

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

STATE OF OHIO,  
v. *Appellant,*  
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,  
*Appellees.*

On Appeal from the United States Court of Appeals  
for the Sixth Circuit

JANET HODGSON, MD., *et al.*,  
*Petitioners and Cross Respondents,*

v.

THE STATE OF MINNESOTA, *et al.*,  
*Respondents and Cross Petitioners.*

On Writs of Certiorari to the United States Court of Appeals  
for the Eighth Circuit

BRIEF FOR *AMICI CURIAE*  
AMERICAN PSYCHOLOGICAL ASSOCIATION,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.,  
AND THE AMERICAN JEWISH COMMITTEE IN  
SUPPORT OF PETITIONERS/CROSS-RESPONDENTS  
IN NOS. 88-1125, 88-1309  
AND IN SUPPORT OF APPELLEES IN NO. 88-805

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INTEREST OF *AMICI CURIAE*<sup>1</sup>

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 75,000 members, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association with over 120,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills.

The American Jewish Committee (AJC) is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including access to abortion on a voluntary basis.

The parental notice and waiting period requirements at issue in these cases are premised upon the States' as-

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<sup>1</sup> The parties have consented to the submission of this brief. Their letters of consent are on file with the Clerk of this Court.

assumptions that, in relevant ways, minors are more psychologically vulnerable than adults, that they are immature and unable to make competent choices concerning abortion, and that such requirements will foster intrafamily communication and cooperation while not harming the adolescents affected. The validity of these legislative assumptions has been tested through empirical research conducted by social scientists. Social science research is also relevant to the arguments of the professionals, pregnant minors, and parents who challenge these requirements that the laws unduly burden minors' rights to choose whether to carry a pregnancy to term or abort. Much of the relevant research has been conducted by members of *amicus* APA; that research is presented in this brief.<sup>2</sup>

#### SUMMARY OF ARGUMENT

Most younger adolescents and many older adolescents voluntarily inform one or both parents about their pregnancies, and seek their counsel about the abortion decision. Where such consultation is voluntarily sought, adolescents are often benefitted. Mandatory parental notification laws have no effect on this group of pregnant minors, however; only those minors who otherwise would *not* involve their parents in the abortion decision are directly affected by these laws.

The empirical research suggests that such adolescents typically have good reasons not to involve their parents in the abortion decision. They may fear a hostile, even violent, reaction to the news that they have been sexually active and are now pregnant. In many cases, they may be from dysfunctional families in which one or both parents

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<sup>2</sup> Counsel gratefully acknowledge the assistance of APA members Bruce Ambuel, Ph.D., William Gardner, Ph.D., Julian Rappaport, Ph.D., and Lenore Walker, Ed.D., and APA staff members Brian Wilcox, Ph.D., and Janet O'Keeffe, Dr. P.H., in the preparation of this brief.

may be absent, or in which child abuse, including sexual abuse, has taken place. For such reasons, or simply wishing to protect their own informational privacy—an appropriate concern for adolescent females—pregnant minors in a State with a parental notification law may delay making the abortion decision, increasing the risk to their health of undergoing the procedure or leading to *de facto* decisions to carry to term. Point I.

Mandatory parental notification may actually undermine the very state interests it is meant to advance. In those families in which the minor daughter has chosen not to inform her parents, state-mandated notification is unlikely to produce greater intrafamily understanding or communication, and may well precipitate a family crisis or exacerbate existing family problems. Moreover, there are no data to suggest that adolescents are less capable than adults of making the abortion decision on their own. Furthermore, abortion itself, as a rule, relieves the stress associated with unwanted pregnancy rather than generates distress a parent (particularly one a minor would prefer to exclude from the process) could ameliorate. Point II.

Even with a bypass procedure, which in virtually every case results in affirmation of the minor's abortion decision but which itself deters some adolescents from seeking an abortion, parental notification laws unduly burden an adolescent's right to choose. *Without* a bypass procedure, the majority of pregnant adolescents who are competent to choose for themselves, and the significant number who would be placed at increased risk by notifying one or both parents, are faced with an intolerable choice: foregoing their right to abortion and becoming adolescent parents, on the one hand, or risking their physical or psychological health by complying with the notification statute, on the other. For these reasons, the Ohio and Minnesota statutes are both unconstitutional.

## INTRODUCTION

These cases concern the constitutionality of Minnesota Statutes § 144.343 (1)-(7) ("the Minnesota statute") and Ohio Amended Substitute House Bill 319 ("the Ohio statute").<sup>3</sup> With certain exceptions, both statutory schemes prohibit a physician from performing an abortion upon a minor unless notice has been provided to the minor's parents. The Minnesota statute requires that the minor notify *both* parents 48 hours in advance of the procedure (whether or not her parents are living together or are or ever were married); unless judicially mandated, the scheme does *not* provide a judicial bypass through which mature minors or minors whose best interests would not be served by notification may be relieved of this obligation.<sup>4</sup> The Ohio statute requires notification of one parent, and establishes a bypass procedure that has been found unduly burdensome by the lower courts.

With or without a judicial bypass procedure, government certainly could not compel an *adult* to notify her parents or other third parties 24 or 48 hours before undergoing an abortion, because the burdens thereby imposed on the right to choose whether to abort or carry to term would not be justified by sufficiently weighty countervailing state interests. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976) (*Danforth*) (spousal veto of abortion decision ruled unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (third party veto of abortion decision ruled unconstitutional); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-450 (1983) (*Akron I*) (24-hour waiting period unconstitutional). The validity of imposing such burdens on adolescents depends

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<sup>3</sup> The key provisions of the Ohio statute are codified at Ohio Rev. Code Ann. §§ 2151, 2912.12, and 2505.073 (Page Supp. 1985).

