No. 06-3188

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AID FOR WOMEN, *et. al.,*
Plaintiffs-Appellees,

v.

NOLA FOULSTON, DISTRICT ATTORNEY,
18TH JUDICIAL DISTRICT OF KANSAS, *et. al.,*
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION

in support of Defendants-Appellants
Supporting Reversal

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INTEREST OF THE *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501c(3) public interest law firm. Our donors and supporters have a vital interest in issues pertaining to the sanctity of life and the family. They believe that states maintain the right to exercise the police power in support of protecting children and families and that the Kansas legislature has reasonably attempted to do so.

This Brief is filed pursuant to the consent of Counsel of Record for the Defendants-Appellants and the accompanying Motion for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

I. THE KANSAS STATUTE REQUIRING NOTIFICATION OF A MINOR'S SEXUAL ACTIVITY IS VALID BECAUSE THE STATE HAS LEGITIMATE INTERESTS IN PROTECTING MINORS AND THAT PROTECTION DOES NOT INTERFERE WITH MINORS' SETTLED PRIVACY RIGHTS.

The court below incorrectly rejected the constitutionality of the Kansas statute, Kan. Stat. Ann. §38-1522 (2004), requiring medical personnel to notify state officials of a minor's sexual activity. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1116 (D. Kan. 2006). This Court should recognize that the constitutional rights of children are not the same as those of adults regarding sexual activity and reproductive issues. The state has a legitimate interest in protecting minors, especially in the arena of health care issues. Further, this Court should

look to a recent decision from the United States District Court of the Eastern District of New York that distinguishes between the varying levels of privacy rights under different notification requirements. As that court held, the full extent of a minor's rights to privacy reaches a minor's decision to conceive or bear a child, and that right is not tantamount to the right to the confidentiality of a minor's sexual activity. *Port Washington Teachers' Ass'n v. Board. of Education.*, 2006 U.S. Dist. LEXIS 1904, at *22 (E.D.N.Y. Jan. 4, 2006). Similarly here, the Kansas policy does not implicate other settled privacy rights of minors concerning pregnancy; this Court should recognize the state's interests in limiting privacy rights for minors concerning sexual activity.

While the Supreme Court has not yet ruled on a minor's right to privacy of sexual activity, the Court has upheld states' interests in regulating minors' rights in other health care decisions. For example, the Supreme Court has consistently and unequivocally declared that states have a compelling interest in encouraging parental involvement in decisions related to pregnancy except in those extreme cases in which such involvement would be detrimental to the child. *Ayotte v. Planned Parenthood of New England*, 126 S. Ct. 961 (2006); *Lambert v. Wicklund,* 520 U.S. 292 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1990); *H.L. v.*

Matheson, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1976).

The Supreme Court has also declared that states have a "'strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" *Ayotte v. Planned Parenthood of New England*, 126 S. Ct. 961, 966 (2006) (quoting *Hodgson v. Minnesota,* 497 U.S. 417, 444-45 (1990)).

Further, even in *Bellotti*, in which the Supreme Court invalidated a Massachusetts abortion statute because it did not provide sufficient judicial remedies to a minor seeking an abortion, the Supreme Court declared that as applied to abortion, the constitutional rights of children could "not be equated with those of adults." 443 U.S. at 634. The Court emphasized the necessity of protecting children by not giving them the same rights as adults in certain situations because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children." *Id*.

Thus, a substantial body of Supreme Court precedent demonstrates that states can protect children by not extending them the full freedoms and rights as adults, particularly in decisions involving health care and reproduction. A minor's rights are not always equal to an adult's because of their inability to make fully

informed decisions. *Id.* While the court below purported to rely upon two of this Court's cases to support a minor's "legitimate expectation of privacy in [her] intimate sexual and confidential medical information," *Aid for Women,* 427 F. Supp. 2d at 1105 (citing *Eastwood v. Dept. of Corrections*, 846 F.2d 627, 631 (10th Cir. 1988) and *ALA v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994)), those cases do not address protection of minors. Both of those cases are insufficient to address the rights of minors concerning sexual confidentiality since *Eastwood* concerns an adult sexual harassment lawsuit, 846 F.2d 627, and *ALA* deals with disclosure of an adult's potential HIV infection, 26 F.3d 989. Since minors are particularly susceptible to making immature decisions regarding their own sexual and medical health, this Court should not rely on *Eastwood* and *ALA* to grant the same expectation of privacy to minors.

Further, while this Court concluded that "the right of informational privacy extends to minors," it did not define the exact parameters of those rights. *Aid for Women v. Foulston,* 441 F.3d 1101, 1116-17 (10th Cir. 2006). This Court cited *Carey v. Population Services International,* 432 U.S. 678 (1977), *Planned Parenthood of Southern. Ariz. v. Lawall*, 307 F.3d 783, 789 (9th Cir. 2002), *Doe v. Attorney General of the United States*, 941 F.2d 780, 796 (9th Cir. 1991), *Doe v. Irwin*, 615 F.2d 1162, 1166 (6th Cir. 1980), and *Wynn v. Carey*, 582 F.2d 1375, 1384 (7th Cir. 1978) to support its conclusion that a minor has informational

privacy rights. However, his Court noted in footnote 17 that it did not need to determine the exact parameters of those rights and explicitly noted that the state does have the authority to regulate the rights of children. *Aid for Women,* 441 F.3d at 1117.

