Approved: May 6, 2002
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE.

The meeting was called to order by Chairperson Senator Nancey Harrington at 11:00 a.m. on May 1, 2002 in Room 245-N of the Capitol.

All members were present except: Senator Teichman, Excused
Senator Lyon, Excused

Committee staff present: Russell Mills, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Theresa Kiernan, Office of the Revisor
Nikki Kraus, Committee Secretary

Conferees appearing before the committee:
Lowell Ramsey, Kansans for Life
Cindy Sheridan, R.N., Planned Parenthood
Carla Mahany, Kansas Public Affairs Director, Planned Parenthood
Diane Whato, Wichita Choice Alliance

Others attending: Please see attached

Chairperson Harrington opened the public hearing on:

HB 3000–Performance of abortions on minors

Ms. Kiernan provided the committee with an explanation of the bill.

The committee discussed the intent of the bill.

Mr. Lowell Ramsey, Kansans for Life, expressed to the committee his organization's support of the bill, but willingness to wait until a better time to proceed with legislation because of pending litigation in the 10th Circuit court.

Senator Vratil made a motion to table **HB 3000**. Senator Gooch seconded the motion. The motion passed.

Senator Harrington directed the committee to written testimony in opposition to the bill from:
Cindy Sheridan, R.N., Planned Parenthood (Attachment 1)
Carla Mahany, Kansas Public Affairs Director, Planned Parenthood (Attachment 2)
Diane Whato, Wichita Choice Alliance (Attachment 3)
Sondra Goldschein, American Civil Liberties Union (Attachment 4)
and L. Forest NewHeart, LMSW, M.Div (Attachment 5).

The meeting was adjourned at 11:30 a.m.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST

DATE: May 1, 2002

NAME	REPRESENTING
Dawen Ramsey	Kansans for Life
Ileen Meyer	KDHE
Cindy Sheridan	Planned Parenthood
Diane Wahto	Wichita Choice Alliance
TARA WOLFE	KU PRO-CHOICE COALITION, Q's EMPOWERMENT ACTION COALITION
Megan Murphy	KU Pro-Choice Coalition / Q's Empowerment Action Coalition
Jennifer Smith	KU Pro-Choice Coalition Womyn's Empowerment Action Coalition
Corrina Beck	KU Pro-Choice Coalition / Womyn's Empowerment Action Coalition
Sally Pulec	KU Pro-choice coalition / Womyn's Empowerment Action Coalition
Jim Vratil	
Kathy Porter	Judicial Branch
Sharon Lockhart	KCA & KS NOW
Carla Mahany	PPKM
Rev. Teri K Messner	Kansas Religious Leaders for Choice

COMPREHENSIVE HEALTH OF
Planned Parenthood
of Kansas and Mid Missouri

TESTIMONY ON HOUSE BILL 3000

Senate Federal and State Affairs Committee

May 1, 2002

Cindy Sheridan, R.N.
Comprehensive Health of Planned Parenthood

SnFedSt
05/01/02
Attach #1

4401 W. 109th Street, Suite 100 ■ Overland Park, Kansas 66211 ■ Phone:913-345-1400 ■ Fax: 913-345-2820

Testimony in Opposition to HB 3000
May 1, 2002
Senate Federal and State Affairs Committee
The Honorable Nancey Harrington, Chair

My name is Cindy Sheridan. I am a Registered Nurse and have been employed by Planned Parenthood of Kansas and Mid-Missouri as the Clinic Charge Nurse of Comprehensive Health Care Services for two years. Our reproductive health care services include abortion. My responsibilities include supervision and training of staff, assisting the physician with procedures, performing diagnostic ultrasound for fetal gestational age, and counseling and education of patients.

Thank you for this opportunity to testify before you today with some of our serious concerns about the effect of HB 3000 on our youngest patients, and on our ability to best serve them. In addition to my oral and written testimony, I have submitted a statement by Lynn Forest Newhart, who served for eight years as a clergy counselor for Planned Parenthood in Missouri as well as Kansas.

Another speaker will address our concerns regarding the constitutionality of this legislation. My comments will be limited to the bill's effect on our ability to continue to provide the best possible counseling services for our patients who are minors. Specifically, I would like to address lines 32-33 on page 1 of the bill, the requirement that counselors not be "legally or financially affiliated with" the physician who performs, or assists in performing, the abortion.

It is unclear exactly what this means. Is a counselor who is paid by Planned Parenthood, a 501(c)(3) nonprofit organization, financially or legally affiliated with the physician who is also employed by Planned Parenthood? Does the mere presence of a counselor providing services on our premises (or those of other abortion providers in Kansas) constitute a legal, and therefore prohibited, relationship? We believe this legislation is an attempt to require that the counseling be provided off-site, by biased counselors.

This language in HB 3000 implies that the counseling provided by clinics that offer abortion services is in some way sub-standard or otherwise suspect. However, the truth is that the counseling offered in these clinics is medically accurate, thorough, compassionate and always provided with the best interests of the patient in mind.

The majority of women, including minors, who seek abortion services have processed their decisions to terminate their pregnancies prior to arriving for their appointment at the clinic. The counseling sessions provided at these clinics generally center on the medical aspects of the abortion procedure, complete aftercare instructions, contraceptive options and an exploration of the woman's decision to terminate her pregnancy. All patients are made keenly aware that abortion is only one option and they are given the opportunity to explore the other options of parenting and adoption through discussion and referral if interested. Every effort is made to determine that each woman has thoroughly processed her decision and is confident that her decision to terminate her pregnancy is the best one for her at this time in her life, given her particular circumstances.

It is important to understand that specific referral procedures are followed whenever a woman expresses any kind of ambivalence regarding her decision to have an abortion or states that she is at the clinic against her will. When this situation occurs, patients are offered referral information for pre-natal care, adoption services and counseling prior to being sent home. These patients are also encouraged to talk about their decision with their spouses, partners, family members, clergy or anyone else who may be able to help them resolve the issues surrounding their decision before returning to the clinic for the procedure.

In the case of minor patients, this situation sometimes leads to a discussion with angry parents who insist that their daughter needs to have the abortion. They often demand that we provide the abortion for their daughter right then because they do not want her to go home and reconsider her decision. However, it is our job to support the young woman's choice, and if her choice is to continue her pregnancy, then we must support her decision with the same conviction that we would provide to a young woman choosing to have an abortion.

Clinic personnel are trained to identify patients who may be unsure of their decision, and they go to great lengths to be certain that no woman has an abortion unless it is her own decision to do so. Suggesting otherwise, as HB 3000 does, is both misleading and inaccurate. Moreover, it significantly underestimates the compassion and professionalism of abortion providers, counselors and other clinic staff.

I would like to conclude by quoting from the testimony of Ms. NewHeart:

> Having worked in a clinic for years it is difficult to imagine how patients would receive the adequate information and counseling necessary if the clinic or physician has no legal or financial connection to those counselors. First, there are many questions about access to those counselors. If the counselors are off site, it adds additional burdens of extra visits and more delays in receiving services. It is unclear how and when and under what conditions those counselors would make themselves available to minors seeking information. And most importantly, without the oversight of the physician or clinic, what measures are in place to assure compliance with medical and professional guidelines for delivery of services and content of information. What training would they receive? How would they know the correct information to give to each patient regarding their clinic visit since some procedures differ from clinic to clinic? What liability would rest with the physician or clinic providing the abortion services for the information and counseling provided by people with whom they have no professional relationship or accountability?

