

CHILD CUSTODY PROTECTION ACT

JUNE 25, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1218]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1218) to amend title 18, United States Code, to prohibit taking minors across State lines in circumvention of laws requiring the involvement of parents in abortion decisions, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 1218, the Child Custody Protection Act, has two primary purposes. The first is to protect the health and safety of young girls by preventing valid and constitutional state parental involvement laws from being circumvented. The second is to protect the rights of parents to be involved in the medical decisions of their minor daughters.

To achieve these purposes, H.R. 1218 makes it a federal offense to knowingly transport a minor across a state line, with the intent that she obtain an abortion, in circumvention of a state's parental consent or parental notification law. Violation of the Act is a Class One misdemeanor, carrying a fine of up to \$100,000 and incarceration of up to one year.

H.R. 1218, introduced by Congresswoman Ileana Ros-Lehtinen, will strengthen the effectiveness of state laws designed to protect children from the health and safety risks associated with abortion. In many cases, only a girl's parents know of her prior psychological and medical history, including allergies to medication and anesthesia. Also, parents are usually the only people who can provide authorization for post-abortion medical procedures or the release of pertinent data from family physicians. When a pregnant girl is taken to have an abortion without her parents' knowledge, none of these precautions can be taken. Thus, when parents are not involved, the risks to the minor girl's health significantly increase. H.R. 1218 is designed to effectuate state laws which safeguard minor girls' physical and emotional health by ensuring parental involvement in their abortion decisions.

H.R. 1218 does not supercede, override, or in any way alter existing state parental involvement laws. Nor does the Act impose any parental notice or consent requirement on any state. H.R. 1218 addresses the interstate transportation of minors in order to circumvent valid, existing state laws, and uses Congress' authority to regulate interstate activity to protect those laws from evasion.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 1218 is designed to address the problem of people transporting minor girls across state lines in defiance of parental consent and notification laws. Currently, more than 20 states require the consent or notification of at least one parent (or court authorization) before a minor can obtain an abortion.¹ These parental involvement laws enjoy overwhelming public support.² Nevertheless,

¹ In addition, parental involvement laws in 12 other states are currently not in effect because of court action regarding those laws.

² A 1998 *New York Times*/CBS News poll found that 78 percent of Americans support parental consent before abortions are performed on girls under the age of 18. Parental notification laws receive even greater support. A 1992 national poll by the Wirthlin Group found that 80 percent of Americans support requiring parental notification before an abortion is performed on a girl under age 18. It is not surprising, then, that 78% of registered voters in a recent poll by Baseline & Associates "strongly disagreed" when asked whether "a person [should] be able to take a minor girl across state lines to obtain an abortion without her parents' knowledge." Another 7% "somewhat disagreed," while only 3% "somewhat agreed" and 6% "strongly agreed."

these laws are frequently circumvented by those who transport minors in interstate commerce to abortion providers in states that do not have parental notification or consent laws. H.R. 1218 would curb the interstate circumvention of these laws, thereby protecting the rights of parents and the physical and mental health of vulnerable minors.

Health Risks Associated With Circumvention of Parental Involvement Laws

With respect to state laws requiring parental or judicial involvement in minors' abortion decisions, federal legislation is warranted due to the scope of the practice of avoiding such laws and the profound physical and psychological risks of an abortion to a minor. As the Supreme Court has observed, "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."³

The taking of an underage girl out of state for an abortion by someone who may have no knowledge of her prior medical or psychological history poses many dangers which could be avoided through the involvement of her parents. A parent would be able to alert the abortionist to any known allergies to anesthesia and medication, provide pertinent information from the girl's medical or psychological history, and provide authorization for the release of pertinent data from family physicians.

Moreover, in light of the dangers involved with the abortion procedure itself, the fact that an adult would take a minor out of state for such a procedure without notifying her parents is particularly troubling. Hemorrhaging, perforation or ripping of the uterus, anesthesia complications, and even death are all risks of abortion procedures. Parents have a right to know when their child seeks to undergo a procedure entailing such risks. Unlike an abortion clinic counselor or another adult, who may have only a transitory role in the minor's life, it is the parents who play a permanent role and who are best able to fully attend to the child's well-being even beyond the abortion.

Once the girl returns home, she may suffer physical complications from the abortion. If the parents are aware that their daughter has had an abortion, that knowledge could be critical to ensuring that the young girl receives treatment in a timely fashion with the onset of symptoms. If the parents remain ignorant of the abortion, however, they will be unable to provide the benefit of their knowledge and expertise to their young daughter in a timely manner if complications develop.

This position has the support of Dr. Bruce A. Lucero, an abortionist who performed some 45,000 abortions over the course of his career. Dr. Lucero, who has supported the Child Custody Protection Act, wrote an op-ed for *The New York Times* about his own experience with minor girls seeking abortions. "In almost all cases," Dr. Lucero wrote, "the only reason that a teen-age girl doesn't want to tell her parents about her pregnancy is that she feels ashamed

³*H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

and doesn't want to let her parents down.”⁴ However, according to Dr. Lucero, “parents are usually the ones who can best help their teen-ager consider her options. And whatever the girl's decision, parents can provide the necessary emotional support and financial assistance.”⁵ Moreover, Dr. Lucero explained that “patients who receive abortions at out-of-state clinics frequently do not return for follow-up care, which can lead to dangerous complications. And a teenager who has an abortion across state lines without her parents' knowledge is even more unlikely to tell them that she is having complications.”⁶

The long-term physical consequences of abortion are well known, including, as the Supreme Court has recognized, “an increased risk of complication in subsequent pregnancies.”⁷ The effects of an abortion decision may remain with an adolescent for the rest of her life. That is all the more reason that her parents' right to be involved should not be usurped by another adult surreptitiously taking her out of state.

Young adolescent girls are particularly at risk of certain detrimental medical consequences from an abortion. For instance, there is a greater risk of cervical injury associated with suction-curettage abortions (at 12 weeks' gestation or earlier) performed on girls 17 or younger.⁸ Cervical injury is of serious concern because it may predispose the young girl to adverse outcomes in future pregnancies.⁹ Girls 17 or younger also face a two and a half times greater risk of acquiring endometritis following an abortion than do women 20–29 years old.¹⁰

Testimony from Parents

At hearings during the 105th and 106th Congresses, the Subcommittee on the Constitution heard testimony from two mothers whose daughters were secretly taken for abortions, with devastating consequences.

Eileen Roberts testified that her 13 year-old daughter was encouraged by a boyfriend, with the assistance of his adult friend, to obtain a secret abortion.¹¹ The adult friend drove Ms. Roberts' daughter to an abortion clinic 45 miles away from her home and paid for their daughter to receive the abortion.¹² After two weeks of observing their daughter's depression, Ms. Roberts and her husband learned that the young girl had an abortion from a question-

⁴Bruce A. Lucero, M.D., *Parental Guidance Needed*, N.Y. Times, July 12, 1998, section 4, at 1.

⁵*Id.*

⁶*Id.*

⁷*Matheson*, 450 U.S. at 411 n.20.

⁸See Willard Cates, Jr., M.D., M.P.H., Kenneth F. Schulz, M.B.A. & David A. Grimes, M.D., *The Risks Associated With Teenage Abortion*, *The New England Journal of Medicine*, Sept. 15, 1983, at 621–624.

⁹See *id.* at 624.

¹⁰See Burkman *et al.*, *Morbidity Risk Among Young Adolescents Undergoing Elective Abortion*, *Contraception*, vol. 30 (1984), at 99–105.

¹¹See *Child Custody Protection Act: Hearings on H.R. 1218 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (May 27, 1999) (statement of Eileen Roberts).

¹²See *id.* While Ms. Roberts' daughter was not taken to another state, her story is illustrative of the harms involved when a child is secretly taken away from her parents for an abortion. After this experience, Ms. Roberts formed an organization called Mothers Against Minor Abortions (MAMA). Ms. Roberts testified: “I speak today for those parents I know around the country, [whose] daughters have been taken out of state for their abortions.” *Id.*

naire they found under her pillow, which their daughter had failed to return to the abortion clinic.¹³

Ms. Roberts' daughter was then hospitalized as a result of the depression, and a physical examination revealed that the abortion had been incompletely performed and required surgery to repair the damage done by the abortionist.¹⁴ The hospital called Ms. Roberts and told her that they could not do reparative surgery without a signed consent form.¹⁵ The following year, Ms. Robert's daughter developed an infection and was diagnosed with having pelvic inflammatory disease, again requiring a two day hospitalization for antibiotic therapy and requiring a signed consent form.¹⁶ Ms. Roberts and her family were responsible for over \$27,000 in medical costs all of which resulted from this one secret abortion.¹⁷

Joyce Farley, the mother of a minor girl, reported how her 12 year-old daughter was provided alcohol, raped, and then taken out of state by the rapist's mother for an abortion.¹⁸ In the words of Joyce Farley, the abortion was arranged to destroy evidence—evidence that her 12 year-old daughter had been raped.¹⁹ On August 31, 1995, her daughter, who had just turned 13, underwent a dangerous medical procedure without anyone present who knew her past medical history (as shown by the false medical history that was given to the abortionist).²⁰ Following the abortion, the mother of the rapist dropped off the child in another town 30 miles from the child's home.²¹ The child returned to her home with severe pain and bleeding which revealed complications from an incomplete abortion.²² When Joyce Farley contacted the original clinic that performed the abortion, the clinic told her that the bleeding was normal and to increase her daughter's Naprosyn, a medication given to her for pain, every hour if needed.²³ Fortunately, Ms. Farley, being a nurse, knew this advice was wrong and could be harmful, but her daughter would not have known this.²⁴ Because of her mother's intervention, Ms. Farley's daughter ultimately received further medical care and a second procedure to complete the abortion.²⁵

The Prevalence of This Interstate Activity

There is no serious dispute regarding the fact that the transportation of minors across state lines in order to obtain abortions is both a widespread and frequent practice. Even groups opposed to H.R. 1218 acknowledge that large numbers of minors are transported across state lines to obtain abortions, in many cases by adults other than their parents. In 1995, Kathryn Kolbert, then an

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See Child Custody Protection Act: Hearings on H.R. 3682 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., (May 21, 1998) (statement of Joyce Farley).*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

attorney with the Center for Reproductive Law and Policy (a national pro-abortion legal defense organization) asserted that thousands of adults are helping minors cross state lines to get abortions in states whose parental involvement requirements are less stringent or non-existent: “There are thousands of minors who cross state lines for an abortion every year and who need the assistance of adults to do that.”²⁶ The following is a survey of several states and their experience with evasion of parental involvement laws.

