

The Teen Endangerment Act

Harming Young Women Who Seek Abortions

(H.R. 748; S. 8, 396, 403)

OVERVIEW

We should do more to counsel our teens to avoid unwanted pregnancy and to support them, not punish them. The Teen Endangerment Act (H.R. 748; S. 8, 396, 403)¹ does not protect teens; instead it harms young women who face unwanted pregnancies. It criminalizes family members and friends for trying to help. It serves no health purpose. In fact, because it provides no exceptions even when a teen's health is in danger, it jeopardizes young women's health. In all of these ways, the Teen Endangerment Act endangers young women who face unwanted pregnancies. In many instances, it will actually interfere with how parents choose to raise their children. It also violates basic constitutional principles of federalism, reproductive rights, due process, equal protection and the right to travel.

The Teen Endangerment Act will impose a mandatory parental notification and delay requirement on young women who need abortion services outside of their home state. It will also make it a federal crime to assist young women who cross state lines to obtain an abortion – making criminals of friends and family members who help teens unable to involve a parent in their decision. The law will subject young women, abortion providers, and others who assist the women to a confusing maze of overlapping and conflicting state and federal laws, which will make it more difficult and more dangerous for young women to obtain abortions.

The Act will create two federal crimes. The first section of the bill – the Travel Provision – makes it a federal crime for any person, other than a parent or guardian, to knowingly transport a minor across certain state lines to obtain an abortion, if the minor does not fulfill the requirements of her home state's law restricting minors' access to abortions. This provision will harm young women who are unable to discuss their unwanted pregnancies with their parents, who may be unsympathetic or even abusive. It will make criminals of caring relatives and friends who assist young women seeking abortions and will force many young women to travel alone for an abortion, seek risky alternatives, or carry unwanted pregnancies to term. To avoid turning trusted relatives and friends into criminals, some teens will have to comply with two state's abortion restrictions and may have to go to court in two states in order to obtain an abortion.

The second section of the bill – the Federal Notification Provision – imposes a federal parental notification and mandatory delay requirement on abortions performed on non-resident minors in more than half of the states. Abortion providers in 26 states will not be able to perform an abortion on a young woman who resides in another state until at least 24 hours after a parent has been notified. This restriction will apply even if a parent accompanies his or her daughter to the out-of-state abortion provider and even in a medical emergency situation. Teens in some states who are unable to involve a parent will have no alternative to notification, because the Act does not include a mechanism for getting a judicial waiver of the notification requirement.

Some young women cannot involve a parent in the very personal decision to terminate a pregnancy. Many of those young women seek guidance from another adult, such as a grandparent, aunt, or adult sibling. Fear of abuse, pressure to carry the pregnancy to term, threats of being thrown out of the house or other negative repercussions top the list of reasons that keep minors from involving a parent in their decision. For battered teenagers and incest survivors in particular, laws that require that one or both parents consent to or be informed of a planned abortion increase the risks in an already dangerous situation.

Young women who seek an abortion in a state in which they do not reside do so for a variety of reasons. Some go out of state due to lack of a nearby abortion provider in their home state, or due to cost considerations, or the reputation of the provider, or differences in the services provided. Some of these young women travel with a parent out of state for their abortion and others travel with other trusted relatives or friends. Other young women travel out of state because they wish to avoid the harm they may suffer if forced to involve a parent or due to difficulties in going to court in their home state to seek a waiver of the parental involvement requirement. Whatever their reason, the Teen Endangerment Act will harm them: requiring some to travel alone out of state, rather than with a trusted relative or friend; forcing some to involve a parent under difficult circumstances; interfering with the decisions made by some together with a parent; depriving some of the ability to obtain an abortion in a health-threatening situation; and causing some to have later, riskier abortions or become unwilling teen mothers.

Harming Young Women Who Seek Abortions

THE TEEN ENDANGERMENT ACT WILL

Harm Young Women by forcing parental involvement even in potentially abusive or dysfunctional family situations, by making it riskier for young women to obtain abortions, by interfering with the parent-daughter relationship, by trapping minors in a confusing maze of conflicting state laws, by forcing young women to choose between foregoing assistance from trusted relatives or friends or exposing them to potential criminal liability, and by ignoring the geographic and economic realities and flaws in state judicial bypass systems that cause some young women to seek an abortion out of state

Punish Caring Relatives and Others Who Help Young Women by criminalizing assistance they provide to young women who travel to another state to exercise their right to obtain an abortion

Violate Established Constitutional Principles of federalism, reproductive rights, due process, equal protection, and the right to travel

HOW THE TEEN ENDANGERMENT ACT CHANGES EXISTING LAW

All minors must comply with the forced parental involvement law, if any, of the state in which they obtain an abortion; the Act does not change that fact. What the Act does is severely restrict most young women's ability to obtain an abortion outside their home states, in many cases forcing minors to comply with the laws of two states and imposing on some minors additional federal notification and delay requirements.

The Travel Provision: The Travel Provision of the Act criminalizes currently lawful situations in which a minor travels out of state for an abortion with assistance. The Act will criminalize the "knowing transport" of a minor across a state line with the intent that the minor obtain an abortion if doing so "abridges the right of a parent" under the forced parental involvement law of the minor's resident state.² "Abridgement of the right of a parent" occurs if the minor obtains an abortion outside her home state without "the parental consent or notification, or the judicial authorization" that would have been required if she obtained an

abortion in the state where she resides. The Act discriminates amongst state laws: not every state's parental involvement law will follow a minor from her state of residency to the state where she obtains an abortion. The Act gives extra-territorial effect only to those laws that meet the Act's definition of a "parental involvement law." The Act does not clearly identify which states have laws matching that definition, but defines such laws so as to exclude those that allow for notification to, or consent of, someone other than a parent, guardian, "legal custodian," or "person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides." Under the

Act, a minor traveling from a state with a parental involvement law that matches the Act's definition must comply with her home state's law if she travels with a companion. However, a minor traveling from a state whose requirements are more expansive than the Act's definition (such as a law that allows a grandparent to consent to the minor's abortion or allows a physician to waive the state's notice requirement) need not comply with her home state's law even if she travels with a companion. If the young woman travels alone, this provision does not apply in any case.