<sup>4</sup> In the event a court invalidates the no-bypass provision, the statute provides that a bypass procedure will go into effect. This "backstop" provision was in effect for several years prior to the district court's final ruling.

upon whether doing so furthers state interests sufficiently to alter the balance.

This Court has recognized that “[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement.” *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*). Thus, although it has asserted that “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *id.* at 635, the Court has been careful to reject a State’s *per se* claim that *all* adolescents are incompetent and immature. Both in the abortion context and in other cases dealing with minors, the Court has taken a more individualized approach in assessing the competency and maturity of minors to make important decisions.<sup>5</sup>

Specifically, this Court has never suggested that all adolescents are incompetent to decide whether to have an abortion. To the contrary, the Court has recognized that

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<sup>5</sup> Outside the abortion context, see *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (Court applied such factors as adolescent’s age, experience, education, background, and intelligence, in concluding that a 16-year old “voluntarily and knowingly waived his Fifth Amendment rights.”); *id.* at 734 n.4 (Powell, J., dissenting) (recognizing that each case must be judged on its own merits, including an evaluation of the “minor’s age” and “actual maturity.”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (it violated first amendment to statutorily exclude press and public from courtroom during testimony of all victims of sexual offenses under age 18; the Court opted for case-by-case determination, including an analysis of the “minor victim’s age, psychological maturity and understanding, [and] the desires of the victim.”); *cf.* *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (permissible for State to execute 16-year-old in cases in which adolescent has a developed moral sense).



the legal status of "minority" encompasses wide ranges of age and maturity levels. See *Danforth*, 428 U.S. at 75. It is only "immature minors" whom the Court perceives as sometimes lacking "the ability to make fully informed choices." *Bellotti II*, 443 U.S. at 640.<sup>6</sup> Thus, a mature minor's decision to have an abortion may not be made subject to her parent's veto. *Akron I*, 462 U.S. at 440; *Bellotti II*, 443 U.S. at 642-643; *Danforth*, 428 U.S. at 74-75. Indeed, the Court has held that "a blanket determination that all minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. *Akron I*, 462 U.S. at 440.

The constitutionally recognized difference between immature and mature minors, see *Bellotti II*, 443 U.S. at 643-644 and n.23, is relevant in evaluating the relative benefits and burdens of a statute that requires all adolescents to consult with their parents before obtaining an abortion.<sup>7</sup> As discussed below, see Point II, *infra*, there is no empirical evidence to suggest that adolescents by about age 14 are less competent to consent to abortion than adults, or that at least some younger adolescents do not possess similar competence.<sup>8</sup>

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<sup>6</sup> See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors").

<sup>7</sup> In related contexts, the "mature minor" doctrine permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences. See Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOOD HALL L.J. 115, 117-120 (1973); see also *H.L. v. Matheson*, 450 U.S. 398, 450 n.49, 453 (1981) (Marshall, J., dissenting), and cases cited therein.

<sup>8</sup> Indeed, it is difficult to reconcile the idea that minors are less competent than adults to consent to abortion with the fact that state law typically allows a minor parent—whatever her age—to consent not only to the health care of her child, but to her own health care as well, including abortion. See J. MORRISSEY, A. HOFFMAN, and J. THROPE, CONSENT AND CONFIDENTIALITY IN THE

## ARGUMENT

I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE.

A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion.

Most adolescents, and younger adolescents in particular, can profit from *sympathetic* guidance from a parent or other adult concerning important choices, such as decisions concerning pregnancy. Research demonstrates that most minors—especially young adolescents aged 11-14—generally do consult their parents about their pregnancies, regardless of legal mandates.

Thus, one study found that approximately three-fourths of minors aged 15 or younger voluntarily informed their parents before they obtained an abortion,<sup>9</sup> and 25% of this group reported that their parents suggested the abortion.<sup>10</sup> In States requiring that minors either inform parents or obtain their consent prior to obtaining an abor-

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HEALTH CARE OF CHILDREN AND ADOLESCENTS 43 (1986) [hereinafter MORRISSEY, HOFFMAN and THROPE].

<sup>9</sup> Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 287-290 (1980) [hereinafter *Telling Parents*]. See generally Mnookin, *Bellotti v. Baird: A Hard Case in the Interest of Children: Advocacy, Law Reform, and Public Policy* 149, 240-241 (R. Mnookin ed. 1985) [hereinafter Mnookin]; Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982) [hereinafter *Clary*]; Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 Adolescence 44 (1980) [hereinafter Rosen].

<sup>10</sup> *Telling Parents*, *supra* note 9, at 290; NATIONAL ACADEMY OF SCIENCES, *RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREG-*

tion, young adolescents rarely use judicial bypass procedures.<sup>11</sup> Older adolescents who are unusually ambivalent about the abortion decision and who perceive themselves as relatively incompetent decisionmakers also are likely to voluntarily involve their parents in the decision.<sup>12</sup> In general, however, older adolescents fully competent to decide medical questions for themselves do not consult their parents about abortion as frequently as do young adolescents.<sup>13</sup>

Parental notice laws result in later, more hazardous, and more expensive abortions, and in minors carrying to term. In Minnesota, the district court found that the burdens of parental notification—even with bypass procedures available—cause “[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents . . . to carry to term.” *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986). In Massachusetts, a smaller jurisdiction where it is less difficult to travel out-of-State to obtain an abortion, mandatory parental notification did not change the number of women who became pregnant, gave birth, or obtained abortions.<sup>14</sup> But the law did force approximately one-

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NANCY, AND CHILDBEARING 113 (1987) [hereinafter NAS REPORT]. Only 8% of 17-year-olds who obtain abortions report that they did so at their parents' suggestion. *Telling Parents*, *supra* note 9, at 290.

