CENTER FOR REPRODUCTIVE RIGHTS

April 26, 2011

VIA FACSIMILE AND FEDERAL EXPRESS

The Honorable Brian D. Schweitzer
Governor of Montana
Montana State Capitol Bldg.
P.O. Box 200801
Helena, MT 59620-0801

Re: Senate Bill 97

Dear Governor Schweitzer:

The Center for Reproductive Rights strongly opposes Senate Bill 97 and urges you to veto this measure. Senate Bill 97 would invade minors' privacy, restrict young women's access to essential reproductive healthcare, and put some minors in danger by requiring physicians to notify a parent of any minor under the age of sixteen seeking an abortion 48 hours before the procedure. This bill is unconstitutional under both the Montana and United States Constitutions, and a similar law has already been struck down by a Montana court in *Wicklund v. State*.[1] Moreover, the bill incorporates an "emergency" effective date, which will place additional burdens both on minors seeking abortions and on a court system that is not yet prepared to carry out the judicial bypass procedures required by the bill.

The Center for Reproductive Rights is a non-profit advocacy organization that seeks to advance reproductive freedom as a fundamental human right. A key part of our mission is ensuring that women throughout the United States have meaningful access to high-quality, comprehensive reproductive health care services. As a part of that mission, we have litigated cases all over the United States that secure the rights of women to have safe and legal abortions, including in Montana. In light of our knowledge and experience, we urge you to veto Senate Bill 97 because it violates minors' constitutional rights under the Montana Constitution, contradicting Montana precedent, and violates minors' rights under the United States Constitution.

I. Senate Bill 97 Would Violate Minors' Constitutional Rights Under the Montana Constitution

Under Senate Bill 97, except in extremely limited circumstances, 48 hours before a minor under sixteen is permitted to obtain an abortion, a physician would personally have to notify one

[1] No. ADV 97-671 (Mont. 1st Dist. Ct.) (order dated Feb. 23, 1999).

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of her parents. The minor could only avoid involving her parents in her decision by going to court and seeking judicial waiver of the notification requirement. A court would not be permitted to authorize a waiver of notification unless it found *both* that the minor was competent to decide whether to have an abortion *and* that the abortion was in her best interests, or that there was evidence that the minor was a victim of abuse perpetrated by her parent(s), or that notification of her parent would not be in her best interests. Notably, the standard would not permit the court to grant authorization for a minor who was mature or competent to make the decision without parental involvement – the court must also find that the abortion is in the minor's best interests.

These requirements intrude on minors' constitutionally-protected right to privacy, and carry with them inherent delay and the potential for risks to health associated with that delay. Similar requirements have already been struck down by a Montana court under the strong protections for privacy found in the Montana Constitution. The Montana Supreme Court has held that the state constitution contains "one of the most stringent protections of its citizens' right to privacy in the country"[2]—unquestionably stronger than that contained in the United States Constitution[3]—including strong protection for a woman's right "to seek and to obtain . . . a pre-viability abortion[.]"[4] Because "where the right to privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution[,] the government must demonstrate a 'compelling state interest' for infringing that right."[5] That compelling interest must be "at a minimum, some interest of the highest order . . . and not otherwise served."[6] In *Wicklund*, the court held that "minors, including pregnant minors, have [the same] fundamental right of individual privacy."[7]

As the court held in *Wicklund*, there is no compelling state interest in requiring a minor to notify her parents of her intention to seek an abortion that would outweigh the minor's right to privacy.[8] In Senate Bill 97, the legislature has alleged that the state has a set of interests in this intrusion—but the interests asserted by the legislature now are the same as those asserted in the law struck down in *Wicklund*,[9] and are still insufficient to outweigh the minor's rights. In fact, the court there found that most of these interests were directly contradicted by the facts in evidence. For example, the state asserted then and asserts now that the notification would "foster[] family unity and preserv[e] the family as a viable social unit."[10] However, as the court