Pennsylvania

Since Pennsylvania’s current parental consent law took effect in March of 1994, news reports have repeatedly maintained that many Pennsylvania teenagers are going out of state to New Jersey and New York to obtain abortions. In fact, in 1995 the *New York Times* reported that “Planned Parenthood in Philadelphia has a list of clinics, from New York to Baltimore, to which they will refer teen-agers, according to the organization’s executive director, Joan Coombs.”²⁷ Moreover, the *Times* gave accounts of clinics that had seen an increase in patients from Pennsylvania.²⁸ One clinic, in Cherry Hill, New Jersey, reported seeing a threefold increase in Pennsylvania teenagers coming for abortions.²⁹ Likewise, a clinic in Queens, New York reported that it was not unusual to see Pennsylvania teenagers as patients in 1995, though earlier it had been rare.³⁰

In the period just prior to the Pennsylvania law taking effect, efforts were underway to make it easier for teenagers to go out of state for abortions. For instance, *Newsday* reported that “[c]ounselors and activists are meeting to plot strategy and printing maps with directions to clinics in New York, New Jersey, Delaware and Washington, D.C., where teenagers can still get abortions without parental consent. . . . ‘We will definitely be encouraging teenagers to go out of state,’ said Shawn Towey, director of the Greater Philadelphia Woman’s Medical Fund, a nonprofit organization that gives money to women who can’t afford to pay for their abortions.”³¹

Moreover, some abortion clinics in nearby states, such as New Jersey and Maryland, use the lack of parental involvement requirements in their own states as a “selling point” in advertising directed at minors in Pennsylvania. For example, the March 1999-February 2000 Yellow Pages for Philadelphia, Pennsylvania contain advertisements from three New Jersey abortionists declaring “No Parental Consent Required.” A Rockville, Maryland abortionist ran a similar advertisement in the May 1998-April 1999 Yellow Pages for Harrisburg, Pennsylvania. Such advertisements have appeared in telephone directories for Wilkes-Barre and Dallas, Scranton, Clarks Summit, and Carbondale, Bethlehem, Allentown, York, and Erie.

²⁶ *Labor of Love is Deemed Criminal*, The National Law Journal, Nov. 11, 1996, at A8.

²⁷ *Teen-Agers Cross State Lines in Abortion Exodus*, N.Y. Times, Dec. 18, 1995, at B6.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ Charles V. Zehren, *New Restrictive Abortion Law*, *Newsday*, Feb. 22, 1994.

Missouri

In 1997, a study in the *American Journal of Public Health* reported that a leading abortion provider in Missouri refers minors out of state for abortions if the girls do not want to involve their parents.³² Reproductive Health Services, which performs over half of the abortions performed in Missouri, refers minors to the Hope Clinic for Women in Granite City, Illinois. Research reveals that based on the available data the odds of a minor traveling out of state for an abortion increased by over 50 percent when Missouri's parental consent law went into effect.³³ Furthermore, compared to older women, underage girls were significantly more likely to travel out of state to have their abortions.³⁴

A 1999 *St. Louis Post-Dispatch* news report confirms that the Hope Clinic in Illinois continues to attract underage girls seeking abortions without parental involvement.³⁵ A clinic counselor estimates that she sees two girls each week seeking to avoid their home state's parental involvement law. One recent example was a 16 year-old girl from Missouri who had called abortion clinics in St. Louis and learned that parental consent was required before a minor could obtain an abortion. According to the report, the Hope Clinic performed 3,200 abortions on out-of-state women last year, and the clinic's executive director estimates that that number is 45% of the total abortions performed at the clinic. The executive director also estimates that 13% of the clinic's clients are minors.

Massachusetts

Massachusetts has also seen an increase in out-of-state abortions performed on its teenage residents since the state's parental consent law went into effect in April of 1981, according to a published study and anecdotal information.³⁶ A 1986 study published in the *American Journal of Public Health* found that in the four months prior to implementation of the parental consent law, an average of 29 Massachusetts minors obtained out-of-state abortions each month (in Rhode Island, New Hampshire, Connecticut, and New York—data for Maine was not available).³⁷ After the parental consent law was implemented, however, the average jumped to between 90 and 95 out-of-state abortions per month (using data from the five states of Rhode Island, New Hampshire, Connecticut, New York, and Maine)—representing one-third of the abortions obtained by Massachusetts' minors.³⁸

The study noted that due to what the authors described as “astute marketing,” one abortion clinic in New Hampshire was able to nearly double the monthly average of abortions performed on Massachusetts minors (from 14 in 1981 to 27 in 1982). The abortionist

³²See Charlotte Ellertson, Ph.D., *Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, *American Journal of Public Health*, Aug., 1997, at 1371.

³³See *id.*

³⁴See *id.*

³⁵See *Illinois May Tighten Rules on Abortions For Teens; Parental Consent is Not Required Abortion Bill Targets as Teen Haven For Abortion*, *St. Louis Post-Dispatch*, Feb. 25, 1999.

³⁶The Massachusetts law was changed in 1997 to require the consent of one parent (or judicial authorization), rather than both parents as previously required.

³⁷See Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, *American Journal of Public Health*, April 1986, at 397.

³⁸See *id.* at 398.

“began advertising in the 1982 Yellow Pages of metropolitan areas along the northern Massachusetts border, stating ‘consent for minors not required.’”³⁹

In April of 1991, the Planned Parenthood League of Massachusetts estimated that approximately 1,200 Massachusetts minor girls travel out of state for abortions each year, the majority of them to New Hampshire.⁴⁰ Planned Parenthood said that surveys of New Hampshire clinics revealed an average of 100 appointments per month by Massachusetts minors.⁴¹

Mississippi

A 1995 study of the effect of Mississippi’s parental consent law revealed that Mississippi has also experienced an increase in the number of minors traveling out of state for abortion. The study, published in *Family Planning Perspectives*, compared data for the five months before the parental consent law took effect in June of 1993, with data for the six months after it took effect, and found that “[a]mong Mississippi residents having an abortion in the state, the ratio of minors to older women decreased by 13%. . . . However, this decline was largely offset by a 32% increase in the ratio of minors to older women among Mississippi residents traveling to other states for abortion services.”⁴² Based on the available data, the study suggests that the Mississippi parental consent law appeared to have “little or no effect on the abortion rate among minors but a large increase in the proportion of minors who travel to other states to have abortions, along with a decrease in minors coming from other states to Mississippi.”⁴³

Virginia

Grace S. Sparks, executive director of the Virginia League of Planned Parenthood, predicted in February of 1997 that if Virginia were to pass a parental notification law, teenagers would travel out of state for abortions. “In every state where they’ve passed parental notification, . . . there’s been an increase in out-of-state abortions,” she said, adding, “I suspect that that’s what will happen in Virginia, that teen-agers who cannot tell their parents . . . will go out of state and have abortions. . . .”⁴⁴

Virginia’s parental notification law took effect on July 1, 1997. According to a recent article in *The Washington Post*, initial reports indicate that abortions performed on Virginia minors dropped 20 percent during the first five months that the law was in effect (from 903 abortions during the same time period in 1996 to approximately 700 abortions in 1997).⁴⁵ The article suggests, however, that Virginia teenagers are traveling to the District of Columbia in order to obtain abortions without involving their parents. In fact, the National Abortion Federation (NAF), which runs a toll-

³⁹*Id.* at 399.

⁴⁰See M.A.J. McKenna, *Mass. abortion laws push teens over border*, Boston Herald, April 7, 1991, at A1.

⁴¹*See id.*

⁴²Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors’ Abortions in Mississippi*, *Family Planning Perspectives*, June, 1995, at 121.

⁴³*Id.* at 122.

⁴⁴Lisa A. Singh, *Those Are the People Who Are Being Hurt*, *Style Weekly*, Feb. 11, 1997.

⁴⁵See Ellen Nakashima, *Fewer Teens Receiving Abortions In Virginia*, *The Washington Post*, March 3, 1998.

free national abortion hotline, said that calls from Virginia teenagers seeking information on how to obtain an abortion out-of-state were the largest source of teenage callers seeking out-of-state abortions, at seven to 10 calls per day. NAF hotline operator Amy Schriefer has gone so far as to talk a Richmond area teenage girl through the route (involving a Greyhound bus and the Metro's Red Line) to obtain an abortion in the District of Columbia.