<sup>11</sup> Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 Fam. Plan. Persp. 259, 261 (1983) [hereinafter *Judging Teenagers*].

<sup>12</sup> *Rosen*, *supra* note 9, at 48.

<sup>13</sup> In a large, multi-state study, the proportion of minors who decided, without parental consultation, to carry to term was similar to the proportion who decided to seek an abortion without parental consultation. *Rosen*, *supra* note 9, at 46. See, e.g., Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Soc. Rev. 385 (1963) [hereinafter Brittain].

<sup>14</sup> See Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986).

third of the minors in the State seeking an abortion to leave the State and obtain the abortion in a jurisdiction without a parental consent statute. *Id.*<sup>15</sup>

Thus, mandatory parental notification creates substantial obstacles for many adolescents choosing to abort their pregnancies: they may have fewer, later, or more expensive abortions because they wish to avoid notifying one or both of their parents.

**B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision.**

Both courts and social scientists have identified the reasons mandatory notification has these deleterious effects. On the basis of a detailed record, the *Hodgson* court found that after five years of operation the compelled notice required by the Minnesota statute almost always had a negative impact, frequently harming the child's welfare. 648 F. Supp. at 764, 768-769. The court found as a matter of fact that compelled two-parent notification in families with a non-custodial or absent parent was typically disruptive, and led to violence and abuse in dysfunctional families. *Id.* at 769.<sup>16</sup>

Data support the district court's findings. One study of parental reaction to adolescent daughters' pregnancies showed that such an announcement typically evoked an initial response of anger and disappointment, and triggered a crisis in the family.<sup>17</sup> And anger is not the only response an adolescent need fear. A major government study has estimated that in 1986, more than one million

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<sup>15</sup> Approximately twice as many women chose to leave the State to obtain their abortions as chose to utilize the judicial bypass. *Id.* at 398, 399.

<sup>16</sup> Appendix to Petition for a Writ of Certiorari in *Hodgson v. Minnesota*, No. 88-1125, filed January 4, 1989 at 141a (testimony of Dr. Lenore Walker).

<sup>17</sup> See, e.g., Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 *Clinical Obstetrics & Gynecology* 1161 (1978).

children and adolescents nationwide had already experienced demonstrable harm as a result of abuse or neglect.<sup>18</sup>

In light of the relatively widespread nature of intra-family abuse, it is not surprising that in about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they are motivated by fear of physical punishment or some other severe reaction.<sup>19</sup> Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers.<sup>20</sup> Adolescents may particularly fear telling their parents about a pregnancy if it is the result of sexual abuse. Research indicates that such abuse—both extrafamilial and intrafamilial—is disturbingly common.<sup>21</sup> Compelling parental in-

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<sup>18</sup> NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 at xx (1989) [hereinafter HHS STUDY]. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. *Id.* at 7-2. See generally Gelles & Strauss, *Behind Closed Doors—Violence in the American Family*, 35(2) J. Soc. Issues 15, 24 (1979) [hereinafter Gelles & Strauss].

<sup>19</sup> Clary, *supra* note 9, at 284. Even if an adolescent misjudged her parents' response, the perception may be more important than the reality in causing adolescents to delay seeking medical assistance or making a decision whether to abort.

<sup>20</sup> Gelles, *Violence and Pregnancy: A Note On The Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975).

<sup>21</sup> See generally D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); HHS STUDY, *supra* note 18, at xx-xxi. See also Moore, Nord & Peterson, *Nonvoluntary Sexual Activity Among Adolescents*, 21 Fam. Plan. Persp. 110, 111 (1989) (data from the 1987 National Survey of Children indicate that 9 percent of 17-year olds, 7.5 percent of 16-year olds, 6.3 percent of 15-year olds and 5.8 percent of girls 14 and under have experienced nonvoluntary sexual intercourse; adolescent girls with parents who abuse alcohol and drugs were two to three times more likely to have experienced nonvoluntary sexual intercourse; sixty-eight percent of white females with three or more risk factors had been sexually abused before or during adolescence); Russell, *The Incidence and*

volvement in such instances, particularly if the pregnancy is the result of incest, is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

Moreover, in many cases involving older adolescents, compelled disclosure will burden a young woman's interest in informational privacy.<sup>22</sup> The protection of privacy and the maintenance of control over personal information in sexual matters is an especially vital concern of adolescent females.<sup>23</sup> As the *Hodgson* district court found, based upon presentation of empirical research and clinical experience, assertion of privacy is a mark of maturity and psychological adaptation among adolescents. *Hodgson v. Minnesota*, 648 F.Supp. at 767, 775. Depriving an adolescent female of autonomy in making the abortion decision often imposes far more stress on her than does making the decision itself or undergoing the medical procedure. *Id.* at 763-764.

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*Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children* in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 25 (L. Walker, ed. 1987) (research on a probability sample of 930 women found that 16 percent reported at least one experience of intrafamilial sexual abuse before the age of 18 and 12 percent had been sexually abused by a relative before 14 years of age; 31 percent reported at least one experience of sexual abuse by a non-relative before the age of 18).