Thank you for considering these concerns about HB 3000. I urge you to oppose this bill.

Cindy Sheridan, RN
913/345-1400

Planned Parenthood®
of Kansas and Mid-Missouri

TESTIMONY
in Opposition to House Bill 3000

by Carla Mahany, Kansas Public Affairs Director
Planned Parenthood of Kansas and Mid-Missouri
913.312.5100, Ext. 227
or 913.915.9636

Senate Committee on Federal and State Affairs

Senator Nancey Harrington, Chair

Wednesday, May 1, 2002

SnFedSt
05/01/02
Attach #2

Planned Parenthood of Kansas and Mid-Missouri opposes House Bill 3000 because it is unconstitutional, unnecessary and unwise policy for Kansas minors.

HB 3000 is unconstitutional on its face because it removes from current law an emergency health exception in addition to an exception to prevent the death of the minor. It may be unconstitutional in effect by adding undue burdens for minors in a couple of ways. First, it does this by requiring that counselors not be "legally or financially affiliated" with the physician who provides an abortion. The meaning of this is not clear, but if it is interpreted to mean off-site counselors, particularly those who are opposed to abortion rights, the result may be delay and confusion for the minor and it may be determined to be a barrier to a minor's access to her legal, constitutional right to choose abortion. Second, it changes "written documentation" that the notice to a parent has been given to the requirement that the physician have "written proof of such notice," again adding unnecessary delay.

Much was made in the hearing before the House Federal and State Affairs Committee of the Minnesota minors law, which was the subject of a US Supreme Court case, *Hodgson v. Minnesota*, which was decided in 1990. The Minnesota law was challenged because it required two-parent notification with no judicial bypass. It is true that this law did not include a health exception, but this was not part of the challenge. The US Supreme Court has never said that a health exception is unnecessary when abortion is restricted for minors as well as adults. Subsequent US Supreme Court cases have been crystal clear on the point that both a health and life exception <u>are</u> necessary.

I was unsure whether the supporters of HB 3000 would try to make a case today that the bill's lack of a health exception is constitutional, given the 10th Circuit Court of Appeals decision two weeks ago that clearly reaffirmed that the lack of a health exception is unconstitutional. This was the pivotal point in their decision striking down Colorado's minors law.

Since the American Civil Liberties Union's Reproductive Freedom Project represented the plaintiffs in this lawsuit, I asked them to review HB 3000. Their written testimony to this Committee has been submitted. They address not only HB 3000's lack of a health exception, but also the "written documentation" of notification provision in this bill.

We do not oppose this legislation only because it is unconstitutional on its face and probably unconstitutional in effect, and certainly would be challenged if passed. We oppose it because we value the health and well-being of our patients, including minors and adults, and because the lack of a health exception and/or a delay in abortion services, especially for our youngest patients, equals risks to minors' health.

Please oppose this dangerous, unconstitutional and unnecessary legislation.

H
Only the Westlaw citation is currently available.

United States Court of Appeals,
Tenth Circuit.

PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS SERVICES, CORPORATION; Peter A.
Vargas, M.D.; Boulder Abortion Clinic, P.C.; Warren M. Hern, M.D.; James A.
McGregor, M.D.; Michael D. Rudnick, M.D.; Aris M. Sophocles, Jr., M.D.; and
Women's Choice of Boulder Valley, Inc., Plaintiffs-Appellees,
v.
William OWENS, in his official capacity as Governor of the State of Colorado;
David J. Thomas, in his official capacity as District Attorney for the First
Judicial District, State of Colorado; A. William Ritter, Jr., in his official
capacity as District Attorney for the Second Judicial District, State of
Colorado; Glenn Davis, in his official capacity as District Attorney for the
Third Judicial District, State of Colorado; Jeanne Marie Smith, in her official
capacity as District Attorney for the Fourth Judicial District, State of
Colorado; Michael Goodbee, in his official capacity as District Attorney for
the Fifth Judicial District, State of Colorado; Sarah Law, in her official
capacity as District Attorney for the Sixth Judicial District, State of
Colorado; Wyatt Angelo, in his official capacity as District Attorney for the
Seventh Judicial District, State of Colorado; Stuart A. Van Meveren, in his
official capacity as District Attorney for the Eighth Judicial District, State
of Colorado; Mark McLucas Myers, in his official capacity as District Attorney
for the Ninth Judicial District, State of Colorado; Gus Sanstrom, in his
official capacity as District Attorney for the Tenth Judicial District, State
of Colorado; Edward J. Rodgers, III, in his official capacity as District
Attorney for the Eleventh Judicial District, State of Colorado; Robert Pastore,
in his official capacity as District Attorney for the Twelfth Judicial
District, State of Colorado; Mark Adams, in his official capacity as District
Attorney for the Thirteenth Judicial District, State of Colorado; Paul R.
McLimans, in his official capacity as District Attorney for the Fourteenth
Judicial District, State of Colorado; Ronald F. Foster, in his official
capacity as District Attorney for the Fifteenth Judicial District, State of
Colorado; Gary Stork, in his official capacity as District Attorney for the
Sixteenth Judicial District, State of Colorado; Robert S. Grant, in his
official capacity as District Attorney for the Seventeenth Judicial District,
State of Colorado; James Peters, in his official capacity as District Attorney
for the Eighteenth Judicial District, State of the Nineteenth Judicial
District, State of Colorado; Al Dominguez, in his official capacity as District
Attorney for the Nineteenth Judicial District, State of Colorado; Alexander M.
Hunter, in his official capacity as District Attorney for the Twentieth
Judicial District, State of Colorado; Frank J. Daniels, in his official
capacity as District Attorney for the Twenty-First Judicial District, State of
Colorado; Michael F. Green, in his official capacity as District Attorney for
the Twenty-Second Judicial District, State of Colorado, Defendants-Appellants,
COLORADO PRO LIFE ALLIANCE, INC.; United Families International, Inc.; Society
for Adolescent Medicine; Colorado Chapter of the American Academy of
Pediatrics; American Medical Women's Association; American Public Health
Association, Amici Curiae.

No. 00-1385.

April 17, 2002.

Appeal from the United States District Court for the District of Colorado, (D.C. No. 99-WM-60).

Maurice G. Knaizer, Deputy Attorney General (Ken Salazar, Attorney General, John S. Sackett, Assistant Attorney General, with him on the briefs), Denver, CO, for Defendants-Appellants.