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[2] *Armstrong v. State*, 989 P.2d 364, 373 (Mont. 1999); *see also State v. Burns,* 803 P.2d 1318, 1320 (Mont. 1992).
[3] *Gryczan v. State*, 283 Mont. 433 (1997); *see also Armstrong*, 989 P.2d at 373.
[4] *Armstrong*, 989 P.2d at 370.
[5] *Id.* at 376.
[6] *Id.* at 376 n.6 (quotation omitted).
[7] *Wicklund*, No. ADV 97-671, at 5.
[8] *Id.* at 8-13.
[9] *Compare Wicklund*, No. ADV 97-671, at 8 (state interests of "(a) protecting minors against their own immaturity; (b) fostering family unity and preserving the family as a viable social unit; (c) protecting the constitutional rights of parents to rear children who are members of their household; and (d) reducing teenage pregnancy and abortion") *with* Senate Bill 97, §2(2) (citing same state interests).
[10] Senate Bill 97, §2(2)(b).

recognized, in Montana, as well as throughout the United States, in the majority of cases when minors obtain abortions, one or both of the minor's parents are aware of it. For those minors who feel they cannot involve a parent, many involve another trusted adult. Additionally, the younger the minor, the more likely she will be to involve a parent in her decision to obtain an abortion.

While most minors do involve their parents in their abortion decision, "[a]dolescents who choose not to tell their parents about their pregnancy often have good reasons for doing so. They are often accurate in their predictions of their parents' reactions."[11] Senate Bill 97 would force minors in abusive homes or facing other difficult circumstances to involve at least one parent in their decision to have an abortion or to seek refuge in the courts. In *Wicklund*, the court found that the state's interest in requiring parental involvement was insufficient in such cases.[12] It also found that the judicial bypass mechanism created by the law would not adequately protect minor's constitutional rights and itself could violate minors' right to privacy: Minors face a number of obstacles to accessing youth courts while preserving their privacy, such as few opportunities for making private phone calls or receiving private return calls from the court, difficulty in arranging legitimate excuses for missing school, and difficulty in arranging transportation to and from the hearings.[13] Moreover, the requirement for parental notification or a court order forces minors to delay obtaining an abortion and, although abortion is a very safe procedure, the risks increase over the course of pregnancy.[14] And as a result of that delay, some minors will be unable to obtain an abortion because of increased cost or because abortion services are no longer available.

The parental notice requirement in Senate Bill 97 also restricts minor's fundamental right to privacy without enhancing the protection of minors, thus violating the express protection of minor's fundamental rights found in the Montana Constitution.[15] In *Wicklund,* the court recognized that a parental notice requirement cannot possibly enhance the protection of minors because, among other reasons, "adolescents are as competent as adults in considering abortion,

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[11] *Wicklund*, No. ADV 97-671, at 10. The court held that "in those cases, parental involvement is not in the minors' best interests." *Id.* at 13. Studies have shown, for example, that "[m]any adolesents who prefer to avoid parental involvement are in dysfunctional families and fear parental retribution." Robert L. Ohsfeldt & Stephan F. Gohmann, *Do Parental Involvement Laws Reduce Adolescent Abortion Rates?*, 12 Contemp. Econ. Policy 65, 66 (1994). Moreover "[a]dolescents in every age group were as competent as adults in considering" whether to have an abortion. *Id.* at 11.

[12] *Id.* at 13.

[13] *Id.* at 7 (noting that "while attempting to defend and maintain their privacy, [minors] are compelled to tell their stories to the judge, a stranger").

[14] E. Steve Lichtenberg, MD and David A. Grimes, MD, Surgical complications: Prevention and management, *in* Management of Unintended Pregnancy and Abnormal Pregnancy 224 (Maureen Paul et al. ed. 2009); L. Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, 103 J. Obstetrics & Gynecology 729, 732, 736 (2004).

[15] *Wicklund*, No. ADV 97-671, at 13; *see* MONT. CONST. art. II, § 15. *See also Matter of S.L.M*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (Mont. 1997). In *S.L.M.*, the court held that a state sentencing law that that could put juveniles at risk of serving adult sentence in addition to their juvenile disposition violated the juvenile rights clause by "reducing, rather than enhancing, a juvenile's rights as compared to an adult's." 287 Mont. at 36, 951 P.2d at 1373.

the medical risks of abortion are considerably lower than for pregnancy and childbirth, and in general adolescents show no substantial psychological effects from abortion."[16]

Finally, the bill would also violate minors' equal protection rights under the Montana Constitution. [17] Under Montana law, minors are able to consent to a range of reproductive healthcare, including contraception and pregnancy care, without parental involvement.[18] By imposing a parental involvement requirement on pregnant minors seeking abortion, but not on pregnant minors seeking medical treatment for pregnancy, this bill would violate the Montana Constitution's strong equal protection requirements.[19]

In *Wicklund*, the court ultimately found that the asserted state interests were insufficient to justify the violations of minors' fundamental rights to equal protection and privacy guaranteed by the Montana Constitution. While Senate Bill 97 would apply to minors under sixteen, as opposed to minors under eighteen, the constitutional analysis remains the same: the bill raises identical constitutional concerns and would doubtless meet with the same result in court.