<sup>22</sup> This interest is partially responsible for the rarity of parent-daughter discussions about sexual matters. Adolescents' discomfort in initiating or participating in such discussions, see Dubbe, *What Parents Are Not Told May Hurt: A Study Of Communication Between Teenagers And Parents*, 14 Fam. Life Coordinator 96, 97, 98 (1965); see generally Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 Fam. Rel. 347 (1980), reflects, in part, a developmentally appropriate concern with privacy.

<sup>23</sup> See Melton, *Decision Making by Children: Psychological Risks and Benefits* in CHILDREN'S COMPETENCE TO CONSENT 21 (G. Melton, G. Koocher & M. Saks eds. 1983); Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 ENV'T & BEHAV. 87 (1979); Wolfe, *Childhood and Privacy* in CHILDREN AND ENV'T 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. Soc. Issues 22 (1977).

Many States recognize the need to respect minors' privacy—and their competence—in making sensitive and important decisions concerning their health and future. Most States presume a minor competent to consent without parental notification to treatment for sexually transmitted diseases, mental health treatment, and medical treatment related to pregnancy, and recognize the crucial role confidentiality plays in permitting minors to obtain access to vitally necessary health services.<sup>24</sup> Minnesota singles out abortion as requiring parental notification. Minn. Stat. § 144.343(1). Additionally, States typically allow minors, whatever their age, to consent to their own health care once they become parents.<sup>25</sup>

Thus, parental consent laws risk causing harm to many of the adolescents they are intended to protect. For a variety of legitimate reasons—fear of domestic physical or psychological violence or appropriate concern for personal privacy—many adolescents will delay or avoid their decision to abort or carry to term, or go out of State to obtain the abortion if feasible, rather than comply with the notification requirement.

#### C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents.

Minnesota's requirement that *both* parents be notified is directed at those adolescents who would voluntarily consult one parent, but would not voluntarily speak with both parents before obtaining an abortion.<sup>26</sup> It imposes often insurmountable barriers. Due to high levels of marital dissolution and the high incidence of out-of-wedlock child-bearing, the great majority of adolescents have lived at least for a time in single parent families. It is estimated

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<sup>24</sup> See generally MORRISSEY, HOFFMAN & THROPE, *supra* note 8.

<sup>25</sup> *Id.* at 43.

<sup>26</sup> In many cases, *two* parent notification may override the judgment, not only of the adolescent, but of one of her parents, that one parent should not be notified.

that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes.<sup>27</sup> Moreover, data obtained from the 1981 Current Population Report indicated that in 1980, 2.3 million or 3.7 percent of all unmarried noninstitutionalized children under the age of 18 were not living with either of their parents.<sup>28</sup>

Data from a nationally representative sample of children aged 11-16 indicates that when an adolescent lives apart from one of her parents, she frequently has little contact with the absent parent.<sup>29</sup> Over one-third of the children living with their mothers in one-parent homes have had no contact at all with their absent father during the previous five years, or are unaware if their father is alive or dead.<sup>30</sup> Over half have had no contact in the previous year.<sup>31</sup> And the little contact that occurs tends to be purely social, not involving counseling about life decisions.<sup>32</sup> "Coparenting among formerly married couples is more of a myth than a reality in all but a tiny fraction of families. [Nonresident parents] typically give up decision-making authority and exercise little direct in-

<sup>27</sup> Hofferth, *Updating Children's Life Course*, 47 J. Marriage and Fam. 93, 93 (1985).

<sup>28</sup> Montemayor and Leigh, *Parent-Absent Children: A Demographic Analysis of Children and Adolescents Living Apart from their Parents*, 31 Fam. Relations 567, 567 (1982).

<sup>29</sup> Furstenberg, Nord, Peterson and Zill, *The Life Course of Children of Divorce*, 48 Am. Sociological Rev. 656, 663 (1983).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* See also Seltzer & Bianchi, *Children's Contact with Absent Parents*, 50 J. Marriage and Fam. 663 (1988).

<sup>32</sup> Furstenberg & Nord, *Parenting Apart: Patterns of Child-rearing After Marital Disruption*, 47 J. Marriage and Fam. 893, 902 (1985) [hereinafter Furstenberg & Nord]. Lack of involvement by the non-custodial parent is also evidenced by the small proportion of absent fathers who contribute to their children's support. See U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, CHILD SUPPORT AND ALIMONY: 1985 (Series P-23, No. 154, 1989) at 1.



fluence over their children's upbringing." <sup>33</sup> Thus, in many instances, mandating parental disclosure would force the involvement of a disinterested parent in potentially disruptive ways. Most troubling is the potential for serious harm to both the mother and the adolescent if an absent father with a history of abusive behavior is notified.<sup>34</sup> In such families, mandatory two-parent notification may be particularly damaging.

Moreover, even in two-parent homes, it is very common for fathers to be completely uninvolved in providing information or giving advice about sexual matters to their daughters. Research has shown that the limited sex education that occurs in the home is usually done by the mother.<sup>35</sup> Moreover, the district court in *Hodgson* found that in many cases compelled two-parent notification had inhibited rather than advanced voluntarily initiated intrafamily communication. 648 F. Supp. at 777-778.<sup>36</sup> Thus, there is no reason to believe that requiring adolescents who would not otherwise do so to speak with their fathers about their abortion decision would promote any kind of beneficial family interaction, and reason in many cases to fear that harm may ensue.