Classification of State Laws Under the Act: Approximately half of the states enforce a requirement for notification or consent of a parent.

- Twenty-six states have laws that appear to match the Teen Endangerment Act's restrictive definition of a "parental involvement law:" Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.
- Nine 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, South Carolina, West Virginia, and Wisconsin.
- Nine 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, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico.³
- The District of Columbia and the other six states – Connecticut, Hawaii, New York, Oregon, Vermont, and Washington – have not enacted forced parental involvement laws.

The Federal Notification Provision: Under the Federal Notification Provision of the Act, a nonresident minor who seeks an abortion in a state other than the 26 with parental involvement laws matching the Act's definition will be subject to a federal notification and delay requirement, unless she has a court order from her home state authorizing an abortion or she signs a written statement declaring that she is the victim of sexual abuse, neglect, or physical abuse by a parent and the physician notifies the designated authorities in the minor's home state. States that mandate parental involvement before a young woman may terminate her pregnancy must provide an alternative procedure by which she may obtain authorization – confidentially and expeditiously – for an abor-

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tion without parental knowledge. Typically, the procedure is a “judicial bypass procedure” through which a young woman may seek a court order waiving the state’s forced parental involvement requirement. The fifteen states that do not have an enforceable parental involvement law lack a judicial bypass procedure, but the Act does not include any mechanism for minors from those states to obtain court authorization if they seek an out of state abortion.

The required federal notice must be given in writing directly to a parent and the physician then must wait 24 hours before performing the abortion. If, after making a “reasonable effort,” the physician is unable to provide actual notice, he or she may mail the notice to a parent, but must then wait more than 72 hours before performing the abortion. The term “reasonable effort” is not defined in the Act.

Liability Under the Act: Both provisions of the Act impose civil and criminal liability. People who assist a young woman in violation of the Travel Provision and abortion providers who violate the Federal Notification Provision will be guilty of a misdemeanor, punishable by imprisonment for up to one year, fines of up to \$100,000, or both.⁴ The Act also allows parents to bring civil suits against persons who violate the Act. Prosecution may be avoided only if the abortion is necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness.

Summary of How the Act Changes Existing Law: The Teen Endangerment Act violates the general legal principles that the laws of one state are not enforceable in another state and that people are required to comply with the laws of the state in which they are located but not simultaneously with the laws of any other state. The Act will make a young woman seeking an out-of-state abortion who is accompanied by a non-parent (such as a trusted relative or friend) subject to the laws of the state in which she seeks the abortion and the law of her state of residency. Although the young woman herself is exempt from prosecution under the Act, she must comply with both states’ laws or risk federal criminal prosecutions of her companion and possibly the abortion provider and others who assist her as well. In order to avoid risk of prosecution of those who would help them, some young women will travel out of state alone. If the young woman seeks an out-of-state abortion in one of the 24 states that do not have a parental involvement law matching the Act’s definition, she will be subject to the Act’s parental notification and mandatory delay provision. The requirements of that provision will apply even when: the minor is accompanied by her parent; or both the state where the minor lives and the state where she seeks the abortion do not require parental involvement; or the minor is in the state for an unrelated reason (such as school attendance or summer job). To avoid the restrictions imposed by the Teen Endangerment Act, young women may seek illegal abortions in their own state, attempt to self-abort, or carry unwanted pregnancies to term. The Act is an extreme and intrusive attempt to deter young women from obtaining safe and legal abortions.

HARMING YOUNG WOMEN

By making it more difficult for young women to safely access constitutionally protected abortion services, the Teen Endangerment Act will harm the very minors that it purports to protect.

The Act Forces Young Women to Rely on Potentially Abusive and Dysfunctional Parents:

Family communication is desirable and most parents know when their daughters undergo an abortion, even when their involvement is not mandated by law.⁵ The younger the minor is, the more likely it is that her parents will know about her abortion decision; one study found that ninety percent of minors under the age of fifteen reported that at least one of their parents knew about their decision.⁶

Unfortunately, not all young women are in situations where they can communicate openly with their parents. Those who avoid parental involvement in the decision to have an abortion usually do so out of fear of abuse, pressure to carry the pregnancy to term, threats of being thrown out of the house, or other negative repercussions.⁷ In families where abusive relationships or other problems prevent good communication between parents and their teenage daughters, state-mandated discussions can exacerbate existing problems. For battered teenagers and incest survivors in particular, forced parental involvement laws increase the risks they face in an already dangerous situation.⁸ The Act imposes one rule for all circumstances, regardless of the family situation that a young woman may face.

Even in the best of circumstances, candid communication about sexuality and reproductive issues may not take place in families. Generally, mandatory notification and consent requirements are not an effective means of encouraging more open discussion and can actually damage relations among family members. Attempts to legislate family dynamics without considering the differing relationships that exist within families are dangerous and unrealistic.

The Act Makes it Riskier for Young Women to Exercise Their Right to Reproductive Choice:

By criminalizing assistance from trusted relatives and friends, the Act will force some young women – already struggling physically and emotionally with unwanted pregnancies – to travel alone. Those young women will be deprived of the benefits of trusted companionship before and after their medical procedure, isolating them from adults who are best able to help them. Some young women will be forced to obtain later, potentially riskier abortions, due to the delays imposed by the Act. Moreover, by imposing its restrictions even in situations in which the minor needs a prompt abortion to protect her health, the Act will endanger the health of some young women.