Adult Male Predators and Evasion of Parental Involvement Laws

Importantly, evasion of a state's parental involvement law can sometimes be part of an effort to cover up the commission of a crime. According to Professor Teresa Collett of the South Texas College of Law, who testified before the Subcommittee on the Constitution last year, it is becoming increasingly clear that most underage pregnancies are the result of a lack of sexual restraint by adult men.⁴⁶ In a study of over 46,000 pregnancies of school-age girls in California, researchers found that "71%, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15 or younger, most births are fathered by adult men 6–7 years their senior. Men aged 25 or older father more births among California school-age girls than do boys under age 18."⁴⁷ Other studies have found that most teenage pregnancies are the result of predatory practices by men who are substantially older.⁴⁸

Another study reports that 58 percent of the time it is the girl's boyfriend who accompanies her for an abortion when her parents have not been told about the pregnancy.⁴⁹ Obviously, many of these males are vulnerable to statutory rape charges, and thus have a strong incentive to pressure the girl to agree to an abortion without revealing the pregnancy to her parents. Currently, such a male often can evade parental consent requirements by driving his victim across state lines.

CONSTITUTIONAL ANALYSIS

Constitutional Authority for the Child Custody Protection Act

H.R. 1218 is a regulation of commerce among the several states. Commerce, as that term is used in the Constitution, includes travel whether or not that travel is for reasons of business.⁵⁰ To transport another person across state lines is to engage in commerce among the states. There is thus no need to address the scope of Congress' power to regulate activity that is not, but that affects, commerce

⁴⁶ See *Child Custody Protection Act: Hearings on H.R. 3682 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (May 21, 1998) (statement of Professor Teresa Stanton Collette, Professor of Law, South Texas College of Law) (citing Mike A. Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births*, 1993 Am. J. Publ. Health 565 (April 1996); David J. Landry & Jacqueline Darroch Forrest, *How Old Are U.S. Fathers?*, Family Planning Perspectives, July/Aug. 1995, at 159).

⁴⁷ See *id.* (citing Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, Lancet, July 1995, at 64).

⁴⁸ See *id.*

⁴⁹ See Stanley Henshaw & Kathryn Post, *Parental Involvement in Minors' Abortion Decisions*, Family Planning Perspectives, Sept./Oct. 1992, at 206.

⁵⁰ See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917).

among the States.⁵¹ Under current Supreme Court jurisprudence, Congress can adopt rules concerning interstate commerce, such as this one, for reasons related primarily to local activity rather than commerce itself.⁵²

The interstate transportation of minors for purposes of securing an abortion is, therefore, clearly a form of interstate commerce which the Constitution expressly empowers Congress to regulate.⁵³ H.R. 1218 only regulates conduct which involves interstate movement, activity which the national government alone is expressly authorized by the Constitution to address.

Roe v. Wade and the Child Custody Protection Act

In *Roe v. Wade*,⁵⁴ a majority of the Supreme Court found that the Fourteenth Amendment's Due Process Clause, which provides that no state shall deprive any person of "life, liberty, or property" without due process of law, includes within it a "substantive" component which bars a state from prohibiting abortions under some circumstances. This substantive component of the Due Process Clause, also described in that case as including a "right to privacy," has been held to forbid virtually all state prohibitions on abortion during the first trimester of pregnancy.⁵⁵ In *Planned Parenthood v. Casey*,⁵⁶ the scope of permissible state regulation of abortion and the standards to be applied in evaluating the constitutionality of state regulations were significantly changed. Instead of declaring that the right to seek an abortion was a "fundamental right" requiring a "compelling state interest" in order to be regulated, the new holding was that state regulation of abortion is permissible so long as such regulation does not place an "undue burden" on a woman's exercise of her constitutional rights with regard to abortion.⁵⁷

H.R. 1218 does not raise any questions concerning the permissible regulation of abortion that are independent of the state laws that it is designed to effectuate. To the extent that a state rule is inconsistent with the Supreme Court's doctrine, that rule is ineffective and H.R. 1218 would not make it effective. Therefore, it is unnecessary to ask whether, for example, the "life exception" in Subsection (b)(1) of H.R. 1218 is an adequate exception to a rule regulating abortion or whether the inability to circumvent a state law is an "undue burden." Because constitutional limits on the States' regulatory authority are in effect incorporated into Subsection (a) of the Act, Subsection (b)(1) is in addition to any exceptions required by the Court's doctrine.

⁵¹ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *United States v. Lopez*, 514 U.S. 549 (1995).

⁵² See *United States v. Darby*, 312 U.S. 100 (1941).

⁵³ U.S. Const., art. I, § 8, cl. 3.

⁵⁴ 410 U.S. 113 (1973).

⁵⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 985 (Scalia, J., dissenting).

⁵⁶ 505 U.S. 833 (1992).

⁵⁷ For the articulation of the "undue burden" standard in *Casey*, see *id.* at 874–880. While the "undue burden" standard as expressed in *Casey* appeared only to be the views of the three-person plurality, Justice Scalia predicted that "undue burden" would henceforward be the relevant standard, see *id.* at 984–995 (Scalia, J., dissenting). It now appears that the lower federal courts understand that the "undue burden" standard is the correct one to be applied in abortion cases, see, e.g., *Manning v. Hunt*, 119 F.3d 254, 260 (4th Cir. 1997) ("The trend does appear to be a move away from the strict scrutiny standard toward the so-called 'undue burden' standard of review.").

Constitutionality of Parental Involvement Laws

Following the Court's decision in *Roe v. Wade*,⁵⁸ many states enacted parental consent or notification statutes requiring minors to notify or seek the consent of their parents before undergoing an abortion. Parental consent laws generally require one or both parents to give actual consent to the minor's decision to have an abortion. Parental notification laws typically require the physician, or in some statutes another health care provider, to notify one or both of the parents of the minor female at some time prior to the abortion.

The Supreme Court first considered parental involvement in a minor daughter's abortion in *Planned Parenthood of Central Missouri v. Danforth*.⁵⁹ The Missouri statute at issue in that case gave a minor girl's parent an absolute veto over her decision to have an abortion. The majority, led by Justice Blackmun, found that the veto power was unconstitutional.⁶⁰ The majority also noted, however, that a state has greater authority to regulate abortion procedures for minor girls than for adult females.⁶¹

In *Bellotti v. Baird*,⁶² the Court remanded a parental consent statute that was unclear as to whether the parents had authority to veto the abortion and as to the availability of a judicial bypass procedure. The statute returned to the Supreme Court in *Bellotti v. Baird (Bellotti II)*.⁶³ The statute in *Bellotti II* required a minor to obtain the consent of her parents or circumvent this requirement through a judicial bypass proceeding that did not take into account whether the minor was sufficiently mature to make an informed decision regarding the abortion. The Supreme Court invalidated the statute without a majority opinion.

Justice Powell's plurality opinion held that a state could limit the ability of a minor girl to obtain an abortion by requiring notification or consent of a parent if, but only if, the state established a procedure where the minor girl could bypass the consent or notification requirement.⁶⁴ This has become the de facto constitutional standard for parental consent and notification laws. In upholding parental involvement laws, the plurality found three reasons why the constitutional rights of minors were not identical to the constitutional rights of adults: "The peculiar vulnerability of children; their inability to make decisions in an informed, mature manner; and the importance of the parental role in child rearing."⁶⁵ Thus, the plurality sought to design guidelines for a judicial bypass proceeding that allowed states to address these interests.

In *H.L. v. Matheson*,⁶⁶ a minor girl challenged the constitutional validity of a state statute that required a physician to give notice to the parents of a minor girl whenever possible before performing an abortion on her. By a vote of six to three, the statute was found to be constitutional. The Court held that a state could require noti-

⁵⁸ 410 U.S. 113 (1973).

⁵⁹ 428 U.S. 52 (1976).

⁶⁰ *See id.*

⁶¹ *See id.* at 74–75.

⁶² 428 U.S. 132 (1976).

⁶³ 443 U.S. 622 (1979).

⁶⁴ *See id.* at 651.

⁶⁵ *Id.* at 634.

⁶⁶ 450 U.S. 398 (1981).

fication of the parents of a minor girl because the notification “furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.”⁶⁷

In *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*,⁶⁸ the Court upheld a state law which required a minor to obtain the consent of one of her parents before obtaining an abortion or, in the alternative, to obtain the consent of a juvenile court judge. While there was no majority opinion, this case marked the first time the Court directly upheld a parental consent requirement.

In *Ohio v. Akron Center for Reproductive Health*,⁶⁹ the Supreme Court upheld a statute that required a physician to give notice to one of the minor’s parents or, under some circumstances, another relative, before performing an abortion on the minor. The statute permitted the physician and the minor to avoid the requirement by a judicial bypass. Justice Kennedy, writing for the majority, held that the bypass proceeding did not unconstitutionally impair a minor’s rights by the creation of unnecessary delay.⁷⁰ The Court established in this case that it will not invalidate state procedures so long as they seem to be reasonably designed to provide the minor with an expedited process.

In *Hodgson v. Minnesota*,⁷¹ the Court invalidated a state statute that required notification of both parents prior to a minor girl’s abortion without the option of a judicial bypass. The Court upheld, however, statutory requirements that both parents be notified of the abortion and a 48 hour waiting period between notification and the performance of the abortion, if such requirements were accompanied by a judicial bypass procedure that met constitutional standards.