II. Senate Bill 97 Would Violate Montana Minors' Rights Under the United States Constitution

Senate Bill 97 would also violate minors' rights under the United States Constitution. While the United States Supreme Court has upheld parental involvement laws under the U.S. Constitution, which is less protective of both privacy rights and minors' rights than the Montana Constitution, the Court has only upheld such laws where they have contained adequate judicial bypass procedures.[20] Those decisions and cases in other federal courts have established that a constitutionally adequate judicial bypass procedure must allow the minor to show *either* that she is mature enough and well enough informed to make her abortion decision, *or* that the desired abortion would be in her best interests.[21] Under Senate Bill 97, the court is not permitted to grant

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[16] *Wicklund*, No. ADV 97-671, at 14. Moreover, the judicial bypass option does little to enhance minors' rights, as it provides "little, if any, protection and, in fact, increases stress, delay and potential medical consequences." *Id.*

[17] *See* MONT. CONST. art. II, § 4.

[18] *See* Mont. Code Ann. § 41-1-402 (2009). Parenting minors may also consent to treatment for their children. *Id.* at (3).

[19] *See Wicklund*, No. ADV 97-671, at 15 (noting that "the Act's state interests and purposes create unequal and unfair application to pregnant minors who want to terminate their pregnancy, when compared with the class of pregnant minors who choose not to do so" and that "the minor who is presumed by the Act to be too immature to decide to have an abortion will, if she continues her pregnancy, become the mother of an infant, fully responsible for its life and for decisions about its medical and other care, without statutory requirements for parental involvement").

[20] Although the U.S. Supreme Court upheld the law at issue in *Wicklund* under the federal constitution, and the state court later struck it down under the state constitution, the key relevant difference between that law and Senate Bill 97 is in the judicial bypass standard, which in SB 97 does not reflect the federal constitutional requirements. *See Lambert v. Wicklund*, 520 U.S. 292 (1997). *See also Bellotti v. Baird*, 443 U.S. 622, 643-644 (1979); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511 (1990).

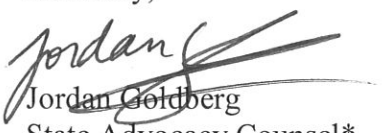
[21] *See, e.g. Lambert,* 520 U.S. at 295 (1997) (reaffirming requirements for parental consent bypass articulated in *Bellotti II* and stating that parental notice bypass that satisfied those requirements was not unconstitutional under the federal constitution); *Bellotti v. Baird*, 443 U.S. 622, 643-644 (1979). While the Supreme Court has never directly addressed whether a parental notice statute must meet the same bypass requirements as a parental consent statute, it

a minor who is mature enough and competent enough to make her own decision a waiver of the notice requirement unless the court also finds that the abortion itself is in her best interests. This standard is insufficient to protect minor's privacy rights under the U.S. Constitution.

III. Conclusion

Senate Bill 97 would deprive Montana minors of access to safe, legal abortions in violation of the Montana Constitution's strong protections for equal protection, privacy, and minors' rights. Moreover, because it would become effective immediately, it would impose additional significant burdens on both minors and the courts. For these reasons, we urge you to veto this harmful measure.

Sincerely,



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has never upheld any parental involvement statute that did not meet these standards. Moreover, other federal courts have explicitly held that both parental consent and parental notice statutes must provide the same bypass procedures. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (parental notice statute must have bypass mechanism meeting requirements applicable to parental consent statutes; *Akron Ctr. for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988) (holding that notice statute must contain bypass procedure that meets *Bellotti II* standards), *rev'd sub nom on other grounds Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (declining to decide if notice statute must have bypass mechanism because Court found that bypass mechanism contained in the statute met *Bellotti II* requirements); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (finding Indiana parental notice statute unconstitutional because bypass procedures did not meet standards mandated for consent statutes).