The Act Imposes Governmental Interference with the Parent-Daughter Relationship:

The Act will impose a mandatory delay even in situations in which the parent supports the daughter's decision to have an abortion. A delay of 24 hours is imposed even if the minor and her parent(s) go to an out-of-state abortion provider together and a longer

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delay is imposed even if the parent consents to the abortion but does not accompany his or her daughter to the physician.

The Act Will Trap Minors in a Confusing Maze of Conflicting State Laws:

A young woman who seeks an abortion in a state other than her home state will be subject to multiple requirements, depending on where she lives, where she seeks the abortion, and whether she travels alone. If she travels out of state with a companion, she may need to comply with the laws of both her home state and the state to which she travels in order to protect those assisting her from criminal and civil liability. Currently, a young woman seeking an abortion can expect the health care providers from whom she seeks the procedure to be familiar with the legal requirements of the state in which they are practicing medicine and the young woman can rely on those persons for assistance in understanding how to comply with the law of that state. However, under the Act, the young woman could no longer rely solely on the assistance of the provider in making sure that she and those accompanying her are meeting all applicable legal requirements. A young woman who plans to travel out of state with a companion will need to determine the law in both her home state and the state to which she is traveling in order to protect those assisting her. This may require contacting clinics in multiple states or researching the applicable forced parental involvement laws, using the definition specified under the Act, to determine whether her home state's law will travel with her and what it requires. Even if she decides to travel alone or is already outside her home state for a reason unrelated to her abortion, she may be subject to the federal parental notification and delay requirements, depending on where she seeks her abortion.

If a young woman is unable to involve a parent and exercises her constitutional choice to seek a judicial waiver of a state's parental involvement law, she may have to go to court in two states: her home state and the state where the abortion will be performed. For example, under the Travel Provision, if she travels from a state with a law matching the Act's definition of a parental involvement law (such as Michigan) into another state with a parental involvement law (such as Indiana or Ohio), she would need orders from courts in both states. Under the Federal Notification Provision, if she resides in a state with a parental involvement law (such as Georgia or North Carolina) and seeks her abortion in a state with a parental involvement law that does not match the Act's definition (such as South Carolina), she would need orders from courts in both states. Having to obtain just one judicial waiver can delay a young woman in obtaining an abortion and cause other harms.⁹ While going to court can be a daunting experience even for adults, minors face additional difficulties in judicial bypass proceedings. It is frightening for many young women to disclose intimate details of their lives to strangers in a formal, legal process. Some young women live in regions where the local judges never grant bypass petitions, or the closest court that hears the petitions is located hundreds of miles away, or where their confidentiality may be jeopardized because people who know them or their family work in the courthouse. Moreover, many young women find it difficult to be absent confidentially from school or work in order to

appear at a hearing. Having to go through the process twice, in two different states, will compound their difficulties.

The Act Fails to Recognize the Importance of Other Family Members and Trusted Adults in a Young Woman's Life:

Some young women have trusted adults in their lives, other than their parents, whom they voluntarily consult in their decision to seek an abortion.¹⁰ These adults include: grandparents, siblings, and other extended family members; clergy, teachers, social workers, or other counselors; and supportive friends. This legislation will discourage such helpful relationships, forcing young women to choose between forgoing needed assistance from these adults and exposing them to criminal liability. The Act could lead to the arrest of family members and friends who are looking out for the best interests of the young women they care about.

The Act Ignores Geographic and Economic Realities and Flaws in the Judicial Bypass System:

Many adult and minor women travel out of state for an abortion. They do so for various reasons, including lack of a nearby abortion provider in their home state, the presence of supportive loved ones in another state, recommendations from trusted relatives or friends, or for financial reasons. In addition, some young women travel out of state due to difficulties in securing a judicial bypass in their home state.

As of 2000, there were no known abortion providers in 87 percent of the counties in the United States.¹¹ Moreover, in some states abortions are not generally available past a certain point in pregnancy due to state laws restricting the performance of abortions or the absence of physicians performing abortions later in pregnancy. Therefore, for some young women, the closest available abortion provider is located in another state. Some may be unable to obtain an abortion anywhere in their home state.

Young women may also travel to neighboring states based on clinic recommendations or for financial reasons. A young woman may receive a recommendation from a trusted individual for a doctor or a clinic that happens to be in a neighboring state. Or varying medical costs may mean that a clinic in a neighboring state provides a more economical option for a minor.

The Act requires young women to grapple with the laws of two states regardless of why they traveled out of state for an abortion. Moreover, the Federal Notification Provision imposes another layer of restrictions on abortion access even if the young woman is seeking an abortion out of state because she is temporarily there for some unrelated reason, such as school or work. If young women are deterred from obtaining an abortion outside their home state, they may obtain unsafe, illegal abortions, attempt to self-abort, or carry an unwanted pregnancy to term.

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PUNISHING CARING RELATIVES AND OTHERS WHO HELP YOUNG WOMEN

The Act will punish caring relatives and others who help young women obtain abortions. Most young women voluntarily involve a parent, relative or other adult in their decision to obtain an abortion.¹² The Act will discourage those non-parents from assisting minors in obtaining desired medical care by the threat of criminal penalties. For example, if a young woman who lives in a state with a parental involvement law matching the Act's definition travels with her grandmother to a state (such as South Carolina or Wisconsin) that allows a grandparent to provide consent for an abortion, the grandmother will face prosecution under the Act if the young woman did not also involve a parent or get a court waiver in order to satisfy her home state's law. Or if she travels with an adult sister and obtains a judicial bypass in the state where she seeks her abortion, her sister will risk prosecution unless the minor also goes to court in her home state and gets a court order there also.