This line of cases makes clear that a state may require the consent or notification of one or both of a minor’s parents if the state provides for a constitutionally sound judicial bypass procedure. The Child Custody Protection Act is designed to preserve the application of such state laws, supplemented by a penalty section to provide a uniform penalty for those individuals circumventing laws by crossing state lines. Because the Act derives its substantive content entirely from state law, the Act will only be enforceable when a prosecutor can show that a constitutionally sound state parental consent or notification law exists. Thus, H.R. 1218 does not independently implicate any constitutional issues associated with parental notification or consent mandates.

Judicial Bypass Procedures

Some critics of H.R. 1218 argue that it will remove the only viable option available to minors who feel that they cannot tell their parents that they wish to obtain abortions. This argument ignores, however, the available judicial bypass procedures which all valid

⁶⁷ *Id.* at 409.

⁶⁸ 462 U.S. 476 (1983).

⁶⁹ 497 U.S. 502 (1990).

⁷⁰ *See id.* at 514–515.

⁷¹ 497 U.S. 417 (1990).

parental involvement statutes contain. Opponents of H.R. 1218 also argue that judicial bypass procedures are too complicated and intrusive to be an effective option for most young girls. Yet, in actuality, judicial bypass proceedings are quite simple and bypasses are easily obtained.⁷²

Critics of H.R. 1218 also claim that the measure endangers the health of young girls who are forced to travel out of state to obtain abortions because the judges in their home states either refuse to hear judicial bypass petitions or deny them arbitrarily. In support of this argument, the critics cite cases like that of Ms. Billie Lominick, who testified before the Constitution Subcommittee regarding her experience with South Carolina's judicial bypass procedures. According to Ms. Lominick, who assisted her grandson's girlfriend in obtaining an out-of-state abortion, only two judges in the whole state of South Carolina would even hear a judicial bypass petition, and one of those judges, according to Ms. Lominick, would only hear petitions from girls residing in his county.⁷³

This argument overlooks the fact that H.R. 1218 merely provides assistance in the enforcement of *constitutional* state parental notice and consent laws. If there are only two judges in an entire state willing to hear judicial bypass proceedings, that state's parental involvement laws are unconstitutional under Supreme Court precedent which requires the state to provide a minor the opportunity to seek a judicial bypass with "sufficient expedition to provide an effective opportunity for an abortion to be obtained."⁷⁴

This fact is illustrated by the First Circuit's decision in *Planned Parenthood League v. Bellotti*.⁷⁵ In that case the court held that the plaintiffs could successfully challenge the state's judicial bypass procedures if they could present "proof of 'a systemic failure to provide a judicial bypass option in the most expeditious, practical manner.'" ⁷⁶ The court of appeals remanded the case to the lower court so that the plaintiffs' could present evidence that, among other things, judges were "'defacto unavailable' to hear minors' abortion petitions,"⁷⁷ and many judges were avoided "for reasons of hostility."⁷⁸ The Sixth Circuit has also recognized that a con-

⁷²A survey of Massachusetts cases filed between 1981 and 1983 found that every minor that sought judicial authorization to bypass parental consent received it. See Robert H. Mnookin, *Bellotti v. Baird, A Hard Case in In the Interest of Children: Advocacy, Law Reform, and Public Policy* 149 at 239 (Robert H. Mnookin ed., 1985). A subsequent study found that orders were refused to only 1 of 477 girls seeking judicial authorization from Massachusetts courts between December 1981 and June 1985. See Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: the Massachusetts Consent Statute*, 78 Am. J. Pub. Health 646, 647 (1988). The average hearing lasted only 12.12 minutes, and "more than 92 percent of the hearings [were] less than or equal to 20 minutes." *Id.* at 648. Based upon a review of bypass petitions filed in Minnesota from August 1, 1981, to March 1, 1986, a federal trial court determined that of the 3,573 bypass petitions filed, six were withdrawn, nine were denied, and 3,558 were granted. See *Hodgson v. State of Minnesota*, 648 F. Supp. 756 at 765 (D. Minn. 1986). Similar ease in obtaining judicial approval as an alternative to parental involvement is suggested by a recent report on the newly enacted Virginia statute requiring parental notification. Out of 18 requests for judicial bypass, "all but one of the requests were granted eventually." Ellen Nakashima, *Fewer Teens Receiving Abortion in Virginia: Notification Law to Get Court Test*, Washington Post (March 3, 1998).

⁷³See *Child Custody Protection Act: Hearings on H.R. 1218 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (May 27, 1999) (statement of Billie Lominick).

⁷⁴*Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (plurality opinion).

⁷⁵868 F.2d 459 (1st Cir. 1989).

⁷⁶*Id.* at 469 (quoting *Hodgson v. Minnesota*, 648 F.Supp. 756, 777 (1986)).

⁷⁷*Id.* at 463.

⁷⁸*Id.* at 461 n.6.

stitutional challenge may be brought for a state's systemic failure to provide an expeditious judicial bypass.⁷⁹

Not only must states provide access to judges who are willing to hear judicial bypass petitions, states must also ensure that the judges who do hear bypass petitions render their decisions in an expedited fashion. For example, in *Planned Parenthood of Southern Arizona v. Lawall*,⁸⁰ the Court of Appeals for the Ninth Circuit struck down an Arizona parental consent statute on the grounds that its judicial bypass provision lacked specific time limits, and was therefore in violation of the *Bellotti II* expediency requirement. The court reached this conclusion even though the Arizona statute stated that such proceedings were to be given priority, and required that "the court shall reach the decision [on a bypass request] promptly and without delay to serve the best interests of a pregnant minor."⁸¹ The court's rationale in adopting a strict interpretation of the Supreme Court's timeliness requirement was that "[o]pen-ended bypass provisions engender substantial possibilities of delay for minors seeking abortions."⁸²

The Fifth Circuit employed essentially identical reasoning in striking down a Louisiana judicial bypass procedure having indefinite time limits.⁸³ The court found that "not only do [the bypass procedures] fail to provide any specific time within which a minor's application will be decided, but they give no assurances (assurances required by *Bellotti II*) that the proceedings will conclude expeditiously."⁸⁴

As these cases illustrate, judicial bypass procedures must be readily accessible and efficient in order to pass constitutional muster. H.R. 1218 will only assist in the enforcement of parental involvement laws which meet the relevant constitutional criteria.

Constitutionality of Lack of Proof of Specific Intent to Circumvent State Law

Critics of H.R. 1218 also argue that it is unconstitutional because it lacks a requirement that the defendant have knowledge of and intend to circumvent the relevant state parental involvement law. This omission, the critics argue, renders the bill unconstitutionally lacking a "criminal intent" element. This argument is without merit for two reasons.

First, H.R. 1218 clearly contains a criminal intent element. An individual cannot be held liable under the bill unless they "*knowingly* transport[] an individual who has not attained the age of 18 years across a State line, *with the intent* that such individual obtain an abortion." The requirement that the defendant "*knowingly*" transport a minor with the intent that the minor obtain an abortion prevents H.R. 1218 from acting as a strict liability law. As stated in one well-known criminal law treatise:

A statute is not of the strict liability variety simply because it permits conviction of the defendant without proof

⁷⁹ See *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686, 690 (6th Cir. 1993).

⁸⁰ 1999 WL 371565 (9th Cir. June 9, 1999).

⁸¹ *Id.* at *4.

⁸² *Id.* at *8.

⁸³ See *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997).

⁸⁴ *Id.* at 1110-11.

that he was aware his conduct was criminal. Although a statute might be drafted in such a way that such awareness is required for conviction, . . . in the absence of such a requirement there usually exists a mens rea requirement that defendant intend or know what he is doing in a physical sense (apart from knowledge as to its legality).⁸⁵

Second, it is well settled that it does not violate due process of law to punish individuals who claim to be ignorant of the law. As the Supreme Court stated over seventy five years ago,

the state may in the maintenance of a public policy provide that he who shall do [particular acts] shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in the cases of mala in se.⁸⁶

This principle has been reaffirmed by the Supreme Court,⁸⁷ with only a few exceptions not relevant here.⁸⁸

Federalism and the Child Custody Protection Act

The United States Constitution created a federal government with limited and enumerated powers. All other powers are, as stated in the Tenth Amendment, “reserved to the States respectively, or to the people.”⁸⁹ According to Professor Stephen Presser of the Northwestern University School of Law,⁹⁰

[t]he Constitution created a federal government with limited and enumerated powers, and much of the genius of the document was the means employed for ensuring that the federal government did not overwhelm the state and local governments. The system of checks and balances, whereby the three branches of the federal government restrained each other, was an important aspect of this plan, but equally important was the basic notion that the federal government was not to intrude on the domestic matters which had traditionally been the prerogative of state and local governments.⁹¹

H.R. 1218 respects this division of authority between the federal government and the states in that it does not attempt to regulate

⁸⁵ Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* §3.8 (1986).

⁸⁶ *United States v. Balint*, 258 U.S. 250, 252 (1922) (internal quotation marks omitted).

⁸⁷ See, e.g., *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

⁸⁸ See, e.g., *id.* at 565 (noting that crimes relating to minor things such as “[p]encils, dental floss, [and] paper clips” might require mens rea element); *Lambert v. California*, 355 U.S. 225 (1958) (holding that where statute makes wholly passive conduct criminal, due process requires scienter); *Smith v. California*, 361 U.S. 147 (1959) (holding that strict liability for possession of obscenity would unconstitutionally chill First Amendment freedoms).