Jennifer Ellen Dalven, American Civil Liberties Union Foundation Reproductive Freedom Project, New York, N.Y. (Louise Melling, American Civil Liberties Union Foundation Reproductive Freedom Project, New York, NY, Edward T. Ramey, Isaacson, Rosenbaum, Woods & Levy, P.C., Denver, CO, Tim Atkeson and Keri Howe, Arnold & Porter, Denver, CO, Mark Silverstein, American Civil Liberties Union Foundation of Colorado, Denver, CO, Kevin C. Paul, Planned Parenthood of the Rocky Mountains, Inc., Denver, CO, with her on the brief), for Plaintiffs-Appellees.

Paul Benjamin Linton, Northbrook, IL, filed an amici curiae brief on behalf of the Colorado Pro Life Alliance, Inc., and United Families International, Inc., in support of Defendants-Appellants.

A. Stephen Hut, Jr., Kimberly A. Parker, and Julie M. Riewe, Wilmer, Cutler & Pickering, Washington, DC, filed an amici curiae brief on behalf of the Society for Adolescent Medicine, the Colorado Chapter of the American Academy of Pediatrics, the American Medical Women's Association, and the American Public Health Association, in support of Plaintiffs-Appellees.

Before BRISCOE, BALDOCK, and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

***1** Plaintiffs filed suit seeking to have a Colorado statute regulating abortion declared unconstitutional and to have enforcement of that statute enjoined. The district court granted summary judgment for plaintiffs, holding that the lack of a health exception for the parental notification requirement of the statute rendered it unconstitutional. We have jurisdiction pursuant to 28 U .S.C. § 1291 and affirm.

I

The Colorado Parental Notification Act ("PNA") was adopted as an initiative in Colorado's general election of November 3, 1998. [FN1] It generally requires that minors in the state of Colorado provide notice to at least one of their parents before obtaining an abortion. The legislative declaration of the act states:

> FN1. The full text of the PNA is set out in the Appendix to this Opinion.

> The people of the state of Colorado ... declare that family life and the preservation of the traditional family unit are of vital importance to the continuation of an orderly society; that the rights of parents to rear and nurture their children during their formative years and to be involved in all decisions of importance affecting such minor children should be protected and encouraged, especially as such parental involvement relates to the pregnancy of an unemancipated minor, recognizing that the decision by any such minor to submit to an abortion may have adverse long-term consequences for her.

Colo.Rev.Stat. § 12-37.5-102.

Performance of an abortion on an "unemancipated minor" is specifically prohibited until at least forty-eight hours after written notice is delivered to the minor's parent, guardian, or foster parent. *Id.* § § 12-37.5-103(2), - 104(1). Violation of the PNA is a class one misdemeanor and creates liability for civil damages. *Id.* § 12-37.5-106(1). [FN2]

> FN2. The statute also provides that "[a]ny person who counsels, advises, encourages or conspires to induce or persuade any pregnant minor to furnish any physician with false information ... concerning the minor's age, marital status or any other fact or circumstance to induce ... the physician to perform an abortion" without written notice can be found guilty of a class five felony. Colo.Rev.Stat. § 12-37.5-106(3).

There are two exceptions to the PNA's notice requirement. First, the notice requirement does not apply if the persons entitled to notice certify in writing that they have already been notified. *Id.* § 12-37.5-105(a). Second, the notice requirement does not apply if the minor declares that she is a victim of child abuse or neglect by the persons entitled to notice, and the physician reports this fact in accordance with Colorado law. § 12-37.5-105(b). Two affirmative defenses to liability also exist. First, the physician is absolved from liability if he shows that he reasonably relied upon representations by the minor indicating compliance with the PNA. *Id.* § 12-37.5-106(2)(a). Second, the physician can show that the abortion was necessary to prevent the imminent death of the minor and that there was insufficient time to provide the required notice. § 12-37.5-

106(2)(b).

Plaintiffs filed suit challenging the constitutionality of the PNA on December 22, 1998. [FN3] Named defendants originally were the governor of Colorado and one local district attorney; the suit was later expanded to include all local district attorneys in Colorado. [FN4] One of plaintiffs' claims was that the PNA was facially unconstitutional because it lacked an exception permitting a physician to perform an abortion without notice or a waiting period even when necessary to protect the health of the pregnant minor. [FN5] *Planned Parenthood of the Rocky Mountains Servs. Corp. v. Owens,* 107 F.Supp.2d 1271, 1275 (D.Colo.2000). The district court granted summary judgment for plaintiffs on this claim. *Id.* at 1276.

FN3. The suit was originally filed in Colorado state court but was removed to federal court by defendants. *Planned Parenthood of the Rocky Mountains Servs. Corp. v. Owens,* 107 F.Supp.2d 1271, 1274--75 (D.Colo.2000).

FN4. Hereinafter, we refer to defendants collectively as "the State ."

FN5. Plaintiffs' other claims were (1) that the PNA violates the federal constitution by failing to provide a judicial bypass for the parental notification provision for mature, abused, or "best interest" children; (2) that the existing judicial bypass provision in the PNA does not adequately protect federal constitutional rights; (3) that the PNA violates state due process rights; (4) that the PNA violates state separation of powers; and (5) that the PNA's definition of abortion violates the federal constitution by requiring parental notification for the use of contraception by minors. *Planned Parenthood,* 107 F.Supp.2d at 1275. Plaintiffs' contraception claim was dismissed after the district court granted the State's motion for partial summary judgment pursuant to a joint motion by the parties. *Id.* at 1276. Because relief was granted to plaintiffs on the health exception claim, the district court did not address the other federal constitutional claims. The state constitutional claims were dismissed without prejudice by the district court. *Id.*

***2** We review the district court's grant of summary judgment de novo. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.,* 165 F.3d 1321, 1326 (10th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **no** genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmovant. *Simms,* 165 F.3d at 1326. "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." *Id.* (quotation omitted). In the absence of a genuine issue of material fact, we determine whether the district court correctly applied the substantive law. *Id.*

II

Key to resolution of this case is our answer to this question: Does the United States Constitution, as interpreted by the Supreme Court, require that state abortion regulations provide a health exception where such an exception is necessary to ensure that those regulations do not threaten the health of a pregnant woman? If the answer is yes, then a subsidiary and related question that we must also answer is: What is the appropriate standard of review to apply when a lawsuit challenges an abortion statute for failing to provide a health exception?

A

Three cases are essential to answering the first question: *Roe v. Wade,* 410 U.S. 113 (1973), which established the current constitutional principles regarding abortion; *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), which reaffirmed and refined the holdings of *Roe;* and *Stenberg v. Carhart,* 530 U.S. 914 (2000), which is the most recent holding by the Supreme Court on the constitutional requirements for a health exception for abortion regulations.

Roe established the importance of protecting the health of pregnant women in the context of abortion

regulation. One of the three central holdings of *Roe* is that for the stage of pregnancy subsequent to viability, a state may regulate and even proscribe abortion, "except, where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe,* 410 U.S. at 165.

This holding was reaffirmed in *Casey,* where the Court stated in the clearest possible terms that abortion regulations cannot interfere with a woman's ability to protect her own health. The *Casey* Court emphasized that "the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey,* 505 U.S. at 880. In upholding Pennsylvania's abortion regulations, the Court found it crucial that the statute had a medical emergency exception to the application of the state regulations, and that the exception was broad enough "to assure that compliance with [the State's] abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.* (quotation omitted).