Health care providers who know that a minor has been transported across state lines by a non-parent could also be at risk from a number of complex provisions regarding conspiracy and accessory liability.¹³ To avoid the risk of liability, the health care provider will have to determine whether the minor seeking an abortion is from another state; whether she was accompanied across state lines by a non-parent; whether, under the Act, she is required to comply with the forced parental involvement law of her home state and, if so, whether she did; and whether she is subject to the federal parental notification and delay requirement. The requirements set forth in state parental involvement laws differ in various ways, including: (1) the age below which young women are subject to the law's requirements; (2) the categories of young women who are not subject to the law's requirements; (3) whether consent by or notification of a parent is required; (3) the number of parents who must give consent or be notified; (4) whether someone other than a parent or legal guardian may give consent or receive notification; (5) the ways in which consent must be obtained or documented; (6) the ways in which notification must be provided; and (7) the amount of time that must elapse between notification and performance of the abortion. If the provider determines that the young woman was required to, but did not, comply with the law of her home state, the provider may risk liability himself unless he denies her the health service she seeks. If the minor is subject to the Federal Notification Provision, the physician risks liability unless he correctly provides notice and waits the required period of time before performing the abortion. Thus, to avoid the risk of criminal liability, health care providers in every state will need to be familiar with numerous state laws or deny services to any minor who cannot prove she resides in the state where the provider is located.

The Teen Endangerment Act will unconstitutionally:

- violate principles of federalism
- endanger young women due to its failure to provide an adequate medical emergency exception
- place an undue burden on young women's access to abortion
- impose a parental notification requirement without providing any judicial waiver option
- hinder the right to travel
- infringe upon equal protection rights under the Fifth Amendment
- endanger the health of young women by making it more dangerous for them to engage in constitutionally protected conduct

VIOLATING THE CONSTITUTION

The Teen Endangerment Act's radical attempt to limit young women's access to abortion will come at the expense of the right to reproductive choice established in *Roe v. Wade*¹⁴ and numerous other established constitutional principles.

Violating Principles of Federalism

The Teen Endangerment Act will violate fundamental principles of federalism and state sovereignty. A core principle of American federalism is that laws of a state apply only within the state's boundaries. The Act will require some people to carry their own state's laws with them when traveling out of state. Under the Act, a minor crossing state lines with a trusted relative or friend will not only be subject to the parental involvement law of the state she has entered, but will also need to comply with the parental involvement law of her home state, if her home state's law matches the Act's definition.

Allowing a state's laws to extend beyond its borders runs completely contrary to the state sovereignty principles on which this country is founded. For example, gambling using slot machines is legal under the laws of Nevada, but not under those of California. Residents of Nevada are prohibited from gambling while in California, while California residents are permitted to gamble while in Nevada. Forcing citizens of California to carry their home state's law into Nevada, thereby prohibiting them from using slot machines while in Nevada, would be inconsistent with federalism principles. Requiring compliance within the borders of one state with the different and possibly conflicting law of another state will be even more improper in the case of abortion – a constitutionally protected right – than it would be in the case of casino gambling, which is not a constitutionally protected activity.

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Twenty-four states and the District of Columbia either have parental involvement laws that do not match the Act's definition of a "parental involvement law," have parental involvement laws which are not enforced in their state, or have not enacted a parental involvement law. These states' legal requirements for the provision of abortion to minors are treated as second-class laws by the Act. Within those twenty-four states and the District, the Act will impose the requirements of other states, whose laws come within the Act's definition of a parental involvement law, on non-resident minors accompanied by a non-parent. Thus, within those states and the District the Act will impose the laws of the other twenty-six states. Health care providers will be faced with the task of comparing the law of their minor patients' home states to the Act's definition of a "parental involvement law" and then, if necessary, making sure that those patients had met the requirements that would have applied if they sought an abortion in their home state – requirements that the providers' own state has not adopted, does not enforce, or even has explicitly rejected. The Federal Notification Provision goes even further: it imposes a parental notification and mandatory delay requirement in those twenty-four states. Under this provision, nonresident minors who seek an abortion will be subject to parental notification and delay even if both the state in which they seek the abortion and their home state have not adopted, do not enforce, or even have explicitly rejected a parental involvement requirement.

In effect, the Act will make those state laws that Congress 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 an arena in which each state regulates its own citizens.

Failing to Provide an Adequate Medical Emergency Exception

The United States Supreme Court has repeatedly ruled that any restriction on abortion must contain exceptions to allow for abortions that are necessary to protect the health and life of the pregnant woman.¹⁵ To be constitutionally adequate, the exception must cover situations in which a woman faces the risk of psychological or emotional harm, not just physical harm.¹⁶ The Act, however, does not include any exception for situations in which the young woman's health is threatened if she does not obtain an abortion. Nor does the Act include an exception for situations in which the young woman has an emergency need for an abortion to save her life where it is endangered by mental illness or disorder. The failure to include these provisions shows an utter lack of regard for established constitutional law and the health of young women.