⁸⁹ U.S. Const. amend. X.

⁹⁰ Professor Presser testified before the Subcommittee on the Constitution in support of the Child Custody Protection Act during the 105th Congress, and submitted a written statement in support of H.R. 1218 during the 106th Congress.

⁹¹ See *Child Custody Protection Act: Hearings on H.R. 1218 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Congress, May 27, 1999 (statement of Professor Stephen B. Presser, Professor of Law, Northwestern University School of Law).

or impose policy on the individual states. Rather, H.R. 1218 is predicated on the validity of state law and derives its substantive application from state law. According to Professor Presser, “[b]y imposing penalties on anyone who seeks to deny a minor or her family the protections of a state’s parental consent/judicial bypass provisions with regard to abortion, as H.R. 1218 would do, the Congress would simply be reinforcing our Federalism scheme, and ensuring that each state’s policy aims regarding this controversial issue are not frustrated.”⁹² Professor Lino A. Graglia of the University of Texas Law School also testified that H.R. 1218 “furthers the principle of federalism” in that it seeks to “reinforce or make effective” state policies that are being transgressed or evaded.⁹³

H.R. 1218 does not supercede, override, or alter existing state laws regarding minors’ abortions. Rather, H.R. 1218 uses Congress’ authority to regulate interstate activity to protect state laws from evasion. As Professor Presser stated:

[t]he political processes of each state exists to resolve these difficult questions through the exercise of popular sovereignty, the bedrock of our entire Constitutional system. Not for nothing are the first three words of the Constitution “We the people,” and unless the Constitution itself expressly denies the people any discretion over a particular area it is their right, indeed, it is their duty to govern themselves regarding that issue through the legislative process. This is the most important right in the Constitution, the right of self government, for which our system of dual sovereignty exists. This Bill is an important step in reinforcing Federalism and in reinforcing self-government. It deserves to be enacted.⁹⁴

In short, H.R. 1218 does not encroach on state powers, but rather reinforces state powers.

H.R. 1218 is not unlike the Mann Act which, before being amended in 1986, made it a crime to transport a woman across state lines “for the purpose of prostitution or debauchery, or for any other immoral purpose.”⁹⁵ That statute was upheld as applied to the transportation of a person to Nevada for purposes of engaging in prostitution, even though prostitution was legal in Nevada.⁹⁶

A similar provision prohibited the persuading, inducing, enticing, or coercion of a minor girl “to go from one place to another by common carrier . . . with the intent that she be induced or coerced to engage in prostitution, debauchery or other immoral practice.”⁹⁷ This provision would presumably have prohibited an individual from causing a 15 year old minor to travel from a state in which

⁹²*Id.*

⁹³See *Child Custody Protection Act: Hearings on H.R. 1218 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Congress, May 27, 1999 (statement of Professor Lino A. Graglia, Professor of Law, University of Texas Law School).

⁹⁴See *Child Custody Protection Act: Hearings on H.R. 1218 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Congress, May 27, 1999 (statement of Professor Stephen B. Presser, Professor of Law, Northwestern University School of Law).

⁹⁵18 U.S.C.A. § 2421 (1970). As amended, the statute prohibits the knowing transportation of any individual across state lines “with the intent that such individual engage in prostitution, or in any sexual activity for which the person can be charged with a criminal offense, or attempts to do so. . . .” 18 U.S.C. § 2421 (West Supp. 1999).

⁹⁶See *United States v. Pelton*, 578 F.2d 701 (8th Cir. 1978).

⁹⁷18 U.S.C.A. § 2423 (1970).

the minimum age for consensual sex was 16 to a state in which the minimum was 14, in order to have sex with her.

Opponents of H.R. 1218 respond to this argument by noting that a violation of the Mann Act is not keyed to the underlying state law. But that distinction is of no significance. The Mann Act flatly prohibited the interstate transportation of women for “prostitution” or for “any other immoral purpose.” In the exercise of its commerce power, Congress could similarly prohibit the interstate transportation of minors for abortions without obtaining parental notice or consent, whether or not parental notice or consent is required by state law.⁹⁸ Instead, H.R. 1218 respects the laws of the various states by only prohibiting the interstate transportation of young girls in order to avoid the laws of states that have chosen to require parental involvement in the abortion decisions of minors.

Moreover, it is important to note that the Mann Act prohibited the interstate transportation of women for “immoral purposes,” and the Supreme Court upheld convictions under that provision for those who only transported women across state lines as “mistresses” and “concubines.”⁹⁹ In upholding the law as a valid exercise of Congress’ commerce power, the Court stated that

[t]he transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.¹⁰⁰

Just as it was appropriate for Congress to use its constitutional authority to keep the channels of interstate commerce free from “immoral” conduct, so it is also appropriate for Congress to exercise that authority to keep the channels of interstate commerce free from those who transport minors across state lines in order to circumvent state parental involvement laws.

The Mann Act is also not the only example of federal laws that prohibit interstate activities that might be legal in the state to which the activity is directed. Indeed, as long ago as 1876, Congress “made it a crime to deposit in the mails any letters or circulars concerning lotteries, whether illegal or chartered by state legislatures.”¹⁰¹ A statute to this effect is still in force.¹⁰² Congress later prohibited the transportation of lottery tickets in interstate commerce, whether or not lotteries are legal in the state to which the tickets are transported.¹⁰³ That provision was upheld by the Supreme Court in *Champion v. Ames*¹⁰⁴ and is still in effect.

⁹⁸ See *Hoke v. United States*, 227 U.S. 308, 323 (1913) (noting, in upholding the constitutionality of the Mann Act, “that Congress has power over transportation ‘among the several states;’ that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations”).

⁹⁹ See *Caminetti v. United States*, 242 U.S. 470, 483 (1917).

¹⁰⁰ *Id.* at 491.

¹⁰¹ *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 421 (1993).

¹⁰² See 18 U.S.C.A. § 1302 (prohibiting the mailing of lottery tickets or letters, circulars, and other materials regarding a lottery).

¹⁰³ See 18 U.S.C. § 1301.

¹⁰⁴ 188 U.S. 321 (1903).

HEARINGS

The Committee's Subcommittee on the Constitution held a hearing on H.R. 1218, the "Child Custody Protection Act," on May 27, 1999. Testimony was received from the following witnesses: Ms. Eileen Roberts, Mothers Against Minors' Abortions, Inc.; Ms. Billie Lominick of Newbury, South Carolina; Professor Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas School of Law; Dr. Jonathon D. Klein, M.D., American Academy of Pediatrics; and Professor John C. Harrison, Professor of Law, University of Virginia School of Law. Additional material was submitted by Professor Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; National Right to Life Committee, Inc.; Center for Reproductive Law and Policy; National Abortion and Reproductive Rights League; and the American Civil Liberties Union.

COMMITTEE CONSIDERATION

On June 8, 1999, the Subcommittee on the Constitution met in open session and ordered reported the bill H.R. 1218, without amendment, by voice vote, a reporting quorum being present. On June 23, 1999, the Committee met in open session and ordered reported favorably the bill, H.R. 1218, without amendment, by a recorded vote of 16 to 13, a quorum being present.

VOTE OF THE COMMITTEE

1. An amendment was offered by Mr. Nadler to exempt grandparents and adult siblings of the minor from the provisions of the bill. The amendment was defeated by a 13-17 roll call vote.

ROLLCALL VOTE NO. 1

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Bryant
Mr. Delahunt	Mr. Chabot
Mr. Wexler	Mr. Barr
Mr. Rothman	Mr. Jenkins
Ms. Baldwin	Mr. Hutchinson
Mr. Weiner	Mr. Pease
	Mr. Cannon
	Mr. Graham
	Ms. Bono
	Mr. Scarborough

2. An amendment was offered by Mr. Nadler to permit any adult who reasonably believed that compliance with state judicial bypass procedures would either "compromise the minor's intent to maintain confidentiality with respect to her choice to terminate a preg-

nancy” or would “be futile because the judicial bypass procedure of the minor’s state of residence is unavailable or ineffective,” to obtain a waiver of the requirements of the bill from a federal district court. The amendment was defeated by a 14–17 roll call vote.

ROLLCALL VOTE NO. 2

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Smith (TX)
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Bryant
Ms. Waters	Mr. Chabot
Mr. Meehan	Mr. Barr
Mr. Wexler	Mr. Jenkins
Mr. Rothman	Mr. Hutchinson
Ms. Baldwin	Mr. Pease
Mr. Weiner	Mr. Cannon
	Mr. Rogan
	Ms. Bono
	Mr. Scarborough

3. Four amendments were offered en bloc by Ms. Jackson Lee to exempt ministers, rabbis, pastors, priests, other religious leaders, aunts, uncles, godparents, and first cousins from the provisions of the bill. The en bloc amendment was defeated by a 14–16 roll call vote.

ROLLCALL VOTE NO. 3

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Ms. Lofgren	Mr. Bryant
Ms. Jackson Lee	Mr. Chabot
Ms. Waters	Mr. Barr
Mr. Meehan	Mr. Jenkins
Mr. Wexler	Mr. Hutchinson
Mr. Rothman	Mr. Pease
Ms. Baldwin	Mr. Cannon
Mr. Weiner	Mr. Rogan
	Ms. Bono
	Mr. Scarborough

4. An amendment was offered by Ms. Waters to prevent the application of the bill “with respect to an abortion where the pregnancy resulted from incest.” The amendment was defeated by a roll call vote of 12–15.