**D. An "Arbitrary And Inflexible" Waiting Period—  
Whether 24 Or 48 Hours—Places Greater Burdens  
On Adolescents Than It Does On Adults.**

The 24-hour and 48-hour waiting periods here at issue impose even greater burdens on adolescents' right to ob-

<sup>33</sup> Furstenberg & Nord, *supra* note 32, at 903.

<sup>34</sup> Domestic violence—both wife battering and child abuse—is not uncommon in American homes. Gelles & Strauss, *supra* note 18. In Minnesota alone, there are an average of 31,200 assaults on women by their partners each year. DEPT. OF CORRECTIONS, MINNESOTA PROGRAMS FOR BATTERED WOMEN (January 1985).

<sup>35</sup> Rozema, *Defensive Communication Climate as a Barrier to Sex Education in the Home*, 35 Fam. Relations 533 (1986).

<sup>36</sup> The court found that some adolescents were dissuaded from contacting one parent because only the consent of both parents would eliminate the need for judicial proceedings.

tain an abortion than do similar provisions this Court has struck down as applied to all women. In *Akron I*, this Court concluded that the State “failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period,” and held that such a waiting period was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.*

Such burdens on the right to obtain an abortion are particularly onerous for adolescents.<sup>37</sup> Adolescents already obtain abortions later in pregnancy than older women, and the risk of complications increases with each week of delay.<sup>38</sup> Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already encounter.

## II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

This Court has asserted, as a guiding principle, that:

[W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

<sup>37</sup> See *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) (“the same objections to the waiting period for adults listed in *City of Akron* apply to waiting periods for minors”); *Hodgson*, 648 F. Supp. at 765 (“[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor’s school and work commitments”).

<sup>38</sup> See Russo, *Adolescent Abortion: The Epidemiological Context in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES* 40, 55-67 (G. Melton ed. 1986) [hereinafter Russo]; NAS REPORT, *supra* note 10, at 114, 277.

*Carey v. Population Services Int'l*, 431 U.S. 678, 696 (1977). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against imposition of "undue burdens," *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that the statutes at issue impose a substantial burden on all minors that would be unconstitutional if imposed on adults. See p. 4, *supra*.

The States have asserted three general purposes in defense of mandatory notification statutes, which in other contexts have been recognized by this Court:<sup>39</sup> promoting a family role in the child-rearing process, Cross-Petition for Writ of Certiorari in No. 88-1309 at 3; assuring that the decision to abort is an informed one, *id.*; and promoting the adolescent's emotional stability, particularly as it relates to "the minor's psychological sequelae that may attend the abortion procedure," *Hodgson*, 648 F. Supp. at 766. In *Hodgson*, after hearing evidence about the manner in which the Minnesota law operated for five years, the trial court found as a matter of fact that none of these interests was promoted. The scientific evidence supports the district court's findings.

**A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication.**

As demonstrated in Point I, *supra*, the scientific and record evidence suggests that mandatory parental notification statutes are actually *destructive* of the family role in child-rearing. The productive communication patterns of a normal family that these laws purport to promote are based upon trust and the voluntary desire to

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<sup>39</sup> See *Danforth*, 428 U.S. at 75 (family role in decisionmaking); *Bellotti II*, 443 U.S. at 635 (decisionmaking competence); *H.L. v. Matheson*, 450 U.S. 398, 412 (1980) (psychological consequences of abortion).

share or to know; compelled or coerced communication lacks these qualities.<sup>40</sup>

**B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One.**

These burdensome regulations also might be defended as needed to ensure that the pregnant woman is making an informed choice. Whether the laws' burdens are justified in light of this purpose should turn in substantial part on whether the scientific evidence supports the State's assumptions about the competence of minors to make decisions about pregnancy.

The Court has yet to define precisely what the capacity to make informed choices means.<sup>41</sup> It has, however, never relied upon a definition of capacity to consent that focuses on the choice made,<sup>42</sup> focusing instead on the individual's cognitive capacity to make the decision to abort, *i.e.*, the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives. Perhaps the most complete statement of this Court's position on competency appears in *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part): "The Court assumes that parental consent

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<sup>40</sup> See generally D. CURRAN, *TRAITS OF A HEALTHY FAMILY* (1983).

<sup>41</sup> But see 45 C.F.R. Part 46 (DHHS rules regarding consent to biomedical and behavioral research including consent to research with children); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589 (1982) [hereinafter Weithorn & Campbell]; Bersoff, *Children as Research Subjects: Problems of Competency and Consent in THE RIGHTS OF CHILDREN* 186 (J. Henning ed. 1982).

<sup>42</sup> Of approximately 1.1 million teenage pregnancies annually, about 40% are terminated by abortion. By any objective standard the decision to abort is one that a reasonable person, including a reasonable adolescent, could make. NAS REPORT, *supra* note 10, at 1, 15, 261; Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 Issues in Brief 1 (1983) [hereinafter AGI].

is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives.”<sup>43</sup> Both psychological theory and significant and substantial evidence developed by social scientists bear on the empirical question whether adolescents possess the requisite capacity to consent under this formulation.

**1. Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations.**

Developmental psychologists<sup>44</sup> have built a rich body of research examining adolescents’ capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence.

The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about

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<sup>43</sup> See also *Bellotti II*, 443 U.S. at 640 (“ability to . . . take account of both immediate and long-range consequences”). The concern that a minor have adequate *information* about her decision, as opposed to the capacity to choose based upon such information, see *Bellotti II*, 443 U.S. at 643, is less a component of the adolescent’s competency than of the physician’s legal and ethical duty to provide all material information to the patient. See Wadlington, *Consent to Medical Care for Minors: The Legal Framework in CHILDREN’S COMPETENCE TO CONSENT* 57 (G. Melton, G. Koocher & M. Saks eds. 1983).