Placing an Undue Burden on Young Women's Access to Abortion

The Act will unduly burden access to abortion for young women who travel across state lines to obtain services and who choose not to involve their parents. In 1973, the United States Supreme Court recognized a constitutional right to choose whether or not to

have an abortion in the landmark decision *Roe v. Wade*.¹⁷ The Court reaffirmed the right to choose in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, holding that restrictions on this right are unconstitutional if they impose an “undue burden” on a woman’s access to abortion.¹⁸ The right extends to both minors and adults, but the Supreme Court has permitted individual states to impose some restrictions on the ability of young women to obtain abortions within the state’s borders.¹⁹ The United States Supreme Court has ruled that states may require parental consent or notification before a minor obtains an abortion in the state, if the law also provides an “alternative” to parental involvement, such as a judicial bypass procedure, by which a young woman can obtain an abortion without involving a parent.²⁰ To obtain a judicial bypass, a young woman must appear before a judge and prove either that she is mature enough to decide whether to have an abortion or that an abortion will be in her best interests.

Thirty-five states enforce parental involvement laws. These laws vary in their requirements, but, absent the Act, they apply only to minors receiving an abortion within those individual states. Under current law, a minor must always meet the requirements of the state in which she is receiving an abortion. Under the Act, a minor from one of the twenty-six states that has a forced parental involvement law that matches the Act’s definition will carry her home state’s law with her when she travels across state lines with a trusted relative or friend to receive an abortion. This will be true even when she travels into one of the other thirty-four states that has an enforceable parental involvement law. She will therefore have to meet the requirements of both her home state and the state in which she receives the abortion, thus being forced to comply with extra burdens beyond those imposed on any other minors seeking abortions. If the young woman does not do so, persons who assisted her will face liability. Every minor from a state with a parental involvement law that matches the Act’s definition will be faced with a choice: overcome the extra obstacles created by the Act or travel alone out of state. For example, a minor who lives in Minnesota and seeks an abortion in Wisconsin will have to comply with both state’s laws, because Minnesota’s law matches the Act’s definition of a parental involvement law. Minnesota requires that both parents of a minor be notified, while Wisconsin allows a minor to obtain an abortion if an adult family member, who can be a sibling over the age of 25, gives consent.²¹ If the minor travels to Wisconsin with her 30-year-old sister to receive an abortion, the consent of her sister will satisfy Wisconsin’s law. However, to satisfy Minnesota’s law, the physician will need to notify both of the young woman’s parents or she will have to go to court in Minnesota for a judicial waiver; otherwise, her sister will have violated the Act.

Nonresident minors who seek an abortion in a state that does not have a parental involvement law matching the Act’s definition will be subject to the federal notification and delay requirements; in some cases those requirements will be in addition to the differing notification or consent requirements of the state in which they seek their abortion. Depending on their state of residence and the state in which they seek their

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abortion, some minors will be subject to the restrictions of both parts of the Act, some to the restrictions of only the Travel Provision, and others to the restrictions of only the Federal Notification Provision.

If a young woman chooses to obtain a judicial bypass of the parental involvement requirements, to avoid the restrictions of either the Travel Provision or the Federal Notification Provision, she will also face an undue burden under the Act, as she may need to go to court in two states – her home state and the state in which she seeks the abortion. For example, a Massachusetts resident traveling to Rhode Island with a non-parent to obtain an abortion will have to obtain a judicial waiver of the parental involvement requirements of both states because the minor carries Massachusetts's parental involvement law with her wherever she goes.²² Similarly, a minor who resides in any state with a parental involvement law and seeks an abortion in a state with a parental involvement law that does not match the Act's definition will need to go to court in two states to avoid mandatory parental notification and delay under the Act. Going through the judicial process just one time is a burden on minors; doing it two times in two different states will place an unconstitutional undue burden on a young woman's access to abortion.

The Act will also create an undue burden on minors' access to abortion by deterring trusted relatives and friends from helping a young woman due to fear of criminal and civil liability. Young women seeking abortions may refrain from seeking advice and assistance for fear of exposing family members, counselors, or other supportive friends to liability. As a result, young women may instead travel alone across state lines. Moreover, in addition to putting persons who travel with the minor at risk of liability, the Act places health care providers at risk. Fear of prosecution may lead some abortion providers to refuse to provide services to young women, thus further unduly burdening minors' access to abortion services.

Imposing a Parental Notification Requirement Without Providing any Judicial Waiver Option

Federal courts have consistently required that laws imposing parental notice or consent requirements provide a confidential, expeditious mechanism for waiver of the parental involvement requirement if the minor is mature or an abortion without parental involvement would be in the minor's best interest.²³ The fifteen states that do not have enforceable parental involvement laws – either because they have not enacted such a law or one has been enjoined due to defects in the law – do not have such a process in place. Thus, minors who reside in those states will not have available to them an expeditious, confidential judicial alternative to the federal parental notification and delay requirement. The Act's failure to provide a judicial waiver option for such minors violates their constitutional rights.

Hindering the Right to Travel

The Act will unconstitutionally regulate interstate travel between *certain* states, for *certain* people and under *certain* conditions. It will make the legality of interstate travel dependent upon the traveler's *state of residency*, the *purpose* of the travel, and the *people with whom she* is traveling.

The right to travel freely between the states is a fundamental right of state citizenship. This includes the right to travel into a state to seek medical services – including abortion services – and to be treated the same as state residents when one does so.²⁴ Therefore, a minor transported from, for example, Massachusetts to Maine by a friend or relative for an abortion is entitled to receive abortion services on the same basis as a Maine minor. Similarly, a minor working in New York for the summer is entitled to receive abortion services on the same basis as a New York resident. However, under the Act, they will not be able to do so.

Under the Act, minors who come into a state to seek medical services will be subjected to different treatment than minors who reside in that state and seek medical services there. Also, minors crossing state lines to seek medical services will be treated differently depending on their state of origin: minors from states with parental involvement laws that match the Act's definition will face special burdens not imposed on minors from states with other or no parental involvement laws. Moreover, a minor who traveled alone into a state from a state with a parental involvement law matching the Act's definition will be treated more favorably than a minor from the same state who traveled with a non-parent: the lone minor will only need to comply with the law of the state she entered, but the accompanied minor will have to comply with the requirements of both her home state and of the state she entered. Thus, the Act creates a hodgepodge of restrictions on interstate travel and results in the disparate treatment of people based on their state of residency, thereby violating the right to interstate travel protected by the Constitution.