ROLLCALL VOTE NO. 4

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Goodlatte
Ms. Waters	Mr. Bryant
Mr. Rothman	Mr. Jenkins
Ms. Baldwin	Mr. Hutchinson
Mr. Weiner	Mr. Cannon
	Mr. Graham
	Ms. Bono
	Mr. Bachus

5. An amendment was offered by Mr. Watt to require proof that the defendant acted with the intent to evade the requirements of a state parental involvement law in order to be prosecuted under the bill. The amendment was defeated by a voice vote.

6. An amendment was offered by Mr. Watt to create an exception where the abortion was necessary to prevent serious physical illness, injury, or disability. The amendment was defeated by a 11-17 roll call vote.

ROLLCALL VOTE NO. 5

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Lofgren	Mr. Gallegly
Ms. Jackson Lee	Mr. Canady
Ms. Waters	Mr. Bryant
Mr. Rothman	Mr. Chabot
Ms. Baldwin	Mr. Barr
Mr. Weiner	Mr. Jenkins
	Mr. Hutchinson
	Mr. Cannon
	Mr. Graham
	Ms. Bono
	Mr. Bachus
	Mr. Scarborough

7. An amendment was offered by Ms. Jackson Lee to require the General Accounting Office to conduct a study of “the impact of the number of unsafe and illegal abortions performed on minors who would be affected by this law, and report to Congress the results of that study within one year.” The amendment was defeated by a 12-17 roll call vote.

ROLLCALL VOTE NO. 6

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Jackson Lee	Mr. Gallegly
Ms. Waters	Mr. Canady
Mr. Meehan	Mr. Bryant
Mr. Wexler	Mr. Chabot
Mr. Rothman	Mr. Barr
Ms. Baldwin	Mr. Jenkins
Mr. Weiner	Mr. Hutchinson
	Mr. Cannon
	Mr. Graham
	Ms. Bono
	Mr. Bachus
	Mr. Scarborough

8. An amendment was offered by Mr. Scott to exempt medical facilities, doctors, and other medical professionals from prosecution under the bill. The amendment was defeated by a 12–16 roll call vote.

ROLLCALL VOTE NO. 7

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Berman	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Lofgren	Mr. Gallegly
Ms. Jackson Lee	Mr. Canady
Ms. Waters	Mr. Bryant
Mr. Wexler	Mr. Chabot
Mr. Rothman	Mr. Jenkins
Ms. Baldwin	Mr. Hutchinson
Mr. Weiner	Mr. Cannon
	Mr. Graham
	Ms. Bono
	Mr. Bachus
	Mr. Scarborough

9. An amendment was offered by Mr. Scott to exempt accessories after the fact, aiders and abettors, and other principals from prosecution under the bill. The amendment was defeated by a voice vote.

10. Final Passage. The motion to report the bill, H.R. 1218, favorably without amendment to the whole House. The motion was agreed to by a roll call vote of 16–13.

ROLLCALL VOTE NO. 8

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Sensenbrenner	Mr. Berman
Mr. McCollum	Mr. Nadler
Mr. Gekas	Mr. Scott
Mr. Coble	Mr. Watt
Mr. Smith (TX)	Ms. Lofgren
Mr. Gallegly	Ms. Jackson Lee
Mr. Canady	Ms. Waters
Mr. Bryant	Mr. Meehan
Mr. Chabot	Mr. Wexler
Mr. Jenkins	Mr. Rothman
Mr. Hutchinson	Ms. Baldwin
Mr. Cannon	Mr. Weiner
Mr. Graham	
Ms. Bono	
Mr. Bachus	
Mr. Scarborough	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1218, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, June 25, 1999.

Hon. HENRY J. HYDE,
 Chairman, Committee on the Judiciary,
 House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1218, the Child Custody Protection Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DAN L. CRIPPEN, *Director*.

H.R. 1218—Child Custody Protection Act

CBO estimates that implementing H.R. 1218 would not result in any significant cost to the federal government. Because enactment of H.R. 1218 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would not be significant. H.R. 1218 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

H.R. 1218 would make it a federal crime to transport a minor across state lines, under certain circumstances, to obtain an abortion without parental notification. Violators would be subject to imprisonment and fines. As a result, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant, however, because of the small number of cases likely to be involved. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1218 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in the following year. CBO expects that any additional receipts and direct spending would be negligible.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226-2860. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article 1, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS

H.R. 1218 amends title 18 of the United States Code by adding sec. 2401 to criminalize the transportation of minors to avoid certain laws relating to abortion.

Section 1. Short Title

This section states that the short title of this bill is the “Child Custody Protection Act.”

Section 2. Transportation of minors in circumvention of certain laws relating to abortion.

Section 2(a) amends title 18 of the United States Code by inserting after chapter 117 the following:

Chapter 117A—Transportation of minors in circumvention of certain laws relating to abortion.

Subsection (a) of this section makes the knowing transportation across a state line of a person under 18 years of age with the intent that she obtain an abortion, in abridgement of a parent’s right of involvement according to State law, a violation of this statute and a chargeable offense.

Subsection (a), paragraph (1), imposes a maximum of one year imprisonment or a fine, or both.

Subsection (a), paragraph (2) specifies the criteria for a violation of the parental right under this statute as follows: an abortion must be performed on a minor in a state other than the minor’s residence and without the parental consent or notification, or the judicial authorization, that would have been required had the abortion been performed in the minor’s state of residence.

Subsection (b), paragraph (1) specifies that subsection (a) does not apply if the abortion is necessary to save the life of the minor.

Subsection (b), paragraph (2) clarifies that neither the minor being transported nor her parents may be prosecuted or sued for a violation of this bill.

Subsection (c) provides an affirmative defense to prosecution or civil action based on violation of the bill where the defendant reasonably believed, based on information obtained directly from the girl’s parent or other compelling facts, that the requirements of the girl’s state of residence regarding parental involvement or judicial authorization in abortions had been satisfied.

Subsection (d) establishes a civil cause of action for a parent who suffers legal harm from a violation of subsection (a).

Subsection (e) sets forth definitions of certain terms in this bill.

Subsection (e)(1)(A) defines “a law requiring parental involvement in a minor’s abortion decision” to be a law requiring either “the notification to, or consent of, a parent of that minor” or “proceedings in a State court.”

Subsection (e)(1)(B) stipulates that a law conforming to the definition in (e)(1)(A) cannot provide notification to or consent of any person or entity other than a “parent” as defined in the subsequent section.

Subsection (e)(2) defines “parent” to mean a parent or guardian, or a legal custodian, or a person standing *in loco parentis* (if that person has “care and control” of the minor and is a person with

whom the minor “regularly resides”) and who is designated by the applicable state parental involvement law as the person to whom notification, or from whom consent, is required.

Subsection (e)(3) defines “minor” to mean a person not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the parental involvement law of the state where the minor resides.

Subsection (e)(4) defines “State” to include the District of Columbia “and any commonwealth, possession, or other territory of the United States.”

Section 2(b) is a clerical amendment to insert the new chapter in the table of chapters for part I of title 18.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18 UNITED STATES CODE

* * * * *

PART I—CRIMES

Chap.		Sec.
1.	General provisions	1
	* * * * *	
117A.	<i>Transportation of minors in circumvention of certain laws relating to abortion</i>	2431
	* * * * *	

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

Sec.
2431. *Transportation of minors in circumvention of certain laws relating to abortion.*

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

(a) *OFFENSE.—*

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

(2) *DEFINITION.—For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State*

where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

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

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

(c) *AFFIRMATIVE DEFENSE.*—It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

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

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

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

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

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

(ii) proceedings in a State court; and

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

(2) the term "parent" means—

(A) a parent or guardian;

(B) a legal custodian; or

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

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

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

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

DISSENTING VIEWS

We strongly dissent from H.R. 1218. As the bill is written, it is opposed by the Administration and will likely be vetoed by the President. This legislation will increase health risks to young women who choose to have an abortion, is anti-family, and is very likely unconstitutional.¹ Additionally, the legislation is opposed by a wide variety of groups that remain committed to reducing teenage pregnancy and protecting a woman's right to choose, such as Planned Parenthood, the National Abortion and Reproductive Rights Action League, and the Center for Reproductive Law and Policy.

Contrary to its stated intent, instead of simply permitting state-required parental involvement, H.R. 1218 will dramatically increase the dangers young women will face in their decision to have an abortion. In fact, the bill contains no prohibitions whatsoever against women traveling across state lines alone to avoid a consent requirement. It will lead more women to seek illegal "back alley" abortions locally, hardly a desirable policy result. To the extent young women continue to seek the involvement of close family members when they cannot confide in their parents—where, for example, a parent has raped a young woman or where there is a history of child abuse—this bill will criminalize the actions of those whom the young woman is most likely to depend upon for support. Consequently, this bill encourages young women to act in isolation, putting them at greater risk of physical and psychological harm.

Further, because the bill violates the principles of federalism, restricts a young woman's right to travel, and compels states to treat non-residents differently than residents, it raises very serious constitutional issues. For these and the other reasons set forth herein, we dissent from H.R. 1218.

