This protection would extend to minors since the Court held in *Danforth* that minors have a constitutional right to choose whether to terminate a pregnancy or not.[40] The Court further held that Congress also does not have the power to validate a law that violates the rights guaranteed by the Fourteenth Amendment.[41]

In the present case, both the Travel and Federal Notification Provisions cause young women to carry their own state laws with them, "strapped on their backs"[42] when they travel to other states. For example, this bill treats a young woman who travels to a state, or who resides in a state temporarily (such as a college student), differently than a minor living in that state. Thus, because New York does not have a law restricting teen abortions, a minor living in New York need not notify her parents in order to obtain an abortion. However, a minor who travels into

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[35] Saenz v. Roe, 526 U.S. 489, 500S01 (1999).

[36] *Id.* at 502.

[37] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 382S83 (1978).

[38] Doe v. Bolton, 410 U.S. 179, 200 (1973).

[39] *Id.*

[40] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74S75 (1976).

[41] *Id.* at 508. One may argue that this means that Congress itself cannot pass laws that treat non-residents visiting a particular state differently than residents of that particular state.

[42] As Professors Laurence Tribe of Harvard Law School and Peter Rubin of Georgetown University Law Center explained that the predecessor version of this legislation "amounts to a statutory attempt to force this most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone)." Memorandum from Laurence H. Tribe & Ralph S. Tyler Professor of Constitutional Law, Harvard University and Peter J. Rubin, Visiting Associate Professor of Law, Georgetown University, to the House Comm. on the Judiciary, at 2 (September 2, 2001).

New York, or who temporarily resides in New York, is saddled with an entirely different legal scheme: she must either obtain a court bypass from her home state or, if no bypass is available, be subject to the bill's mandatory notice requirements. The bill thus would discriminate against teenagers within the same state on the basis of their state or origin and would deprive teens of their right to travel to engage in conduct legal in another state in violation of constitutionally protected rights to equal protection and interstate travel.

Second, both the Travel and Federal Notification Provisions have an unconstitutionally narrow life exception for the woman and no health exception. These exceptions are especially important in light of the tremendous uncertainty and onerous civil and criminal penalties responsible adults and health care providers would face. In particular, the delay that the bill's notice requirements would impose under section 2432 could prove fatal or dangerous to a young woman's health and future fertility.

The narrowness of the "life" exception in both sections – applying only "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" would also place health care providers in an impossible position. Just how severe must a physical threat to a woman's health be before a physician feels confident that a life exception may be invoked? How much would a court second-guess a medical decision of this type in a future court proceeding? What would be the cost of defending such a case even if a physician ultimately prevails in a civil or criminal case, or both? As the Supreme Court has recognized, laws containing life exceptions cannot pick and choose among life-threatening circumstances.[43]

The lack of any health exception is also constitutionally problematic. In *Stenberg v Carhart*, the Court held that a statute must provide a pre-viability and post-viability health exception in order to be constitutional.[44] The majority held that the Partial Birth Ban Act lacked a health exception required under *Roe* when the procedure is necessary in the doctor's judgment for the preservation of the health or life of the woman.[45] Any restriction on abortion must have

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[43]Planned Parenthood of Southeastern Pa. v Casey, 505 U.S. 833, 879 (1992).

[44] Stenberg v. Carhart, 530 U.S. 914, 930 (2000). Courts have held that the recently enacted Partial-Birth Abortion Act is unconstitutional because of concerns similar to those in *Stenberg*, see Hope Clinic v. Ryan, 249 F.3d 603, 604S05 (7th Cir. 2001); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000); Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 142 (3rd Cir. 2000). Additionally, courts have also struck down these statutes because they were overbroad. *See* Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 797S98 (8th Cir. 1999).