Infringing Upon Equal Protection Rights Under the Fifth Amendment

The Fifth Amendment prohibits Congress from depriving individuals of equal protection of the law.²⁵ Equal protection case law prohibits Congress from creating a classification that penalizes the exercise of a constitutional right, except in furtherance of a compelling governmental interest.²⁶ When such a classification is formed, it is subject to strict scrutiny, the highest level of judicial scrutiny. Under strict scrutiny analysis, the government has the burden of establishing that the classification is narrowly tailored and based on the furtherance of a compelling governmental interest. The Act impermissibly classifies persons based on the exercise of two fundamental rights – the constitutional right to choose abortion and the right to interstate travel – because it is not narrowly tailored nor does it further a compelling governmental interest.

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As to the right to reproductive choice, the Act impermissibly classifies among minors being transported across state lines and among those persons transporting them: it penalizes only those persons who are assisting minors in exercising their right to abortion. However, persons transporting minors across state lines are not penalized by the Act if the minors are being transported for other purposes, including, for example, to seek pregnancy-related care associated with carrying a pregnancy to term, or to seek a medical procedure far riskier than abortion.

With respect to the right to interstate travel, the Act also impermissibly classifies among both minors and the persons transporting them. The minor's state of residency determines whether the person transporting her or the abortion provider is committing a crime. No other federal statute classifies among interstate travelers based upon their state residency. Indeed, the Supreme Court's decision in *Saenz v. Roe*²⁷ confirms the illegitimacy of classifying based on state of residency. In that case, the Court held that it is not permissible to classify based upon state residency for the purpose of determining eligibility for welfare benefits. Surely, if it is unconstitutional for the government to limit access to welfare benefits for persons from another state, it is unconstitutional to limit access to constitutionally protected abortion services based on a person's state of residency.

Endangering the Health of Young Women By Making it More Dangerous for Them to Engage in Constitutionally Protected Conduct

The Supreme Court has ruled that the government cannot deter someone from engaging in constitutionally protected conduct by making it more dangerous to engage in that conduct,²⁸ yet that is exactly what the Act does. The Act tries to dissuade young women from exercising their constitutional right to obtain an abortion by making it more dangerous for them to exercise that right. It deters young women from traveling with a trusted relative or friend, who will be at risk of criminal prosecution, and thus encourages young women to travel alone out of state to obtain an abortion. Yet, depending on the abortion procedure, it may be unsafe for the young woman to drive herself home after the abortion, especially over long distances. Thus, the young woman is exposed to more danger than if she traveled with a trusted adult.

CONCLUSION

The Teen Endangerment Act is an extreme measure that will severely restrict young women's ability to obtain an abortion outside their home states, even in situations in which a parent is involved in their decision or the abortion is necessary to protect the young woman's health. The Act will not only harm the health of teenagers across the country, but will also direct the full force of the federal criminal justice system against family members, friends, and others who attempt to help young women in need. This bill is not about protecting minors – its purpose is to make it more difficult for minors to obtain abortions by threatening to punish trusted adults to whom they turn for help.

The Teen Endangerment Act is also an assault on the core American principles of federalism and state sovereignty, which hold that the laws of a state only apply within its boundaries, as well as on constitutional rights to reproductive choice, due process, and equal protection.

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Appendix A

LANGUAGE OF H.R. 748 (2005) AS AMENDED IN THE HOUSE JUDICIARY COMMITTEE

A BILL

To amend title 18, United States Code, to prevent the transportation of minors in circumvention of certain laws relating to abortion, and for other purposes.

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 Interstate Abortion Notification Act”.

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

Title 18, United States Code, is amended by inserting after chapter 117 the following:

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

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

“(a) OFFENSE.—

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

“(2) DEFINITION.—For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed or

induced on the minor, in a State other than the State where the minor resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the minor resides.

“(b) EXCEPTIONS.—

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

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

“(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant—

(1) reasonably believed, based on information the defendant obtained directly from a parent of the minor, that before the minor obtained the abortion, the parental consent or notification, or judicial authorization, took place that would have been required by the law requiring parental involvement in a minor’s abortion decision, had the abortion been performed in the State where the minor resides; or

(2) was presented with documentation showing with a reasonable degree of certainty that a court in the minor’s State of residence waived any parental notification required by the laws of that State, or otherwise authorized that the minor be allowed to procure an abortion.

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

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

“(1) the term ‘abortion’ means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to

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increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of a spontaneous abortion, accidental trauma or a criminal assault on the pregnant female or her unborn child;

“(2) the term a ‘law requiring parental involvement in a minor’s abortion decision’ means 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;

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

“(4) the term ‘parent’ means—

“(A) a parent or guardian;

“(B) a legal custodian; or

“(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides, who is designated by the law requiring parental involvement in the minor’s abortion decision as a person to whom notification, or from whom consent, is required; and

“(5) the term ‘State’ includes the District of Columbia and any commonwealth, possession, or other territory of the United States.”.

SEC. 3. CHILD INTERSTATE ABORTION NOTIFICATION.

Title 18, United States Code, is amended by inserting after chapter 117A the following:

“CHAPTER 117B—CHILD INTERSTATE ABORTION NOTIFICATION

“§ 2432. Child interstate abortion notification

“(a) OFFENSE.—

“(1) GENERALLY.—A physician who knowingly performs or induces an abortion on a minor in violation of the requirements of this section shall be fined under this title or imprisoned not more than one year, or both.