<sup>44</sup> Developmental psychologists are scientists who study cognitive, perceptual, personality, social and emotional development along the life span of individuals.

hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information.<sup>45</sup>

Competent decisionmaking is also dependent on social and personality development including the development of personal values, identity, autonomy, and the ability to resolve social dilemmas. Research in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion and rebellion against parents. In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas,<sup>46</sup> understanding social rules and laws,<sup>47</sup> reasoning about interpersonal relationships<sup>48</sup> and interpersonal problems,<sup>49</sup> and reasoning about

<sup>45</sup> For a discussion of these changes from three theoretical perspectives, see B. INHELDER & J. PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* (1958); Braine & Romain, *Logical Reasoning in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT* 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Sternberg & Powell, *The Development of Intelligence in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT* 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983).

<sup>46</sup> Rest, *Morality in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT* 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* (Lickona ed. 1976); Kohlberg & Hersch, *Moral Development: A Review of the Theory*, 16 *Theory into Practice* 53 (1977).

<sup>47</sup> Tapp & Kohlberg, *Developing Senses of Law and Legal Justice in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 89 (J. Tapp. & F. Levine, eds. 1977).

<sup>48</sup> R. SELMAN, *THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES* (1980).

<sup>49</sup> Marsh, Serafica & Barenboim, *Effect of Perspective-taking Training on Interpersonal Problem Solving*, 51 *Child Development*

custody preference during parental divorce.<sup>50</sup> By middle adolescence most young people develop an adult-like identity and understanding of self.<sup>51</sup> Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy.<sup>52</sup> Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.

There is not as much information about the practical decisionmaking competence of younger adolescents—those aged 11 to 13.<sup>53</sup> Research has indicated that there is considerable variability in cognitive development and decisionmaking competence among adolescents, and there are some 11-to-13-year-olds who possess adult-like capabilities in these areas.<sup>54</sup> It is instructive that young adolescents are deemed capable in many state statutes of giving informed consent to various medical procedures, including mental health services, treatment for sexually transmitted diseases, and surgery related to childbirth. Should they have a child, young adolescents are typically deemed competent to make health care decisions both for themselves

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140 (1980); Marsh, Serafica & Barenboim, *Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning*, 138 *J. Genetic Psychology* 37 (1981).

<sup>50</sup> Greenberg, *An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making* (1983) (Dissertation Abstracts Int'l).

<sup>51</sup> Harter, *Developmental Perspectives On the Self System in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT* 275 (Heatherington, ed. 1983).

<sup>52</sup> See Conger, *A World They Never Knew: The Family and Social Change in TWELVE TO SIXTEEN* 197 (J. Kagan & R. Coles eds. 1972); Brittain, *supra* note 13.

<sup>53</sup> Because few young adolescents become pregnant, it is difficult for researchers to obtain a sample large enough to study the abortion decisionmaking competence of this group.

<sup>54</sup> See sources cited *supra* notes 46-51.

and their child.<sup>55</sup> At a minimum, therefore, a case-by-case approach to assessing decisionmaking competence among young adolescents is essential.

For all the reasons set forth in this section, the assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research.

**2. Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion.**

There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions.<sup>56</sup> The evidence does not support the assumption underlying notification laws that adolescents lack an adult's capacity to understand and reason about problems and decisions, including medical and psychological treatment alternatives, or the ability to comprehend and consider risks and benefits regarding treatment alternatives.<sup>57</sup>

<sup>55</sup> MORRISSEY, HOFFMAN & THROPE, *supra* note 8, at 43.

<sup>56</sup> Studies comparing adolescents and adults include Belter & Grisso, *Children's Recognition of Rights Violations in Counseling*, 15 Prof. Psychology 899 (1984) [hereinafter Belter & Grisso]; Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) [hereinafter Grisso]; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Weithorn & Campbell, *supra* note 41; Ambuel, *Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy* (1989) (Dissertation Abstracts Int'l) [hereinafter Ambuel].

<sup>57</sup> See, e.g., Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES* 1 (G. Melton ed. 1986) [hereinafter Melton & Pliner]; Weithorn,



The two most directly relevant studies compared abortion decisionmaking by adolescents and adults at the time they received pregnancy tests in actual treatment settings. Results of both are consistent with the research and theory reviewed above showing that "adolescents are as able to conceptualize and reason about treatment alternatives as adults are."<sup>58</sup> In one study,<sup>59</sup> 16 unmarried adolescents, aged 13-17, and 26 unmarried adult women, aged 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own

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*Children's Capacities in Legal Contexts in CHILDREN, MENTAL HEALTH, AND THE LAW* 25 (N. Reppucci & Assoc. eds. 1984); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care in CHILDREN'S COMPETENCE TO CONSENT* 93 (G. Melton, G. Koocher & M. Saks eds. 1983); Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES* 85 (G. Melton ed. 1982); Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof. Psychology 412 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. Am. Acad. Child Psychiatry 505 (1978).

Not all older adolescents and not all adults reach the highest levels of competence to consent to treatment, see Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 Am. J. Psychiatry 279 (1977), but there is no substantial support for the proposition that cognitive abilities of the two groups are different.

<sup>58</sup> APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73, 73 (1987) [hereinafter Interdivisional Committee Study].