***3** *Roe* and *Casey* directly address only state regulation of post- viability abortions, *Roe,* 410 U.S. at 164-65; *Casey,* 505 U.S. at 879 (joint opinion of O'Connor, Kennedy, and Souter, JJ.), a context in which the Court has held that a state has a "compelling" interest in protecting potential life, *Roe,* 410 U .S. at 163. This means that pre-viability, where the state's interest in regulation of abortion is weaker, the state would likewise have **no** constitutional power to infringe on the right of the pregnant woman to protect her health. In other words, at **no** time during the period of pregnancy may the state regulate abortion in a manner that infringes on the ability of a pregnant woman to protect her health. In *Stenberg,* the Court confirmed this deduction. "Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." 530 U.S. at 930.

Stenberg also confirmed that the lack of a health exception is a sufficient ground for invalidating a state abortion statute. *Id.* (announcing two "independent reasons" for invalidating the state abortion law in question, one of which was that "the law lack[ed] any exception for the preservation of the ... health of the mother" (quotation omitted)); *see also id.* at 947 (O'Connor, J., concurring) ("[T]he Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances when the banned procedure is necessary to preserve the health of the mother."). Even the dissent in *Stenberg* agreed that *Casey* and *Roe* require state abortion regulations to have health exceptions for those situations in which continuing a pregnancy would threaten the health of the mother. *Id.* at 1009 (Thomas, J ., dissenting). The point of departure for the dissent regarded application of the foregoing standard to the facts in *Stenberg. Id.* (contending that *Roe* and *Casey* were inapplicable to the presented facts because they "say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods."). [FN6]

> FN6. Even before the Supreme Court affirmed the existence of the health-exception requirement in *Casey* and *Stenberg,* the Court was filling in the substance of that requirement in a series of cases. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 768B71 (1986) (invalidating a requirement that a second physician be present for all abortions where viability is possible because there was **no** health exception to the requirement), *overruled in part on other grounds by Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 882- 83 (1992); *Planned Parenthood Ass'n of Kan. City v. Ashcroft,* 462 U .S. 476, 485 n.8 (1983) (upholding a Missouri statute requiring two physicians to be present for third-trimester abortions because the statute could be interpreted to create a health exception to that requirement); *see also Harris v. McRae,* 448 U.S. 297, 316 (1980) ("[I]t could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [*Roe*]."). Although *Casey* overrules in part *Thornburgh, Thornburgh's* essential holding regarding the health exception requirement was reaffirmed by *Casey. See Jane L. v. Bangerter,* 102 F.3d 1112, 1118 n.7 (10th Cir.1996).

That the PNA regulates abortion performed for minors does not alter the constitutional requirements or mandates laid down by the Court regarding the necessity of a health exception. "Constitutional rights

do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 74 (1976). The State does not urge--and the Court has never ruled-- that a state may constitutionally infringe on a minor's ability to protect her health through an abortion, or that the health exception requirement either does not apply or applies differently to minors.

Thus, the current state of the law is that state abortion regulations must provide an exception for the protection of the health of pregnant women where those regulations might otherwise infringe on their ability to protect their health through an abortion. [FN7]

> FN7. The State argues that the analysis of whether a health exception is required for a particular state abortion regulation must proceed using the "undue burden" test laid out in *Casey,* a test that generally applies to state regulation of pre-viability abortion. *Casey,* 505 U.S. at 876- 77 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). However, the *Stenberg* Court implicitly concluded that the "undue burden" test does not apply to the determination of whether a health exception is required, and that the lack of a health exception is a separate, independent ground upon which a state abortion regulation may be invalidated.*Stenberg,* 530 U.S. at 930 (holding that the Nebraska statute is unconstitutional for "at least two *independent* reasons," the lack of a health exception and the imposition of an undue burden (emphasis added)). The proper analysis is thus to determine whether a health exception is necessary given the restrictions imposed by the PNA. *See id.* at 931. Our analysis, based on the facts conceded by the State and contained in the record, shows that a health exception is necessary.

B

***4** Although facial challenges to statutes generally require the plaintiff to show that there are **no** circumstances under which the law could be valid, *see United States v. Salerno,* 481 U.S. 739, 745 (1987), the standard of review for facial challenges to abortion statutes is quite different.

We have followed the majority of other circuits in holding that *Casey* altered the *Salerno* standard in the context of abortion cases, with the *Casey* "undue burden" test replacing the *Salerno* "**no** set of circumstances" test. *See Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th Cir.1996). Review of state pre-viability abortion regulations generally proceeds under *Casey,* which prescribes a showing that the state abortion regulation operates, "in a large fraction of the cases ... as a substantial obstacle to a woman's choice to undergo an abortion." *Casey,* 505 U.S. at 895. The State concedes that the *Salerno* standard is inapplicable and assumes that our review should proceed under the *Casey* standard.

However, in *Stenberg* the Supreme Court departed in yet another manner from *Salerno,* relying on neither the *Salerno* "**no** set of circumstances" test nor the *Casey* "undue burden" test in striking down Nebraska's "partial birth abortion ban" for lack of a health exception. *See Stenberg,* 530 U.S. at 938; *see also id.* at 1019 (Thomas, J., dissenting) (arguing that under the "**no** set of circumstances" test the Nebraska statute should not be declared facially unconstitutional). Without overruling or even citing *Salerno,* the Court instead held that in the absence of evidence that a health exception would "never [be] necessary to preserve the health of women," the statute must be declared unconstitutional. *Stenberg,* 530 U.S. at 937-38 (quotation omitted). The district court in this case implicitly reached this conclusion as well. *See Planned Parenthood,* 107 F.Supp.2d at 1280 (concluding without discussing *Salerno* that *Stenberg* established a per se rule requiring a health exception). We will "follow what the Supreme Court actually did--rather than what it failed to say--and apply" the standard for reviewing abortion statutes laid out in *Stenberg. Planned Parenthood v. Miller,* 63 F.3d 1452, 1458 (8th Cir.1995).

Applying that standard, if we conclude that the record shows that there is **no** genuine issue as to the material fact that the PNA will infringe on the ability of *any* pregnant woman to protect her health, we must hold the statute unconstitutional. Plaintiffs need not show that all, or even most, pregnant women who will be covered by the provisions of the PNA would have the right to protect their health infringed unconstitutionally by the PNA. *See Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 196 (6th Cir.1997) ("[A] post- viability abortion regulation

which threatens the life or health of even a few pregnant women should be deemed unconstitutional.").

***5** With these preliminary matters resolved, we address whether the Colorado statute meets the appropriate constitutional requirements.

III

We first conclude that the evidence presented by the parties before the district court mandates that the PNA contain a health exception. We then reject the State's argument that the PNA may be interpreted to contain a constitutionally adequate health exception by reading into it a provision from Colorado's Children's Code. That rejection is compelled because (1) Colorado's principles of statutory interpretation do not allow us to consider such an interpretation; and (2) even if the PNA and the Children's Code arguably conflict, those principles of statutory interpretation would not allow us to read the Children's Code as superseding the PNA.