“(2) PARENTAL NOTIFICATION.—A physician who performs or induces an abortion on a minor who is a resident of a State other than the State in which the abortion is performed must provide at least 24 hours actual notice to a parent of the minor before performing the abortion. If actual notice to such parent is not possible after a reasonable effort has been made, 24 hours constructive notice must be given to a parent.

“(b) EXCEPTIONS.—The notification requirement of subsection (a)(2) does not apply if—

“(1) the abortion is performed or induced in a State that has a law in force requiring parental involvement in a minor’s abortion decision and the physician complies with the requirements of that law;

“(2) the physician is presented with documentation showing with a reasonable degree of certainty that a court in the minor’s State of residence has waived any parental notification required by the laws of that State, or has otherwise authorized that the minor be allowed to procure an abortion;

“(3) the minor declares in a signed written statement that she is the victim of sexual abuse, neglect, or physical abuse by a parent, and, before an abortion is performed on the minor, the physician notifies the authorities specified to receive reports of child abuse or neglect by the law of the State in which the minor resides of the known or suspected abuse or neglect; or

“(4) the abortion is 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

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pregnancy itself.

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

“(d) DEFINITIONS.—For the purposes of this section—

“(1) the term ‘abortion’ means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of a spontaneous abortion, accidental trauma, or a criminal assault on the pregnant female or her unborn child;

“(2) the term ‘actual notice’ means the giving of written notice directly, in person;

“(3) the term ‘constructive notice’ means notice that is given by certified mail, return receipt requested, restricted delivery to the last known address of the person being notified, with delivery deemed to have occurred 48 hours following noon on the next day subsequent to mailing on which regular mail delivery takes place, days on which mail is not delivered excluded;

“(4) the term a ‘law requiring parental involvement in a minor’s abortion decision’ means 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;

“(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;

“(5) the term ‘minor’ means an individual who is not older than 18 years and who is not emancipated under State law;

“(6) the term ‘parent’ means—

“(A) a parent or guardian;

“(B) a legal custodian; or

“(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides; as determined by State law;

“(7) the term ‘physician’ means a doctor of medicine legally authorized to practice medicine by the State in which such doctor practices medicine, or any other person legally empowered under State law to perform an abortion; and

“(8) the term ‘State’ includes the District of Columbia and any commonwealth, possession, or other territory of the United States.”.

SEC. 4. SEVERABILITY AND EFFECTIVE DATE.

(a) The provisions of this Act shall be severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

(b) The provisions of this Act shall take effect upon enactment.

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Appendix B

THE MEDICAL COMMUNITY SPEAKS OUT AGAINST THE TEEN ENDANGERMENT ACT AND FORCED PARENTAL INVOLVEMENT

The American medical community opposes forced parental involvement laws on the grounds they pose dangers to the health and well being of young women. The Teen Endangerment Act would exacerbate the problems posed by such laws by delaying access to abortion services and requiring young women to travel alone to obtain an abortion. The Teen Endangerment Act could lead to a new generation of back alley abortions for those young women who are determined to end their pregnancies.

AMERICAN ACADEMY OF PEDIATRICS (AAP) AND SOCIETY FOR ADOLESCENT MEDICINE (SAM)

“The bill would have the unintentional outcome of placing a chilling effect on teenagers’ ability to talk openly with adults – including family members and medical providers – because it sends a message that adults who help young people grapple with difficult decisions are criminals. This disincentive is extremely dangerous for those young people most in need of support and guidance in a difficult time, particularly when they cannot involve their parents.”

“Confidentiality of health care services is an important element in assuring adolescents’ access to care – and it is compromised when adolescents are required to seek parental consent. The AAP and SAM strongly believe that young people must have access to confidential health care services – including reproductive health care and abortions services Concern about confidentiality is one of the primary reasons young people delay seeking health services for sensitive issues, whether for an unintended pregnancy or for other reasons. While parental involvement is very desirable, and should be encouraged, it may not always be feasible and it should not be legislated. Young people must be able to receive essential health care expeditiously and confidentially.”

(Written Statement for the Record submitted on behalf of the American Academy of Pediatrics and Society for Adolescent Medicine to the Senate Judiciary Committee Regarding S. 851 [Child Custody Protection Act, 108th Cong.], June 10, 2004)

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH (PRCH)

“[P]arents ideally should be – and usually are – involved in health decisions regarding their children. However, the Child Interstate Abortion Notification Act does nothing to promote such communication. Instead, CIANA places incredible burdens on both young women and physicians; infringes on the rights of adolescents to health care that does not violate their safety and health; makes caring family, friends and doctors criminals; and could be detrimental to the health and emotional well-being of all patients.”

(Testimony by Warren Seigel, M.D., on behalf of Physicians for Reproductive Choice and Health, submitted to the 109th House Subcommittee on the Constitution of the Committee on the Judiciary, March 3, 2005)

AMERICAN MEDICAL WOMEN'S ASSOCIATION (AMWA)

“We feel that abortion is a decision that should be reached between patients and physicians, and we believe that forced parental involvement will have a negative impact on the doctor-patient relationship.”