I. H.R. 1218 Will Endanger Young Women

Although abortion is generally very safe, it is still far preferable and safer to permit a trusted friend or family member to drive a woman home from this surgical procedure.² Under this bill, teenagers who are unable to satisfy a state parental involvement law—either because they cannot tell one parent (or in some states, both parents) about their pregnancy or because they have no fair chance of obtaining a judicial bypass—will be forced to travel alone across state lines to obtain an abortion.

¹During the last Congress, the Administration sent several letters to the Committee outlining its strong opposition to H.R. 3682, last year's "Child Custody Protection Act." See also Statement of Administration Policy, July 14, 1998. H.R. 1218 is substantially the same as H.R. 3682.

²Many teenagers seeking an abortion must travel out of state to obtain the procedure, either because the closest facility is located in a neighboring state or because there is no in-state provider available. In fact, currently 86% of counties—home to 32% of women of childbearing age—lack an abortion provider. See Stanley K. Henshaw, "Abortion Services in the United States, 1995 and 1996," *Family Planning Perspectives*, Vol. 30, No. 6, 262, 266 (Nov/Dec 1998).

As much as we would prefer the active and supportive involvement of parents in their children's major decisions, it is not always realistic to expect children to seek parental involvement willingly in the sensitive area of abortion. And where a child is unwilling or unable to seek parental consent, the results can be tragic. The testimony of Bill and Mary Bell before the Constitution Subcommittee is telling in this regard.³ The Bells were the parents of a daughter who died receiving an illegal abortion because she did not want her parents to know about her pregnancy, notwithstanding Indiana's parental notice law. A Planned Parenthood counselor in Indiana informed Becky that she would have to notify her parents or petition a judge in order to get an abortion. Becky responded that she did not want to tell her parents because she did not want to hurt them. She also replied that if she could not tell her parents, with whom she was very close, she would not feel comfortable asking a judge she did not even know. Instead of traveling 110 miles away to Kentucky, Becky opted to undergo an illegal abortion close to her home. Tragically, Becky developed serious complications from her illegal abortion that caused her death. It is unlikely that H.R. 1218 could have changed this outcome or would have convinced Becky to confide in her parents about her pregnancy.

Moreover, many young women justifiably fear that they would be physically or emotionally abused if forced to disclose their pregnancy to their parents. Nearly one-third of minors who choose not to consult with their parents have experienced violence in their family or feared violence or being forced to leave home.⁴ Enacting this legislation and forcing young women in these circumstances to notify their parents of their pregnancies will only exacerbate the dangerous cycle of violence in dysfunctional families. This is the lesson of Spring Adams, an Idaho teenager who was shot to death by her father after he learned she was planning to terminate a pregnancy caused by his acts of incest.⁵ It is clear that when a young woman believes that she cannot involve her parents in her decision to terminate a pregnancy, the law cannot mandate healthy, open family communication.

We are well aware of proponents' claims that the bill protects minors who cannot obtain parental consent because they have the option to appear before judges and bypass any parental involvement laws. While bypass may have some theoretical benefits, in many cases it is difficult if not impossible for troubled young women to obtain. Some teenagers live in regions where the local judges consistently refuse to grant bypasses, regardless of the facts involved.

³See Hearing on H.R. 3682 "The Child Custody Protection Act" before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 2d Sess. (1998) (statement of Bill and Mary Bell, submitted for the record). See also Position Paper from The National Abortion Federation, "The True Victims of S. 1645/H.R. 3682 The Teen Endangerment Act" (June 1998) (describing the case of Keishawn, an eleven year old from Maryland, who was impregnated by her step-father, and sought an abortion with the assistance of her aunt, Vicky Simpson, who was awaiting an order granting her custody of Keishawn. Upon learning of the pregnancy, Keishawn's doctors in Maryland recommended that Keishawn have anesthesia during the abortion procedure, but none of the hospitals in Maryland would allow the abortion to be provided at their facility. As a result, Keishawn's aunt sought the attention of a specialist practicing in a neighboring state, who agreed to provide the abortion. Under H.R. 1218, Vicki could have been federally prosecuted for helping her young niece cope with this pregnancy resulting from incest).

⁴See Henshaw at 196.

⁵See Maggie Boule, "An American Tragedy," Sunday Oregonian, Aug. 27, 1989.

For example, one study found that a number of judges in Massachusetts either refuse to handle abortion petitions or focus inappropriately on the morality of abortion.⁶ Others may live in small communities where the judge may be a friend of the young woman's parents, a family member, or even the parent of a friend. Still others may live in regions where the relevant courts are not open in the evenings or on weekends, when minors could seek a bypass without missing school or arousing suspicion.⁷ The difficulties in obtaining a judicial bypass were clearly illustrated by Ms. Billie Lominick during her testimony before the Subcommittee on the Constitution. Ms. Lominick was a 63-year old grandmother who helped a pregnant minor from a physically and sexually abusive household cross state lines to obtain an abortion. Ms. Lominick testified that her assistance was essential because the minor was unable to find any judge in her home state of South Carolina who would hear her judicial bypass petition.⁸

Moreover, reliance on the judicial bypass system as an effective alternative to parental consent understates the intimidating effect of seeking a court-sanctioned abortion. Many minors fear that the judicial bypass procedure lacks the necessary confidentiality. The American Medical Association has noted that "because the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. . . . The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since . . . 1973.⁹ Many young women, faced with the prospect of embarrassment and social stigma would resort to drastic measures rather than undergo the humiliation of revealing intimate details of their lives to a series of strangers in a formal, legal process. Young women's concerns about confidentiality are especially acute in rural areas. For example, in one case a minor discovered that her bypass hearing would be conducted by her former Sunday school teacher.¹⁰

The argument has been made by proponents of H.R. 1218 that in these situations, when judicial bypasses are not functioning properly, a young woman could seek—and undoubtedly obtain—relief in federal court. This argument ignores the facts. In *Cleveland*

⁶See Patricia Donovan, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," *Family Planning Perspectives*, vol. 15, no. 6 (Nov./Dec. 1983): 259. See also *Hodgson v. Minnesota*, 487 U.S. 417, 475 (1990) (finding that in Minnesota, many judges refuse even to hear bypass proceedings); *In re T.W.*, 551 So.2d 1186, 1190 (Fla. 1989) (describing how a judge in Florida, after denying a bypass petition to a teenage girl who was in high school, participated in extracurricular activities, worked 20 hours a week, and baby-sat regularly for her mother, suggested that he, as a representative of the court, had standing to represent the state's interest when the minor appealed the denial).

⁷The courts in Massachusetts, Minnesota, and Rhode Island are not open in the evenings or on weekends. See Patricia Donovan, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," *Family Planning Perspectives*, vol. 15, no. 6 (Nov./Dec. 1983): 259.

⁸See Hearing on H.R. 1218 "The Child Custody Protection Act" before the Subcomm. on the Constitution of the House Comm. on the Judiciary 106th Cong. 1st Sess. (1999) (statement of Billie Lominick).

⁹See Council on Ethical and Judicial Affairs, AMA, "Mandatory Parental Consent to Abortion," *JAMA*, vol. 269, no. 1 (Jan. 6, 1993): 83

¹⁰See *Memphis Planned Parenthood v. Sundquist*, No. 3:89-0520, slip op. at 13 (M.D. Tenn. Aug. 26, 1997); See also Tamar Lewin, "Parental Consent to Abortion: How Enforcement Can Vary," *N.Y. Times*, May 29, 1992, p. A1 (describing how a judge in Toledo, Ohio denied permission to a 17½ year old woman, an "A" student who planned to attend college and who testified she was not financially or emotionally prepared for college and motherhood at the same time, stating that the girl had "not had enough hard knocks in her life").

Surgi-Center v. Jones,¹¹ Planned Parenthood and other abortion providers in the Akron area brought suit alleging that Ohio's judicial bypass procedure produced a series of factually incorrect and arbitrary results.¹² Despite the arbitrary nature of the decisions by the juvenile courts in Ohio, the federal court stated that it was a court of "limited jurisdiction" that could not review the decisions of state courts.¹³ The court dismissed the case "because both [the Court of Appeals] and the District Court are without jurisdiction to provide plaintiffs with the relief that they seek, namely the review of arbitrary state court decisions."¹⁴ Accordingly, it is not the case that judicial bypass procedures are meaningful and effective, nor is it the case that, when they are not, the federal courts will provide relief.

II. H.R. 1218 is Anti-Family

H.R. 1218 is hostile to the well-being of families. Despite proponents' belief that H.R. 1218 would enforce parents' right to counsel their daughters, the reality is that it is impossible to legislate complex family relationships. Studies reveal that more than half of all young women who do not involve a parent in a decision to terminate a pregnancy choose to involve another trusted adult, who is very often a relative.¹⁵ Although the bill excepts parents from criminal and civil liability, even non-parent adults who are raising a child will be swept in by the bill's prohibitions. This is because the exception is excessively narrow and refers only to a parent or guardian; a legal custodian; or a person designated by a state's parental involvement law as a person to whom notification, or from whom consent, is required.¹⁶ The Majority rejected amendments that would have excepted other family members—such as a grandparent, step-parent, an aunt, an uncle, a foster parent, or an adult sibling.¹⁷ The Majority also refused to grant an exception where a parent has engaged in an incestuous relationship with the minor. The absence of such an exception locks victims of incest into requiring consent from the incestuous parent.