A

Both parties agree that there are circumstances in which complications of a pregnancy may pose major health risks to the patient, including a threat to the patient's life. *Planned Parenthood,* 107 F.Supp.2d at 1277. (9 App. at 2481, 2588; Appellants' Br. at 9.) The parties also agree that these medical complications may require medical treatment during the mandatory forty-eight- hour waiting period of the PNA, and that treatment may necessitate an abortion as defined in the PNA. *Planned Parenthood,* 107 F.Supp.2d at 1277. (9 App. at 2481B83; 12 *id.* at 3297; Appellants' Br. at 9.) Medical experts deposed on behalf of both defendants and plaintiffs stated that delays required by the PNA for the provision of an abortion to treat medical complications could result in significant harm to the health of a pregnant woman and that these medical complications could often arise in circumstances short of imminent death. *Planned Parenthood,* 107 F.Supp.2d at 1277 & n.9. (1 App. at 203- 208; 4 *id.* at 1047-1067, 1120-21; 5 *id.* at 1248-53; 6 *id.* at 1477-79, 1485, 1601-03, 1608-09; 9 *id.* at 2624B26.) Consequently, the PNA's affirmative defense for imminent death would not be available to treating physicians in such situations.

Stated more formalistically, the evidence before the district court at the time of plaintiffs' summary judgment motion showed (1) that there are circumstances in which pregnant minor women may be diagnosed by a physician with a pregnancy complication that could seriously threaten their health; (2) that such threatened harm may fall short of imminent death; and (3) that the forty-eight-hour delay required by the PNA would interfere with the medically appropriate treatment--an abortion--for these women. [FN8] Having carefully reviewed the record, we agree with the district court that there is **no** genuine issue as to the material fact that the PNA infringes on the ability of pregnant women to protect their health. We thus conclude that a health exception to Colorado's Parental Notification Act is constitutionally required.

FN8. The State disputes whether a form of pregnancy complication-- ectopic pregnancy, where the fertilized egg is located somewhere other than the uterus--would be covered by the PNA, and whether termination of an ectopic pregnancy would be an abortion for purposes of the PNA. As the district court noted, however, there are a number of other pregnancy complications the parties agree could pose major risks to the health of the pregnant minor, treatment for which may require an abortion as defined by the PNA and for which the forty-eight-hour waiting period of the PNA (or any delay at all) could endanger the health of the pregnant minor. *Planned Parenthood,* 107 F.Supp.2d at 1277 n.7. Thus, we need not address the ectopic pregnancy issue to resolve this case.

B

Although the State admits that "[w]ithin its four corners, the Act contains **no** express exception when an abortion is necessary for the minor's health," [FN9] it contends that such an exception should be imported from other provisions of Colorado law. (Appellants' Br. at 12.) In particular, the State points to § 19-1-104(3) of the Colorado Revised Statutes--part of the Colorado Children's Code--which allows a state juvenile court to grant authorization for emergency medical treatment for a minor when "reasonable effort" is not sufficient to notify the minor's parents. This provision of Colorado law, the State claims, effectively creates a health exception to the PNA that satisfies constitutional requirements. [FN10] In analyzing the State's argument, we rely on Colorado's principles and laws of statutory construction to interpret the PNA and other Colorado

HB 3000
New burdens on minors' access to abortion

Please also refer to the attached "Talking Points" about HB 3000.

- HB 3000 is unconstitutional, unnecessary and unwise policy for Kansas minors.

- Current Kansas law already restricts minors' access through parental notification, with a constitutionally required health and life exception, and a workable judicial bypass for minors who – for compelling reasons which include incest and other forms of abuse – would rather face a judge than inform their parents.

- The level of parental involvement and awareness is already quite high in Kansas. For example, during a six month period at Comprehensive Health Care Services in Overland Park in the last half of 2000, out of approximately 250 procedures for minors, judicial bypass was needed only six times (an average of once per month).

- It is unconstitutional on its face because it does not include a health exception as well as an exception to prevent the death of the minor.

- The US Supreme Court has ruled as recently as summer, 2000 in *Stenberg v. Carhart* that a health as well as life exception is mandatory when access to abortion is restricted. Contrary to the contentions of the bill's sponsors, the *Hodgson* case that stems from the Minnesota minors' law did not even address the absence of a health exception and therefore the Court neither struck down nor upheld this part of the Minnesota law. Later US Supreme Court cases have made it clear that abortion restrictions are unconstitutional without it. It is incorrect to imply that the Minnesota case is the law of the land regarding the health exception requirement.

- HB 3000 is unconstitutional in effect because of its vagueness in the new definition of "counselor," and because it attacks judicial bypass in several ways that create an unnecessary delay and undue burden.

- Adolescents already tend to delay getting any help for their pregnancy, no matter what kind of help it is, due to ignorance or denial. Delay affects safety, adds to the minor's burden, and consequently adds to the unconstitutionality of this bill.

- HB 3000 causes additional delay for minors in the following ways:

  It would require completely unnecessary changes to the definition of "counselor" as someone who is not affiliated with the physician legally or financially. The exact meaning is unclear. Especially if the counseling must be performed by someone not even on the clinic premises, delay is inevitable and inaccurate and/or incomplete counseling would be likely.

  It would require that a return receipt from the parent be received by the provider before the procedure may take place. This is fraught with problems. It penalizes minors whose parents may work 12 hours a day and are unable to get to the post office to sign for the notification letter, or whose parents are homeless, or simply away from home for several weeks. Nowhere else in the country is the minor's abortion delayed until the return receipt is actually received.

TALKING POINTS ON MINORS ABORTION -- HOUSE BILL 3000

For more information, contact Carla Mahany, Planned Parenthood of Kansas and Mid-Missouri, 913.915.9636

The intent of HB 3000 is to delay access to abortion for minors by requiring parental notification by certified mail (this would often cause delay of at least a week), changing the definition of "counselor" to erode the minor's ability to have complete, unbiased and accurate information, and by making judicial by-pass nearly impossible to obtain. The bill is unconstitutional on its face because it eliminates the "health" exception, and it is unconstitutional in effect by creating significant burdens for minors who, for good reasons, cannot speak to their parents. The result of its passage would be increased health risks to pregnant minors.

The level of parental involvement/awareness is already quite high in Kansas. For example, during a six-month period at Comprehensive Health Care Services in Overland Park in the last half of 2000, out of approximately 250 procedures for minors (below the age of 18, with approximately 10 younger than 15), judicial by-pass was needed only six times (an average of once per month). There are compelling reasons for young people to seek a by-pass – pregnancy as a result of incest, a history of abuse by parents leading them to fear for their safety if their parents find out, etc.

More than one third of all abortions after 12 weeks are obtained by teenagers. Teens face not only state regulatory hurdles, but also delays in recognizing that they are pregnant and taking decisive action. They may:

- understand little about how their bodies work and therefore may not recognize signs of pregnancy
- become pregnant before they have begun to menstruate or before their cycle is regular, so they don't have the signal of a missed period
- believe a variety of myths, such as "You can't get pregnant the first time"
- keep rape or sexual abuse a secret, denying the possibility of pregnancy
- keep hoping they're wrong, that it will go away, that they won't have to disappoint their family, friends, teachers
- be intimidated by the health care system

Delays mean greater health risks to the pregnant minor. The earlier the abortion, the fewer risks because the procedure is less complicated. (However, the risks of giving birth are much greater that having an abortion, even later in pregnancy.)