<sup>59</sup> Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980).

choices. The study revealed no differences between the unmarried minors and adults in the decisions they made or in their knowledge of pregnancy-related laws. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no differences on such factors as the positive emotions associated with mothering, financial concerns, the effect of given choices on one's goals or present lifestyle, or social stigma.

The second highly relevant study examined pregnancy decisionmaking in 15 adolescents aged 14-15, 19 adolescents aged 16-17, and 40 adults aged 18-21, at the time they sought a pregnancy test at a women's health clinic.<sup>60</sup> The sample was representative of various economic, racial and religious backgrounds. Each person participated in an extensive decisionmaking interview conducted by a counselor, which was audio-taped and later rated by trained, independent raters. The four measures used to evaluate decisionmaking competence were suggested by this Court's understanding of competency,<sup>61</sup> and focused on the individual's cognitive and volitional capacity: consideration of risks and benefits including immediate and future consequences; quality and clarity of reasoning; number and types of factors considered; and volition, *i.e.*, making a decision without being coerced by or acquiescing to others. Results showed that minors aged 14 to 17, who considered abortion as an option, equaled adults in all

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<sup>60</sup> Ambuel, *supra* note 56; Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper Presented at American Psychological Association Convention, available from *amicus* counsel of record).

<sup>61</sup> See *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part). See also Wadlington, *Consent to Medical Care for Minors: The Legal Framework in CHILDREN'S COMPETENCE TO CONSENT* 57 (G.P. Melton, G. Koocher & M. Saks eds. 1983).

four measures of competence. Taken together these two studies suggest that minors equal adults, "in their 'competence' to imagine the various ramifications of the pregnancy decision,"<sup>62</sup> and their capacity to make a reasoned choice when facing unplanned pregnancy.<sup>63</sup>

Indeed, the National Academy of Sciences, in a major review of the research, observed that almost all minors who employ judicial bypass procedures to avoid parental involvement are held to be mature, and their decisions to have an abortion are held to be in their best interests.<sup>64</sup> This evidence strongly suggests that many adolescents who choose not to consult with their parents are competent to make the abortion decision.<sup>65</sup>

<sup>62</sup> *Id.* See Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987).

<sup>63</sup> In another relevant study, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were given detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study—factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, *supra* note 41. For a confirming study, see Belter & Grisso, *supra* note 56; Grisso, *supra* note 56.

<sup>64</sup> See NAS REPORT, *supra* note 10, at 194-195. For supporting research see Melton & Pliner, *supra* note 57, at 26; Mnookin, *supra* note 9; *Judging Teenagers*, *supra* note 11, at 259-267; see also *Hodgson v. Minnesota*, 648 F. Supp. at 765, 766-67.

<sup>65</sup> Indeed, it can be seriously questioned whether a notification statute with a bypass procedure in practice does more than expend judicial resources. At worst, it is a source of anxiety, medically harmful delay, and family conflict. Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79, 82 (1987). That so many minors, despite its burdens, choose to undergo a bypass process and succeed in demonstrating their competence and best interests to a judge, dramatizes the fact that *without* a bypass, the burdens of mandatory parental notification would be intolerable.

Thus, empirical studies of treatment and abortion decisionmaking have found no differences between adolescents aged 14-18 and adults in factors related to legal competence.<sup>66</sup> There is therefore no scientific foundation for the States' assumption that adolescents' decisions to have an abortion are generally less thoughtful and informed than adults' decisions.

Moreover, related research indicates that attempts by the State to compel parental consultation in minors' abortion decisions are unlikely to result in better reasoned decisions.<sup>67</sup> One study found that although adolescents who were able to discuss their unintended pregnancy with two or three people they considered sympathetic and supportive decided upon a course of action faster than women with less social support, no benefit accrued from discussing the pregnancy with parents or others considered unsympathetic.<sup>68</sup> Research has consistently shown

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<sup>66</sup> Studies have recognized differences between adults and adolescents regarding the decision to have an abortion, but those differences do not reflect upon the relative competence of adolescents (or adults) to make the abortion decision. Instead, the differences appear to be related to minors' and adults' differing social situations. For example, adolescents tend to see their decision as more influenced by consideration of its impact on others, and more frequently involve a parent in the decision. They also tend to take more time to reach a decision, making the added delays caused by notification and bypass procedures even more potentially harmful to the adolescents' health than similar requirements would be to adults' health. See Interdivisional Committee Study, *supra* note 58, at 73, and studies cited therein.

<sup>67</sup> Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 Neb. L. Rev. 455, 470-471 (1983); Zabin & Hirsch, *Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents* 16 (1988) (Paper presented at Annual Meeting of American Public Health Association, available upon request from counsel of record). See Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 Population and Env't 35 (1980).

<sup>68</sup> Ashton, *Pattern of Discussion and Decision-making Amongst Abortion Patients*, 12 J. Biosocial Sci. 247 (1980).

that parents are seldom significant sources of sex education for their children.<sup>69</sup> The findings of many studies suggest that sex is an issue of conflict that rarely elicits open and honest communication between parents and adolescents, and that a general lack of rapport between parents and adolescents contributes to their difficulty in communicating about sex.<sup>70</sup> In many instances, therefore, compelled parental involvement in the abortion decision is not likely to be constructive.

**C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion.**

The scientific evidence also fails to lend any support to the States' assumptions that the psychological sequelae of abortion are more severe for an adolescent than for an adult and that forced parental involvement is therefore necessary to ensure the continuing psychological well-being of the adolescent.