Each of the cases mentioned above concern the extension of informational privacy in the issues of abortion and contraceptives. Thus, these cases do support this Court's conclusion that minors have informational privacy rights. *Id.* None of those cases, however, led this Court to conclude that the Plaintiffs would likely succeed on the merits. *Id.* at 1116. The reason, of course, is that those cases do not speak to the privacy rights implicated by the Kansas statute.

However, helpful insight can be found elsewhere. In January 2006, the same month that this Court remanded the instant case, the United States District Court for the Eastern District of New York decided *Port Washington Teachers' Ass'n v. Board. of Education.*, 2006 U.S. Dist. LEXIS 1904, at *22 (E.D.N.Y. Jan. 4, 2006), a decision that discussed helpful distinctions in minors' informational privacy rights under various types of notification statutes. Although Court below did interact with this Court's reasons for deciding that the Plaintiffs would not likely prevail on the merits, *Aid for Women,* 441 F.3d at 1114-16, it did not interact with *Port Washington's* helpful distinctions.

That case addresses parameters on minors' rights of informational privacy that will be useful in the case at hand. In *Port Washington,* the court addressed the difference between a minor's right to privacy under abortion notification statutes and her right to privacy under pregnancy notification laws. 2006 U.S. Dist. LEXIS 1904, at *21. That court distinguished the cases concerning the right to privacy in abortion and contraception. The *Port Washington* court held that a parental notification requirement for a pregnant minor was valid for two reasons: 1) The rights of privacy extended in abortion and contraception cases are limited to those specific concerns; and 2) the requirement of notification of sexual activity does not interfere with the minor's ultimate right to seek an abortion. *Id.*

In addressing the limitations of the abortion and contraception cases, the court rejected the plaintiff's reliance on *Hodgson* and *Bellotti*. *Port Washington,* 2006 U.S. Dist. LEXIS 1904, at *19. The plaintiff cited those cases for the proposition that the right to privacy in making health care decisions regarding pregnancy should extend to minors and should also be subject to a judicial bypass requirement, similar to abortion notification statutes. *Id.* The *Port Washington* court rejected the plaintiff's reliance on *Hodgson* because that "Court's holding was limited to the 'decision to conceive or to bear a child.'" *Id.* (quoting *Hodgson*, 497 U.S. at 434). That court held that since the Supreme Court had never addressed the issue of pregnancy notification, it would be improper to stretch the

holding of the abortion notification cases to extend the privacy right to pregnancy notifications. *Id*. at *20

> The Court does not accept [the] attempt to blur the distinction between the well-settled protections that apply to a minor seeking an abortion and the unrecognized protections . . . to prevent the disclosure of a minor's pregnancy to her parents. No Court has created such a right to privacy for minors, and the Court here declines to do so as well.

Id. at *21. Further, the rights of privacy in those cases are limited; a general right of privacy is not extended to minors. Just as the rights of privacy did not extend to parental notification of pregnancy in *Port Washington*, so here this Court should distinguish the line of abortion and contraception cases to find that the instant notification policy is not implicated by those limited privacy rights.

In addition to the holding that a minor's privacy rights concerning abortion are limited to abortion per se, the *Port Washington* court also held that the abortion notification statutes were inapplicable in that case because the notification requirement did not interfere with the minor's right to terminate the pregnancy. *Id.* at *22. "The distinction between notification of abortion and notification of pregnancy is not a formalistic one. Parental notification of a student's pregnancy does not intrude on the student's right to ultimately seek an abortion or to carry her fetus to term." *Id.* Because the notification policy in that case did not impose a substantial burden on the

minor's ultimate rights, the court held that the abortion notification requirements were inapplicable to parental notification of pregnancy. *Id.*

The notification statute in the case at hand similarly does not intrude on a minor's right to make her own decisions regarding a future pregnancy. The Kansas statute requires mere notification of a minor's sexual activity, and does not impose restrictions on the minors' other decisions. The New York District Court found that the pregnancy notification statute is one step removed from the rights granted to minors under the abortion notification; the privacy rights granted to a minor's abortion decisions were not implicated in the notification of a minor's pregnancy. This Court should find that the sexual activity notification statute is a second step further removed from the pregnancy notification statute in *Port Washington.* The instant statute does not implicate a minor's right to seek contraceptives, become pregnant, or ultimately seek an abortion. Because the state has an interest in protecting minors and because the statute does not impose a substantial burden on the minor's right to privacy, this Court should uphold the statute.

CONCLUSION

For the forgoing reasons, this Court should find that the Kansas notification statute is valid and does not violate a minor's constitutional right to privacy.

Respectfully submitted

This 30th day of November, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Aid for Women v. Foulston*, No. 06-3188, on all required parties by emailing an electronic version and by depositing two paper copies in the United States mail, first class postage, prepaid on November 30, 2006, addressed as follows:

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CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that the PDF version of this motion has been scanned for viruses using Security Shield Virus Scan, and that it is virus free.

I hereby certify that no privacy redactions were required.

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