The bill also illogically allows for civil actions between family members by authorizing lawsuits to be brought by parents suffering "legal harm" against any person assisting a minor in obtaining an abortion across state lines. The legislation is so broad that even a person who committed rape or incest towards his own daughter is permitted to bring a lawsuit seeking compensation under H.R. 1218.

¹¹ 2 F.3d 686 (6th Cir. 1993).

¹² For example, a nearly-18-year-old minor petitioned for a waiver because she did not wish to discuss the matter with her parents. The juvenile court found that her reluctance to discuss the issue with her parents was, itself, evidence that she was not mature enough to make the decision as to whether to have an abortion. This example demonstrates that, at least for this judge, any minor who sought a bypass rather than discuss the matter with her parent could never obtain one—thereby defeating a central purpose of a judicial bypass.

¹³ See *Cleveland Surgi-Center*, 2 F.3d at 691.

¹⁴ *Id.*

¹⁵ See Henshaw, at 207.

¹⁶ H.R. 1218, proposed 18 U.S.C. § 2431(e).

¹⁷ Of the 39 states with parental involvement laws, only Illinois and South Carolina openly allow consent or notice to a grandparent. See "Who Decides? A State-By-State Review of Abortion And Reproductive Rights," National Abortion Rights Action League, pp. 154-5, (1998). Ohio allows notice to a grandparent, step-parent or adult sibling under certain circumstances.

H.R. 1218 does nothing to help build open, trusting relationships between family members. The net result will be the exact opposite of the drafter’s intent—weakening family communications and creating suspicion and mistrust among close family members.

III. H.R. 1218 is Dangerously Over Broad

Supporters of this bill claim to be targeting predatory individuals who force and coerce a minor into obtaining an abortion. However, the net cast by this bill is far broader and more problematic.

The legislation includes a criminal penalty against persons who “knowingly transport an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion.”¹⁸ In other words, this law makes it a *federal crime* to assist a pregnant minor to obtain a *lawful* abortion without any intention to avoid state parental consent laws. Anyone simply transporting a minor—a bus driver, taxi driver, family member or friend—could be jailed for up to a year or fined or both. The same applies to emergency medical personnel who may be aware they are taking a minor across state lines to obtain an abortion but would have no choice if a medical emergency were occurring.

The supporters of this bill inaccurately compare it to the Mann Act, which prohibits the transport of “any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the U.S., with intent that such individual engage in prostitution, or in a sexual activity for which any person can be charged with a criminal offense. . . .”¹⁹ The Mann Act, like most other criminal laws, contains a *mens rea* component, that requires that criminally liable individuals have an intention to break the law. A person convicted of possessing stolen property, for example, must know or have reason to know that the property they possess is stolen. H.R. 1218 has no such intent requirement and, therefore, imposes strict criminal liability for anyone in violation.²⁰ Where the Mann Act purports to guard against corruption of minors, a laudable but not constitutionally-protected purpose, H.R. 1218 imposes significant restrictions on a constitutionally-protected right to an abortion. Thus, it seems to us that the analogy is at best weak.

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

The civil liability provisions of this bill create a blanket federal cause of action for a parent who suffers “legal harm” as a result of his or her child being transported across state lines, and would further chill family and doctor/patient relations. Agency law principles would enable an “aggrieved” parent to sue medical facilities,

¹⁸ H.R. 1218, proposed 18 U.S.C. § 2431.

¹⁹ 18 U.S.C. § 2421.

²⁰ The affirmative defense available in H.R. 1218 does not address this problem.

doctors, nurses, taxi drivers, relatives, ministers, and anyone else providing assistance to a minor being transported across state lines to obtain an abortion. Not only would the civil liability provision subject virtually everyone assisting a minor to civil lawsuits, it would subject everyone else the minor comes in contact with to the rules of discovery. The legislation also raises troubling questions concerning the impact of civil liability provisions on Federal Rule of Civil Procedure 26 protective orders when the entire scheme of this new federal cause of action is based on material that is invasive.

IV. H.R. 1218 Is Likely Unconstitutional

By imposing substantial new obstacles and dangers in the path of a minor seeking an abortion, H.R. 1218 also raises a number of serious constitutional concerns. First, if enacted, H.R. 1218 would violate the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, as well as the rights of residents of different states to travel to and from any state of the Union for lawful purposes. As Professors Laurence Tribe of Harvard Law School and Peter Rubin of Georgetown University Law Center explained, “[H.R. 1218] amounts to a statutory attempt to force this most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone).”²¹

One of the fundamental principles of our federal system is that a state may not project its laws into other states. Crossing the border into another state, which every citizen has a right to do, permits the traveler temporarily to shed her home state’s laws regulating primary conduct in favor of the laws of the state that she is visiting. H.R. 1218 undermines this principle, and, in essence states that individuals may indeed be bound by the laws of their home states even as they traverse the nation by traveling to other states with very different laws.

Proponents of H.R. 1218 attempt to respond to this claim by stating that the legislation actually strengthens federalism, by allowing states to enforce their laws more effectively. However, we have seen no effort by the Majority to empower states to enforce their own gun, gambling, sales tax, or fraud laws against residents who cross state lines to take advantage of the laws of other states. Instead we face another shortsighted effort to politicize a tragic family dilemma, while doing nothing to respond to the underlying problem of teen pregnancies or dysfunctional families.

The Supreme Court has clearly and consistently held that states cannot prohibit the lawful out-of-state conduct of their citizens, nor may they impose criminal sanctions on this behavior, as H.R. 1218 does.²² The Court recently reaffirmed this principle in its recent

²¹Memorandum to the Comm. on the Judiciary from Laurence H. Tribe, Ralph S. Tyler Professor of Constitutional Law, Harvard University and Peter J. Rubin, Visiting Associate Professor of Law, Georgetown University, at 2.

²²See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336 n.13 (1989) (quoting *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion), (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) “[T]he limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, ‘any attempt ‘directly’ to assert extraterritorial

landmark right to travel decision, *Saenz v. Roe*.²³ In its decision, the Court held that, even with congressional approval, California's attempt to impose on recently-arrived residents the welfare laws of their former states of residence was an unconstitutional penalty upon their right to interstate travel.²⁴ The decision also reaffirmed that the constitutional right to travel under the Privileges and Immunities Clause of Article IV, § 2, provides a similar type of protection to a non-resident who enters a state with the intent eventually to return to her home state.²⁵

This principle applies to minors' rights to seek an abortion on non-discriminatory terms as well as to welfare benefits. In *Saenz*, the Court specifically referred to *Doe v. Bolton*,²⁶ which held that, under Article IV of the Constitution, a state may not restrict the ability of visiting non-residents to obtain abortions on the same terms and conditions under which they are made available by law to state residents: "[T]he Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons . . . who enter [a state] seeking the medical services that are available there."²⁷ It also is clear that such protections will flow to minors given that *Planned Parenthood v. Danforth*²⁸ held that pregnant minors have a constitutional right to choose whether to terminate a pregnancy.

Finally, we would note that, in addition to these clear-cut constitutional problems, others have observed that the bill may well violate other constitutional requirements. For example, the ACLU, Professor Tribe and others have opined that the bill also contains an inadequate life exception and lacks any health exception, in possible abrogation of *Roe v. Wade* and its progeny.²⁹ Additionally, the bill may impose an "undue burden" on the right to choose an abortion.³⁰ The Center for Reproductive Law & Policy also has written that H.R. 1218 violates the First Amendment's right to associate as well as the Equal Protection Principle of the Fifth Amendment.³¹

CONCLUSION

H.R. 1218 does nothing to make abortion less necessary, only more dangerous. It will not accomplish its policy purposes of en-

jurisdiction over persons or property would offend sister States and exceed the inherent limit of the State's power.'").

²³ 119 S. Ct. 1518, 1525–1527 (1999) (describing the various components of the right to travel and their constitutional derivations).

²⁴ See *id.* at 1526–1527.

²⁵ See *id.*

²⁶ 410 U.S. 179.

²⁷ *Id.* at 200.

²⁸ 428 U.S. 52, 74 (1976).

²⁹ The ACLU points to *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992) (holding that all abortion regulations must contain a valid medical emergency exception "for 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). H.R. 1218 only provides an exception to its penalties when the abortion is "necessary to save the life of a 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 pregnancy itself." See also Letter from Laurence H. Tribe to Members of the Senate Judiciary Committee at 1 (June 23, 1998) (hereinafter Tribe Letter).

³⁰ See Tribe Letter.

³¹ See "Statement of the Center for Reproductive Law & Policy In Opposition to the "Child Custody Protection Act," H.R. 1218, June 21, 1999 (stating that H.R. 1218 violates the First Amendment Right to Associate by criminalizing the association between a minor and another person for the purpose of effectuating the minor's right to choose abortion and arguing that H.R. 1218 violates the Equal Protection Principle of the Fifth Amendment by impermissibly classifying among minors being transported across state lines as well as among individuals transporting them).

couraging parental involvement and takes the wrong approach to the problem of teenage pregnancy. It does nothing to increase teen awareness of the dangers of premarital sex. The bill preys on the problems of dysfunctional families where children cannot confide in their parents or fear physical harm when they do. The bill does nothing to stop a teenager from actually obtaining an out-of-state abortion, other than making the trip more dangerous.

We are disappointed that the Majority has held steadfast in its efforts to isolate children in this way. Because H.R. 1218 is a burdensome attack on the rights and well-being of young women, we dissent from this legislation.

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