Abortion is a fundamental right supported by more than 25 years of constitutional case law. They are not analogous to tattoos. Tattoos are not a "right," and lack of access to tattoos won't affect a minor's health or life.

The consequences of adolescent pregnancy and childbearing are serious:

- Teen mothers are less likely to graduate from high school and more likely than their peers who delay childbearing to live in poverty and to rely on welfare
- The children of teenage mothers are often born at low birth weight, experience health and development problems, and are frequently poor, abused, and/or neglected

Legislators who want to do something positive for the health of minors should support the following state policies:

- ensure greater access to contraceptives and medically accurate sexuality education
- ensure that a pregnant minor can obtain prenatal care and delivery services without parental consent or notification
- ensure that minors are able to consent to the diagnosis and treatment of sexually transmitted infections

Presentation to the Senate Federal and State Affairs Committee
1 May 2002

Thank you for this opportunity to speak to you today on the issue of HB3000. This presentation is in honor of Becky Bell, the young woman who died in the name of restrictive abortion laws. We are testifying against this bill because if it is passed, it will put minor women and girls in danger in the same way Becky Bell was put in danger.

Many of us grew up during the time when abortion was illegal and unsafe. We became proponents of reproductive rights as young women because we wanted women to be safe. We wanted women to have the right to use contraception and to have legal and safe abortions when they needed them. Abortion nowadays is safer for a woman than carrying a pregnancy to term and is also statistically safer than most other common medical procedures, including plastic surgery and some vaccinations. Yet, today, this committee is considering a bill that would put adolescent women seeking abortions in jeopardy by delaying access or by forcing them to seek abortions under circumstances and using procedures that are less than safe. Yes, the coat hangar is still alive and well as a tool for women who are barred from access to legal abortions.

Some of you may think that you are helping pregnant teens by putting up barriers to their getting abortions. I have no doubt that your intentions are good. However, the harm this bill would do to these young women is incalculable. Abortion is legal so that women will be safe. This bill will only serve to make abortion less safe for young women. Don't be responsible for creating more Becky Bells in the State of Kansas.

Please see the attached fact sheet for more information.

Diane Wahto, Co-Chairperson
Wichita Choice Alliance
Wichita KS

Sharon Lockhart, President
Kansas Choice Alliance

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Adolescents Need Safe and Legal Abortion

Who are adolescents?
The term "adolescents" refers to people between the ages of 10 and 19. In a 1998 joint statement, the World Health Organization, the United Nations Children's Fund, and the United Nations Population Fund agreed on the following categorizations of young men and women:

Adolescent:	10 to 19 years
Youth:	15 to 24 years[1]
Young people:	10 to 24 years

As defined above, adolescents comprise 20% of the world's population.[2]

Lack of safe, legal abortion services for adolescents jeopardizes their health and lives and undermines their right to make decisions concerning childbearing. Unsafe abortion has particularly serious health implications for adolescents and young women, especially where abortion is illegal, severely restricted, or difficult for adolescents to access. Governments should take steps to ensure that adolescents can terminate pregnancies safely, both by liberalizing restrictive abortion laws and addressing the particular reproductive health needs of adolescents.

Adolescents Have More Unwanted Pregnancies
Adolescents face social, cultural, and legal barriers to family planning. As demonstrated in Table I, in countries worldwide, a high percentage of adolescent pregnancies are unplanned.

Governments should acknowledge adolescents' heightened risk of unwanted pregnancy.

- Because many societies continue to regard adolescent sex as a social taboo, adolescents generally do not have the information they need to avoid pregnancy.[3]
- Even where adolescents are aware of contraception, they often cannot easily obtain it. Not only may they lack the financial means to purchase contraception, but also many adolescents live in countries that require parental or spousal consent or set a minimum age for obtaining contraception.[4]

Safe and Legal Abortion Saves Adolescents' Lives
Unsafe abortion and early childbirth pose enormous risks to adolescents' lives and health.

Governments should ensure access to legal and safe abortion services for adolescents.

- Non-married pregnant girls face shame, social isolation, interruption of education, increased economic hardship, and diminished opportunity to marry. For these reasons, abortion is the most common solution to an unwanted pregnancy for a non-married girl in most parts of the world.[5]
- Carrying a pregnancy to term is more dangerous for young girls than for mature women. Adolescents' physical immaturity contributes to difficulties they face during labor. Mothers aged 17 or younger face a risk of death during childbirth that is two to four times greater than that faced by mothers aged 20 or older.[6] Infant mortality and morbidity is also higher among infants born to adolescents: the risk of dying in the first year of life is approximately 30% greater among babies whose mothers are aged 15 to 19 than among babies born to mothers aged 20 to 29.[7]
- Adolescents' shame, guilt, and fear of discovery often lead them to a state of psychological denial about the reality of their pregnancies. Paralyzed by their emotions and unaware of the consequences of delay, many adolescents wait longer than adult women to terminate their pregnancies. Adolescents are thus more likely to undergo late abortions and, consequently, to experience complications.[8]

- Even where abortion is legal, the procedure may be too expensive or too difficult for an adolescent to obtain without the involvement of family or neighbors. As a result, regardless of abortion's legal status, non-married adolescent girls most often seek unsafe abortion services from non-medical providers. [9]
- Because adolescents who have babies often cannot pursue education and develop marketable skills, they often have difficulty supporting themselves financially.[10] The effects of poverty on their nutrition, health care, and environment could contribute to future health problems.

Laws that Deny Adolescents Access to Abortion Violate Their Rights and Put Them at Risk
Adolescents face special barriers to abortion services. Among these barriers are laws that require adolescents to notify their parents or obtain their parents' consent prior to undergoing an abortion.

These parental involvement requirements interfere in adolescents' decision-making about abortion by forcing them to engage their parents in their private deliberations. Adolescents may well wish to involve their parents in their decision, but governments should not mandate that they do so.