(Letter from AMWA President Clarita E. Herrera to Congresswoman Ros-Lehtinen expressing opposition to H.R. 1218 [“Child Custody Protection Act”, 106th Cong.]; April 22, 1999)

AMERICAN MEDICAL ASSOCIATION (AMA)

“With respect to parental involvement when minors seek an abortion, the AMA believes that the following guidelines constitute good medical practice: (1) Physicians should ascertain the law in their state on parental involvement . . . (2) Physicians should strongly encourage minors to discuss their pregnancy with their parents . . . (3) Physicians should not feel or be compelled to require minors to obtain consent of their parents before deciding whether to undergo an abortion. The patient - even an adolescent - generally must decide whether, on balance, parental involvement is advisable. Accordingly, minors should ultimately be allowed to decide whether parental involvement is appropriate. (4) Physicians should try to ensure that minor patients have made an informed decision . . . Minors should be urged to seek the advice and counsel of those adults in whom they have confidence, including professional counselors, relatives, friends, teachers, or the clergy.”

(Council on Ethical and Judicial Affairs; Report H; House of Delegates Meeting; June 1992)

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AMERICAN PUBLIC HEALTH ASSOCIATION (APHA)

“. . . [T]he threat of compelling parental notification is a strong disincentive to an adolescent’s seeking professional reproductive health care or advice.”

(Adolescent Access to Comprehensive, Confidential Reproductive Health Care, Policy 9001, Jan. 1, 1990; www.apha.org/legislative/policy/policysearch/index.cfm?fuseaction=view&id=1212)

ENDNOTES

- ¹ H.R. 748 is termed the “Child Interstate Abortion Notification Act” or “CIANA” by its sponsors. The Senate versions of the bill are termed the “Child Custody Protection Act” or “CCPA” by their sponsors.
- ² H.R. 748, § 2431(a) (109th Cong. 2005); S. 8, § 2431(a) (109th Cong. 2005).
- ³ Enforcement of the forced parental involvement laws of these nine states has been permanently or preliminarily blocked by a federal or state court order or Attorney General opinion, based on challenges to the law under the federal or a state constitution.
- ⁴ Any individual, minor or adult, except the young woman seeking an abortion and her parents, could be liable under the Teen Endangerment Act. See H.R. 748, § 2431(b)(2); S. 8, § 2431(b)(2). Violation of the Act will be a Class A misdemeanor. See *id.* § 2431(a); 18 U.S.C. §§ 3559, 3571.
- ⁵ See Mary S. Griffin-Carlson & Paul J. Schwanenflugel, *Adolescent Abortion and Parental Notification: Evidence for the Importance of Family Functioning on the Perceived Quality of Parental Involvement in U.S. Families*, 39 J. Child Psychol. Psychiat. 543 (1998); Mary S. Griffin-Carlson & Kathleen J. Mackin, *Parental Consent: Factors Influencing Adolescent Disclosure Regarding Abortion*, 28 *Adolescence* 1 (1993); Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors’ Abortion Decisions*, 24 *Fam. Plan. Persp.* 196 (1992); Laurie S. Zabin, *et al.*, *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents’ Communication With Parents and Parent Surrogates*, 24 *Fam. Plan. Persp.* 148 (1992); Raye Hudson Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 25 *Adolescence* 43 (1980).
- ⁶ Henshaw & Kost, *supra* note 5, at 200.
- ⁷ See, e.g., Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 *JAMA* 82, 82-84 (1993); Henshaw & Kost, *supra* note 5, at 207; Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 *Fam. Plan. Persp.* 259 (1983).
- ⁸ See Am. Acad. of Pediatrics, *The Adolescent’s Right to Confidential Care When Considering Abortion*, 97 *Pediatrics* 746, 748 (1996); Council on Ethical and Judicial Affairs, *supra* note 7, at 82-86.
- ⁹ See Charlotte Ellertson, *Mandatory Parental Involvement in Minors’ Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 *Am. J. of Pub. Health* 1367 (1997); Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors’ Abortions in Mississippi*, 27 *Fam. Plan. Persp.* 120 (1995).
- ¹⁰ See Griffin-Carlson & Mackin, *supra* note 5, at 9; Henshaw & Kost, *supra* note 5, at 205-06; Zabin, *et al.*, *supra* note 5.
- ¹¹ See 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).
- ¹² Henshaw & Kost, *supra* note 5, at 207.
- ¹³ As a proposed addition to the federal Criminal Code, the Act will be read with other provisions of the Code, including conspiracy and accessory liability. Attempts to amend the Act to limit the scope of liability to the principal who commits the offense were repeatedly rejected by the bill’s sponsors during the 105th and 106th Congresses.
- ¹⁴ 410 U.S. 113 (1973).
- ¹⁵ *Roe v. Wade*, 410 U.S. 113, 164-165 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931, 937 (2000).
- ¹⁶ *Doe v. Bolton*, 410 U.S. 179, 193 (1973).
- ¹⁷ 410 U.S. 113.
- ¹⁸ 505 U.S. 833 (1992).
- ¹⁹ See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bellotti v. Baird*, 443 U.S. 622, 644-45 (1979) (“*Bellotti II*”).

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²⁰ *Casey*, 505 U.S. 833; *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Bellotti II*, 443 U.S. 622.

²¹ Minn. Stat. § 144.343; Wis. Stat. § 48.375.

²² R.I. Gen. Laws § 23-4.7-6; Mass. Gen. Laws ch. 112, § 12S.

²³ *See, e.g., Bellotti II*, 443 U.S. at 643-44; *Hodgson*, 497 U.S. at 460-61 (O'Connor, J., concurring).

²⁴ *See, e.g., Saenz v. Roe*, 526 U.S. 489, 500, 502 (1999); *Doe v. Bolton*, 410 U.S. at 200.

²⁵ This prohibition on the federal government denying equal protection of the laws acts in the same manner in which the Fourteenth Amendment prohibits the states from denying equal protection.

See Bolling v. Sharpe, 347 U.S. 497 (1954).

²⁶ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

²⁷ 526 U.S. 489.

²⁸ *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (plurality opinion).