**1. *Adolescents who choose to abort are not less stable psychologically than other adolescents.***

The increasingly early biological maturation of adolescents is well documented.<sup>71</sup> A majority of individuals become sexually active during adolescence.<sup>72</sup> Indeed, 40% of today's 20-year-old women have had at least one

<sup>69</sup> Rozema, *supra* note 35, at 532; Bennett & Dickinson, *Student-parent Involvement in sex, birth control and venereal disease education*, 16 J. Sex Research 114, 115 (1980).

<sup>70</sup> *Id.* Parents, not surprisingly, generally disapprove of their children's premarital sexual relations. Marsman & Herold, *Attitudes Toward Sex Education and Values in Sex Education*, 35 Fam. Relations 357 (1986).

<sup>71</sup> Rauh, Johnson, & Burket, *The Reproductive Adolescent*, 20 Pediatric Clinics of North America 1005 (1973).

<sup>72</sup> Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 Am. Psychologist 89 (1987).

pregnancy during their teen years.<sup>73</sup> And there is no empirical support for the supposition that adolescents seeking abortions are drawn from an especially psychologically or emotionally vulnerable subpopulation. Unmarried adolescents who seek abortions are similar in psychological makeup to other adolescents.<sup>74</sup> Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background and academic achievement.<sup>75</sup> Adolescents who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity—greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism.<sup>76</sup> Thus, not only is it unproven that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually shown to be the case.

**2. Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion.**

More generally, the evidence does not support this Court's assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1980). Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.<sup>77</sup>

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<sup>73</sup> Russo, *supra* note 38, at 63.

<sup>74</sup> Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 *Am. J. Orthopsychiatry* 432, 436 (1980) [hereinafter Olson].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Marecek, *Consequences of Adolescent Childbearing and Abortion in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES* 96

When women experience regret, depression, or guilt following an abortion, such feelings are mild and diminish rapidly.<sup>78</sup> When serious problems do occur, they are most likely to occur among women with prior histories of psychiatric problems.<sup>79</sup> With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient."<sup>80</sup> "Very few teenagers have severe psychiatric complications after induced abortion."<sup>81</sup>

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion for adolescents are usually positive, with significant diminution of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief."<sup>82</sup> Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress,

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(G. Melton ed. 1986) [hereinafter *Consequences*]; Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES* 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 *Psychology of Women Q.* 79 (1976) [hereinafter *Shusterman*]. See generally Brief for Amicus Curiae American Psychological Association in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

<sup>78</sup> Adler & Dolcini, *supra* note 77, at 84.

<sup>79</sup> *Id.* See NAS REPORT, *supra* note 10, at 195.

<sup>80</sup> Olson, *supra* note 74, at 440.

<sup>81</sup> Cates, *Adolescent Abortions in the United States*, 1 *J. Adolescent Health Care* 18 (1980); see C. CHILMAN (ed.), *ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY* (NIH Pub. No. 79-1426) (1978); Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 15 *J. Nervous and Mental Disorders* 155 (1974); see also David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 *Fam. Plan. Persp.* 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). See generally NAS REPORT, *supra* note 10, at 195-196.

<sup>82</sup> Adler & Dolcini, *supra* note 77, at 84 (and references cited therein).

as measured by standardized psychological tests.<sup>83</sup> Moreover, there is no evidence to support the proposition that any distress resulting from an adolescent's abortion would be mitigated by involuntary parental notification.

An abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their education, to be relegated to low-paying jobs, to be single parents, and to be on welfare,"<sup>84</sup> as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital instability.<sup>85</sup>

As the National Academy of Sciences recently reported, "on the basis of existing research . . . *the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious psychological harm as a result of an abortion is not supported.*"<sup>86</sup> Moreover, as noted above, those who need support and can get it from their parents typically seek it voluntarily. For these reasons, it is unsurprising that bypass proceedings invariably result in a ruling favorable to the minor.

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<sup>83</sup> Shusterman, *supra* note 77.

<sup>84</sup> NAS REPORT, *supra* note 10, at 18.

<sup>85</sup> *Consequences*, *supra* note 77, at 96. Regardless of one's moral position on abortion itself, and *amici* take none herein, the data strongly support the position that abortion is more psychologically benign than carrying to term for almost all adolescents.

<sup>86</sup> NAS REPORT, *supra* note 10, at 277 (emphasis added). "Perhaps the most authoritative form of post-publication review of scientific findings occurs when organizations such as the National Academy of Sciences . . . appoint panels of the most distinguished scientists in the field, provide them with ample time and resources, and commission a state-of-the-art evaluation of a given area of research." Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 501 (1986).



## CONCLUSION

Both the Minnesota and Ohio statutes impose significant burdens on adolescents' right to choose whether to abort or carry to term without significantly advancing any of the asserted state interests. In these circumstances, even parental notification statutes that provide for judicial bypass impose unconstitutional burdens on mature adolescents and adolescents whose interests would be better served by not notifying their parents. The judicial process is invariably stressful and virtually always affirms the minor's choice to proceed without parental involvement. Moreover, to mandate parental notification and *not* provide for judicial bypass would be intolerable, leaving minors mature enough to decide for themselves, and those whose best interests would be injured substantially by parental notification, with a choice between suffering this statutorily imposed injury or carrying to term. Such a fearful choice cannot constitutionally be imposed without a substantial reason.

*Amici* therefore respectfully submit that the decision of the Eighth Circuit should be reversed and the Minnesota statute struck down in its entirety, and that the decision of the Sixth Circuit concerning the Ohio statute should be affirmed.

Respectfully submitted,

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