- The Convention on the Rights of the Child, which defines a "child" as anyone under the age of 18, recognizes "the evolving capacities of the child" when considering the role of parents in guiding a child's exercise of her rights.[17] Governments should thus acknowledge that a parent's role is limited by the child's own capacity for independent decision-making.
- Rather than mandating parental involvement, governments should ensure that health care providers are trained to assess the capability of adolescents to make reasonable, independent, and confidential decisions regarding their reproductive health.[18]
- Parental involvement requirements may cause serious rifts in girls' relationships with their parents or give rise to violent reprisals. They may also cause adolescents to delay seeking an abortion, increasing the physical risks of the procedure with each week of delay.
- Governments should ensure that adolescents have access to appropriate, high- quality abortion services. Women's health care services should be equipped to meet the health needs of adolescents. In addition, health personnel should be trained to provide information to adolescents about preventing and terminating pregnancy.
- Studies from several low- and middle-income nations reveal that pregnant, unmarried adolescents decide to terminate their pregnancies more frequently than other groups.[11] Between one million and four million adolescent women in low- and middle-income nations obtain clandestine, usually unsafe, abortions.[12]
- Each year, at least five million induced abortions are performed on adolescents between the ages of 15 and 19, which means that girls in this age group account for at least 10 % of all induced abortions worldwide each year. Many of these abortions are performed under unsafe conditions.[13]
- Adolescents tend to delay obtaining an abortion until after the first trimester and often seek help from a non-medical provider, leading to higher rates of complications. Self-induced abortion is also common among adolescents in many countries.[14]
- The World Health Organization has estimated that in many African countries, up to 70% of all women who receive treatment for complications of abortion are under age 20.[15]
- Among industrialized countries, the United States has one of the higher adolescent abortion rates. The abortion rates per 1,000 for 15 to 19-year-olds vary from three in Germany, six in Japan, 19 in England and Wales, to 36 in the United States.[16]

Endnotes

1 United Nations Population Fund, Technical and Policy Division Draft Report, The Sexual and Reproductive Health of Adolescents 2 (April 1998) [hereinafter Sexual and Reproductive Health of Adolescents].
2 Id. at 4, citing United Nations, The Sex and Age Distribution of the World Population (1996).
3 See, e.g., G.S. Mpangile, M.T. Leshabari, and D.J. Kihwele, *Induced Abortion in Dar es Salaam, Tanzania: The Plight of Adolescents, in Abortion in the Developing World*, 387, 392 (Cynthia Indriso & Axel I. Mundigo eds., 1999).
4 Alan Guttmacher Institute, Into a New World 31 (1998).
5 Cynthia Indriso & Axel I. Mundigo, *Introduction, in* Abortion in the Developing World 23, 47 (Cynthia Indriso & Axel I. Mundigo eds., 1999).
6 Alan Guttmacher Institute, Issues in Brief: Risks and Realities of Early Childbearing Worldwide (viewed on May 12, 2000) < http://www.agi-usa.org/pubs/ib10.html> [hereinafter AGI Early Childbearing], citing A.P. McCauley & C. Salter, Meeting the Needs of Young Adults, Series J, No. 41 POP. REPORTS (1995).
7 AGI Early Childbearing, supra note 6, citing J.M. Sullivan et al., Infant and Child Mortality, (Macro Int'l, Demographic and Health Surveys Comparative Studies No. 15, 1994).
8 Indriso & Mundigo, supra note 5, at 48.
9 Indriso & Mundigo, supra note 5, at 47-48.
10 AGI Early Childbearing, supra note 6.
11 Sexual and Reproductive Health of Adolescents, supra note 1, at 5.
12 Judith Senderowitz, World Bank Discussion Papers, Adolescent Health: Reassessing the Passage to Adulthood 16 (1995) [hereinafter Reassessing the Passage to Adulthood].
13 Indriso & Mundigo supra note 5. at 47 citing P. Senanayake and M. Ladjali. Adolescent Health: Changing Needs, 46(2) International Journal of Gynecology and Obstetrics, 137-43 (1994).
14 The Center for Population Options, International Center on Adolescent Fertility, Adolescents and Unsafe Abortion in Developing Countries: A Preventable Tragedy 3 (1992).
15 Safe Motherhood Inter-Agency Group, Unsafe Abortion (last visited February 17, 2000) citing World Health Organization, The Health of Young People: A Challenge and a Promise (1993).
16 Alan Guttmacher Institute, Into a New World 35, tbl. 6b (1998).
17 Convention on the Rights of the Child, opened for signature Nov. 20, 1989, arts. 1, 5, G.A. Res. 44/25, 44 U.N.GAOR Supp. (No. 49), U.N. Doc. A/44/49, 28 I.L.M. 1448 (1989) (entered into force Sept. 2, 1990).
18 Rebecca Cook & Bernard M. Dickens, *Recognizing Adolescents' "Evolving Capacities" to Exercise Choice in Reproductive Health Care*, Int'l J. of Gynecology and Obstetrics, Word Report on Women's Health Year 2000 (forthcoming 2000) (manuscript at 15, on file with CRLP).

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION
REPRODUCTIVE FREEDOM PROJECT
BEFORE THE KANSAS SENATE STATE AND FEDERAL AFFAIRS COMMITTEE
IN OPPOSITION TO HOUSE BILL NO. 3000
MAY 1, 2002

The American Civil Liberties Union is a national organization devoted to defending the freedoms guaranteed under the federal and state constitutions and their Bills of Rights. The Reproductive Freedom Project, through litigation, advocacy, and public education, seeks to protect the rights of individuals to decide freely, without governmental hindrance or coercion, whether or not to bear a child. The Project works with ACLU affiliates in all 50 states and the District of Columbia to analyze legislation affecting reproductive choice, including bills to require parental notification for abortion. The Project successfully challenged Colorado's parental involvement law, recently obtaining a decision from the U.S. Court of Appeals for the Tenth Circuit holding that law unconstitutional because it lacked an exception to its notification requirement for situations in which a prompt abortion is necessary to protect a minor's health.

We thank the Committee for the opportunity to testify on Kansas House Bill No. 3000 ("H.B. 3000" or "the bill").

Kansas H.B. 3000

Kansas law already requires that minors receive counseling and notify their parents before an abortion. Under current requirements, counseling and notice can be waived if the physician determines that an emergency exists that threatens the health, safety, or well-being of the minor. H.B. 3000 eliminates the exception for situations in which delaying an abortion would put a minor's health, safety, or well-being at risk. Instead, H.B. 3000 would allow physicians to perform abortions without notice or counseling only when it is necessary to prevent the minor's death.

Kansas law already requires that a minor's parent or legal guardian be notified before an abortion. H.B. 3000 makes the notification process more burdensome by requiring that such notice be given either in person or by certified mail, return receipt requested, with written proof.

Parental Notice Laws Without a Health Exception Are Unconstitutional

A parental notice law that does not contain an exception for situations in which an immediate abortion is necessary to protect the health of a minor is unconstitutional. In an unbroken line of cases, beginning with Roe v. Wade, 410 U.S. 113 (1973), and running through its recent decision in Stenberg v. Carhart, 540 U.S. 914 (2000), the Supreme Court has consistently held that abortion regulations that lack exceptions necessary to protect the health and lives of women are unconstitutional.

Two weeks ago, the U.S. Court of Appeals for the Tenth Circuit, the Circuit in which Kansas sits, struck down Colorado's parental notice law because it lacked a health exception. In Planned Parenthood v. Owens, No. 00-1385, 2002 WL 571784 (10th Cir. Apr. 17, 2002), the

Tenth Circuit held that the parental notice law's lack of a health exception impermissibly conflicted with Supreme Court precedent requiring abortion regulations to contain an exception to preserve the health of the woman. Because H.B. 3000 eliminates the parental notice law's health exception and replaces it with an exception that applies only to prevent a teen's imminent death, it is unconstitutional.