[45] *Stenberg*, 530 U.S. at 938. The Court further stated that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger

an exception "where it is necessary, in appropriate medical judgment, for the preservation of the life or the health of the mother."[46] Yet the legislation contains no health exception whatsoever, in clear violation of Supreme Court precedent.[47]

Third, both the Federal Notification and Travel Provisions are in conflict with the courts holding that any restriction that has the purpose or effect of placing an "undue burden" on a woman's right to choose to have an abortion up until pre-viability is unconstitutional.[48] The Federal Notification Provision does this in two ways. As an initial matter, it denies many young women the option of obtaining a court waiver at all. This is because the bill takes away the option of going to court for those teens who live in a state without an enforceable teen abortion restriction[49] and who seek an abortion in another state that either does not have an enforceable teen abortion law or has a law that does not meet the bill's standards for such a law.[50] In these situations, the minor's home state has no waiver system in place and the bill does not permit use of another state's waiver system. Accordingly, the teen will not be able to obtain an abortion until the doctor provides notice of the abortion to one of her parents. The Federal Notification Provision thus makes parental involvement mandatory for these teens with absolutely no option for a court bypass. The U.S. Supreme Court has stated that, in order to be constitutional, a statute requiring parental involvement must offer an alternative such as a judicial bypass.[51]

Moreover, the provision in the Federal Notification Provision requiring that the doctor

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women's health" a health exception is needed. *Id.*

[46] *Id.* at 930 (quoting *Casey*, 505 U.S. at 879).

[47] Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (determining that the partial-birth ban act did need a health exception when the procedure is necessary in the doctor's judgment for the preservation of the health or life of the woman); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879S80 (1992) (upholding a Pennsylvania statute that defined a medical emergency as a condition that requires an abortion of the fetus or a condition that would "create serious risk of substantial and irreversible impairment of a major bodily function" because it would not impose an undue burden on a woman's right to choose); Roe v. Wade, 410 U.S. 113, 164S65 (1973) (finding that a state may regulate or proscribe post-viability abortions with the exception where it is necessary for the preservation of the life or health of the woman).

[48] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992).

[49]The following states do not have enforceable parental involvement laws: AK, CA, CT, FL, HI, ID, IL, MT, NV, NH, NJ, NM, NY, OK, OR, VT, WA, and D.C.

[50]H.R. 748, § 2 (proposed 18 U.S.C. § 2432 (d)(4)).

[51]Hodgson v. Minnesota, 497 U.S. 417, 420 (1990); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510 (1990).

must provide 24 hours actual notice or at least 48 hours more constructive notice to the parents of the minor before providing the abortion care would also appear to impose an undue burden on a woman's right to choose.[52] The Court in *Casey* found the reason the 24-hour delay was constitutional was because there was a health exception for the preservation of the life and health of the woman.[53] Without this exception present, the Federal Notification Provision would likely be held unconstitutional because these delays will put an "undue burden" on a woman's right to choose.

With respect to the Travel Provision, a young woman who determined that she could not involve her parents may have to go through a judicial bypass in two states, also constituting an undue burden. For instance, if the young woman lived in a state with a consent law, but the closest health care provider was in a state that also had a consent law, the minor would have to go through the judicial bypass in each state if she felt that she could not obtain either parent's consent. Requiring two judicial proceedings necessarily results in delays, thereby further compounding the medical risk of the procedure. In addition, the judicial bypass process often does not provide a real alternative for minors who need to obtain abortions. Many states have judicial bypass procedures that are applied inconsistently by local judges making them an unreliable alternative for minors residing in those states.[54]

Conclusion

While promoting the involvement of parents in decisions concerning the pregnancy of a minor is a laudable and desirable goal, the heavy-handed approach in this legislation that ignores the real circumstances affecting real people attempting to grapple with some of life's most difficult decisions is neither sound, nor is it humane. The rights of parents are important, but the right of young people to seek out the protection of responsible adults in difficult and sometimes dangerous situations is a value Congress must respect. This bill violates these basic principles of humanity and regard for human dimension of these problems. It is reckless in it s disregard for the welfare of young people in difficult situations.

John Conyers, Jr.
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[52] *Id.*

[53] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 886 (1992).

[54] Dr. Michele Wilson, Associate Professor, University of Alabama-Birmingham, Statement (Sept. 1, 2001) (on file with author); Beverly Howard, Court-appointed Advocate and Attorney, Montgomery, Alabama (June 10, 1998) (on file with author); Bernadette McNabb, Executive Director, Knoxville Center for Reproductive Health (on file with author).

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