Laws that Significantly Delay a Woman's Access to Abortion Are Unconstitutional

As it is unrealistic to expect a physician to make a house call to provide in person parental notification for every teen seeking an abortion, the only real option left for providing notification to a parent is the time-consuming mail option. The looming criminal penalties for a physician's noncompliance will ensure that the minor is not able to access an abortion until the returned receipt is in the physician's hand. Requiring the minor to wait until the physician notifies the parent "in person or by certified mail, return receipt requested," and until the physician receives written proof that the parent has been notified, will substantially delay a minor's abortion.

This delay has significant consequences both practically and constitutionally. Although abortion is safe throughout pregnancy, the risks increase each week that the pregnancy advances. In addition, abortion becomes more expensive and far less available as a woman's pregnancy progresses. For some, the delay caused by the bill will force them to continue an unwanted pregnancy to term or to take matters into their own hands. The U.S. Constitution does not countenance this sort of delay. As the Supreme Court has recognized, "a pregnant adolescent cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." Bellotti v. Baird, 443 U.S. 622, 642 (1979). For this reason, laws requiring parental involvement must work expeditiously. Because the bill would require teens to delay their abortions for a significant period of time, putting their health at risk and possibly preventing them from getting an abortion at all, the bill is likely to be found unconstitutional.

We urge you to oppose H.B. 3000. Thank you for the opportunity to testify on this important issue.

Contact Person: Sondra Goldschein
(212) 549 2628

TESTIMONY IN OPPOSITION TO HB 3000
May 1, 2002
Senate Federal and State Affairs Committee

by L. Forest NewHeart, LMSW, M.Div.

My name is Lynn Forest NewHeart and I am writing to express my deep concerns regarding House Bill 3000. I was employed by Planned Parenthood for eight years as a clergy counselor. I am currently seeking a PhD in social work at the University of Kansas.

During my eight years with Planned Parenthood (in both Kansas and Missouri clinics), I had the opportunity and responsibility of counseling many women regarding options for pregnancy, and specifically women who chose to have an abortion. I also worked directly with many minors throughout those eight years, including those young women who, after much discussion and counsel, chose judicial bypass rather than seek parental notification. From my experience working with this population, I believe HB 3000 produces unnecessary obstacles to abortion for minors, and may cause more harm than good. Enactment of this bill will prove detrimental to minor women rather than securing additional protection. My concerns are threefold.

First, several additional layers of obstacles are added to minors seeking abortion which will only serve to delay the abortion. Making an additional visit to an off-site counselor adds the potential for many problems, but logistically it would add another appointment, an additional trip, and more time away from work, school or family for the parents and the minor. Having to wait for a certified letter to be picked up, filled out and returned before an abortion can occur just adds additional days (or weeks) to a process already long and arduous enough. Besides the hassles of additional appointments, need for transportation, and time lost from school or work, the main concern is that any delay only increases the burden for women; increases the cost (thereby denying access for some); and, increases the risks involved, as the pregnancy continues to progress while the client is navigating the system. If we really care about the health and welfare of these young women, we would be working to reduce the number of minors having second trimester abortions by creating better access to services earlier in the first trimester, not creating more burdensome delays.

Second, requiring correspondence by mail, even with the 'protection' of certified, return receipts, entirely removes any form of assurance of confidentiality of that minor. For those few minors who cannot and choose not to involve a parent or legal guardian, the mandate to inform parents by certified mail and return receipt jeopardizes that minor's privacy and confidentiality. At best, it will cause delays due to the time and logistics required of the US Postal Service. At worst, family members or anyone in the household other than the intended parent may obtain access to the documents and thereby eliminate the patient's confidentiality. It would be nice to believe that certifying a letter would ensure privacy, but even if the intended parent signs for the document, neither the patient

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nor the provider (who is liable for protecting patients' confidentiality) has any control or ability to ensure privacy.

Several years ago a 17-year-old young woman made an appointment to have an abortion. After explaining the requirements for the parental consent required under Missouri law, she shared her fears about telling her parents that she was pregnant. We talked several times on the phone and she was finally able to tell her mother. The following week when she came to the clinic for her appointment she had several bruises on her arms and back and 12 stitches in a cut above her eyebrow. Upon inquiring of her health status in regards to the visible injuries, the young woman stated that her father had found the abortion information she had received from the clinic and proceeded to beat her and her mother. This young woman told me that it was her fault her dad beat her because she should never have brought the information about abortion into the house were it not for the consent law. Her mother blamed her as well but still accompanied her to the clinic for the abortion.

In this instance the information was not mailed to the house, and did not require a return receipt, but it does illustrate the vulnerability of some young women when privacy and confidentiality cannot be ensured. The majority of minors do not need protection from their parents. The majority of minors who want to have an abortion have the support and consent of their parents. But for the few young women out there who are not fortunate to have those protections and support, the State should not make them more vulnerable. If the State is truly concerned about the health and welfare of these young women, then the laws should reflect the desire for parental support, but also protect those few who do not have it.

My third concern is regarding the counseling that would be provided by the changes proposed in HB 3000. Having worked in a clinic for years it is difficult to imagine how patients would receive the adequate information and counseling necessary if the clinic or physician has no legal or financial connection to those counselors. First, there are many questions about access to those counselors. If the counselors are off-site, it adds additional burdens of extra visits and more delays in receiving services. It is unclear how and when and under what conditions those counselors would make themselves available to minors seeking information. And most importantly, without the oversight of the physician or clinic, what measures are in place to assure compliance with medical and professional guidelines for delivery of services and content of information. What training would they receive? How would they know the correct information to give to each patient regarding their clinic visit since some procedures differ from clinic to clinic? What liability would rest with the physician or clinic providing the abortion services for the information and counseling provided by people with whom they have no professional relationship or accountability?

A significant majority of minors who seek abortion have parental involvement from the start. Most have consent of their parents when they enter the clinic or doctor's office. The majority of minors who inquire about judicial bypass, after hearing about all that is involved, choose to go ahead and talk with their parents about an abortion. The judicial bypass process is not an "easy out" for spoiled kids who don't want to disappoint their parents. When faced with the task of appearing before a judge to plead their case or talk with their parents, most minors realize that it is better for them to talk with their parents. Every minor I have assisted through the judicial bypass process, I first discussed

their reasoning for not wanting to involve their parents, and everyone who actually went through the court process had extremely good reasons for not involving their parents. Several young women I counseled had been threatened with being kicked out of their homes if they ever got pregnant and did not want to find themselves homeless while still in high school. A couple of clients had situations in their families where the parents would not have consented to anything their child wanted, regardless of the option they chose. One very mature 16 year old went through judicial bypass to "spare" her mother because her father was dying of cancer at the time and she did not want to add to her mother's burden. Many of the women had serious and credible fear over repercussions, physical or emotional, if their parents discovered they were pregnant. It is not an easy thing to go through judicial bypass, but for those few women every year who have compelling reasons to not involve a parent, there has to be a way to protect their right to choose AND provide services without causing them more harm.

I urge you to oppose this unwise and unnecessary legislation.

L. Forest NewHeart, LMSW, M.Div.