Golden Gate University Law Review

Volume 25
Issue 3 *Women's Law Forum*

Article 2

January 1995

American Academy of Pediatrics v. Lungren: California's Parental Consent to Abortion Statute and the Right to Privacy

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COMMENT

AMERICAN ACADEMY OF PEDIATRICS v. LUNGREN: CALIFORNIA'S PARENTAL CONSENT TO ABORTION STATUTE AND THE RIGHT TO PRIVACY

> This scheme forces a young woman in an already dire situation to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a black-robed stranger. For such a woman, this dilemma is more likely to result in trauma and pain than in an informed and voluntary decision.[1]

I. INTRODUCTION

In *American Academy of Pediatrics v. Lungren*,[2] hereinafter *American Academy of Pediatrics II*,[3] the First District

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1. Hodgson v. Minnesota, 497 U.S. 417, 479 (1990) (Marshall, J., concurring in part and dissenting in part).

2. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (per Stein, J; the other panel members were Newsom, Acting P.J., and Dossee, J.), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). The American Academy of Pediatrics is a group of health care providers. Other named plaintiff-respondents include the California Medical Association and the American College of Obstetricians and Gynecologists. Defendant-appellant Daniel E. Lungren was the Attorney General for the State of California at the time of publication. District Attorneys for all counties in California are also named defendant-appellants.

3. American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Ct. App. 1989), *remanded sub nom.* American Academy of Pediatrics v. Lungren, No. 884-574, slip op. (Cal. Super. Ct. 1992), *aff'd*, 32 Cal. Rptr. 2d 546 (Ct. App. 1994), *modified*, 94 C.D.O.S. 5184 (Cal. Ct. App. 1994), *reh'g denied*, 1994 Cal. App. LEXIS 813 (Cal. Ct. App. Aug. 1, 1994), *review granted*, 882 P.2d 247 (Cal.

Court of Appeal of California unanimously held that California's parental consent law for minors seeking abortions[4]

Sept. 29, 1994). Because this case was previously heard at the California Court of Appeal with the name American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Ct. App. 1989), *see infra* notes 21-27 and accompanying text, the earlier case (263 Cal. Rptr. 46), will be referred to as *American Academy of Pediatrics I*, and the instant case will be referred to as *American Academy of Pediatrics II*.

4. CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1995). In significant portion, the parental consent statute reads:

> (a) Except in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian.
> (b) If one or both of an unemancipated, pregnant minor's parents or her guardian refuse to consent to the performance of an abortion, or if the minor elects not to seek the consent of one or both of her parents or her guardian, an unemancipated pregnant minor may file a petition with the juvenile court . . . . The hearing shall be set within three days of the filing of the petition . . . .
> (c) At the hearing on a minor's petition brought pursuant to subdivision (b) for the authorization of an abortion, the court shall consider all evidence duly presented, and order either of the following:
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> > (1) If the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition.
> > (2) If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, the court shall then consider whether performance of the abortion would be in the best interest of the minor. In the event that the court finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the event that the court finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition . . . .
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> (f) It is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail of up to 30 days, or both, for any person to knowingly perform an abortion on an unmarried or unemancipated minor without complying with the requirements of this section.

Id.

is unconstitutional.[5] The court of appeal found that the parental consent law violates the right to privacy explicitly guaranteed by the California Constitution.[6]

In evaluating the constitutionality of the statute, the court of appeal applied a test recently mandated by the California Supreme Court for all right to privacy cases.[7] The court of appeal affirmed the judgment of the trial court and sustained a permanent injunction against enforcement of the parental consent law.[8] The decision confirmed that minors share in the protections of the California Constitution's right to privacy.[9] Nevertheless, in late September, 1994, the California Supreme Court granted the State's petition requesting review of the court of appeal's decision.[10]

This comment will discuss the background right to privacy jurisprudence,[11] examine the grounds under which the court of appeal decided the case,[12] and review appellants'[13] and respondents' arguments.[14] Based upon the opposing parties' arguments and controlling precedent, the author will explain why the California Supreme Court should affirm the court of appeal's decision.[15]

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5. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 548.

6. *Id.* at 555.

7. The court of appeal followed the analysis set forth in Hill v. NCAA, 865 P.2d 633 (Cal. 1994). *Hill* involved a claim by a college athlete that her right to privacy under the California Constitution was violated by mandatory drug testing policies of the NCAA. The California Supreme Court held that it was improper for *all* right to privacy cases to be analyzed under a compelling interest standard. Instead, the supreme court devised a three-step balancing test to determine whether a violation of the right to privacy is justified. *See Hill*, 865 P.2d at 654-56. *See infra* notes 97-115 and accompanying text for a discussion of the impact of *Hill* on *American Academy of Pediatrics II*.

8. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559.

9. *See id.* at 549.

10. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d 546, *review granted*, 882 P.2d 247 (per Lucas, C.J., Kennard, J., Arabian, J., and Baxter, J.) (Cal. Sept. 29, 1994).

11. *See infra* notes 37-88 and accompanying text.

12. *See infra* notes 91-123 and accompanying text.

13. *See infra* notes 125-179 and accompanying text.

14. *See infra* notes 181-222 and accompanying text.

15. *See infra* notes 223-274 and accompanying text.

II. FACTS AND PROCEDURAL HISTORY OF *AMERICAN ACADEMY OF PEDIATRICS II*

In 1987, the California Legislature passed Assembly Bill 2274.[16] The bill required a minor seeking an abortion to obtain the written consent of one of her parents.[17] In the alternative, the minor could petition the juvenile court for permission to proceed with the abortion.[18] If the court determined that the minor was sufficiently mature to decide on her own whether to obtain an abortion, the court would be required to grant permission.[19] If however, the court found the minor to be too immature to make the decision, the court would make it for her.[20]

The newly enacted statute was challenged immediately by a group of health care providers and the American Civil Liberties Union.[21] These groups argued that the parental consent requirement violated California's constitutional guarantee of privacy.[22]

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16. 1987 Cal. Stat. 1237 (amending CAL. CIV. CODE § 34.5 and adding CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1995)). *See supra* note 4 for relevant text from the parental consent statute.

17. CAL. HEALTH & SAFETY CODE § 25958(a) (West Supp. 1995). *See supra* note 4 for relevant text from the parental consent statute.

18. *Id.* § 25958(b). *See supra* note 4 for relevant text from the parental consent statute.

19. *Id.* § 25958(c)(1). *See supra* note 4 for relevant text from the parental consent statute.

20. *Id.* § 25958(c)(2). *See supra* note 4 for relevant text from the parental consent statute.

21. *See* American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Ct. App. 1989), *remanded sub nom.* American Academy of Pediatrics v. Lungren, No. 884-574, slip op. (Cal. Super. Ct. 1992), *aff'd*, 32 Cal. Rptr 2d 546 (Ct. App. 1994), *modified*, 94 C.D.O.S. 5184 (Cal. Ct. App. 1994), *reh'g denied*, 1994 Cal. App. LEXIS 813 (Cal. Ct. App. Aug. 1, 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). *See supra* note 3 for an explanation of the titles used to describe the two appearances of this case before the First District Court of Appeal of California.

The American Civil Liberties Union is a public interest group involved with issues concerning constitutional protections.

22. *See American Academy of Pediatrics I*, 263 Cal. Rptr. at 51 n.5. Plaintiffs asserted that the statute violated rights to informational and autonomy privacy, as well as the right to equal protection. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559 app.

The superior court granted a preliminary injunction against enforcement of the statute,[23] and the State appealed. The court of appeal affirmed the preliminary injunction and remanded the case to superior court to determine if the statute met the strictures of California's Constitution.[24] The court of appeal instructed the superior court that the state could justify any infringement of the fundamental right to privacy only if the parental consent statute furthered a compelling interest.[25] This interest must be one in which "the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights."[26] Finally, the court of appeal required that there be no less burdensome alternatives to the statute.[27]

On remand, the State asserted several interests. Specifically, the trial court considered whether the statute furthered state interests in "the medical, emotional and psychological welfare of minors . . . . [Other stated interests included] reducing the teenage pregnancy rate, and . . . preserving and fostering the parent-child relationship."[28] The trial court found that while the state's interests were all compelling, the statute failed to further any of them.[29] In fact, the court found the legislation would injure most of these interests, if it had any impact on them at all.[30]

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23. *See American Academy of Pediatrics I*, 263 Cal. Rptr. at 47.

24. *See id.* at 54. The court of appeal noted that the California Constitution affords more protection for privacy than the United States Constitution: "Since the time of its enactment, California's constitutional right to privacy has been recognized as being broader than the federal right." *Id.* at 51.

25. *See id.* at 54.

26. *Id.* at 55 (quoting Bagley v. Washington, 421 P.2d 409, 415 (Cal. 1966)).

27. *See American Academy of Pediatrics I*, 263 Cal. Rptr. 46, 55.

28. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 550 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

29. *See id.*

30. *See id.* The trial court admitted evidence that minors suffer no more, and often less long-term psychological harm from obtaining an abortion than do adults. *See id.* at 559-62 app. Furthermore, the trial court found, the alternative to abortion, bringing the pregnancy to term, is statistically more dangerous to the minor than abortion. *See id.* The court also found that requiring minors to get parental permission would increase the physical and emotional danger to the minor. *See id.* The court heard evidence that a minor confessing her pregnancy to her parents is often subject to physical and emotional violence in the home. *See id.* According to the evidence at trial, the delay involved in going through the judicial process, as an alternative to obtaining parents' permission, also increases the danger to the

Based upon these findings, the trial court held that the statute violates the right to privacy found in Article I, section 1 of the California Constitution.[31] Thus, the court permanently enjoined enforcement of the statute.[32] On appeal, the court of appeal affirmed the judgment of the trial court, thereby upholding the permanent injunction.[33] The State filed a petition for review, which the California Supreme Court granted.[34] At the time of this writing, the parties were completing briefing, and the date for oral argument had not yet been determined.

III. BACKGROUND

The opposing parties in *American Academy of Pediatrics II* hold widely disparate views of the applicable law governing the case. Appellants argue that the standards promulgated by the United States Supreme Court should guide the California Supreme Court's determination of the statute's validity.[35] Respondents contend that the case must be decided by examining precedents of California courts interpreting the California Constitution.[36] A brief discussion of the background of these two perspectives underscores the ideological gulf separating

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minor; the longer the pregnancy progresses, the more dangerous obtaining an abortion becomes. *See id.*

31. *See id.* at 550. *See infra* notes 80-88 and accompanying text for a discussion of the "Privacy Initiative;" the California Constitution's explicit right to privacy.

32. American Academy of Pediatrics v. Lungren, No. 884-574, slip op. (Cal. Super. Ct. June 5, 1992), *aff'd*, 32 Cal. Rptr. 2d 546 (Ct. App. 1994), *modified*, 94 C.D.O.S. 5184 (Cal. Ct. App. 1994), *reh'g denied*, 1994 Cal. App. LEXIS 813 (Cal. Ct. App. Aug. 1, 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). The trial court also ruled that the statute violates the right to informational privacy and equal protection. *See id.* at 30, 39.

33. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559.

34. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d 546, *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

35. *See* Appellants' Opening Brief at 9, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). Appellants argue: "[T]he appropriate standard against which to measure parental involvement in an unemancipated minor's abortion decision making is the significant state interest." *Id.*

36. *See* Respondents' Answer to Petition for Review at 25, *American Academy of Pediatrics II* (No. A058627). Respondents argue: "California Courts have long recognized a special duty to construe California's constitutional provisions independent of any comparable federal rights, especially in the area of individual liberties." *Id.*

the parties' positions.

A. UNITED STATES SUPREME COURT CASES

The modern history of federal abortion cases began in 1973, with *Roe v. Wade*.[37] In *Roe*, the United States Supreme Court ruled that any statute prohibiting women from obtaining an abortion prior to the viability of the fetus violates their right to privacy under the United States Constitution.[38] This ruling invalidated the abortion law in Texas, as well as similar laws in many other states.[39]

Several states reacted to *Roe's* broad holding by passing legislation concerning peripheral abortion issues, such as waiting periods,[40] spousal notification,[41] and parental consent.[42]

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37. 410 U.S. 113 (1973). In *Roe*, a pregnant woman challenged a Texas statute that prohibited obtaining or performing abortions for any reason other than protecting the life of the mother. The Court reproduced the statute, in significant portion, which read:

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years . . . .

Roe, 410 U.S. at 117 (quoting TEX. PENAL CODE ANN. § 1191 (West 1968)).

38. *See Roe*, 410 U.S. at 114. The Court noted that there is no explicit right of privacy in the United States Constitution. *Id.* at 152. Instead, the Court cited the rights to privacy that have been found to implicitly exist in both the Ninth and Fourteenth Amendments:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153.

39. *See id.* at 118 n.2 for a list of other abortion statutes which were overturned or otherwise affected by *Roe's* holding.

40. *See, e.g.*, TENN. CODE ANN. § 39-15-202 (1991); KY. REV. STAT. ANN. § 311.726 (Baldwin 1991); 18 PA. CONS. STAT. ANN. § 3205 (Supp. 1994); OHIO REV. CODE ANN. § 2919.12 (Anderson 1993).

41. *See, e.g.*, R.I. GEN. LAWS § 23-4.8-2 (1989); KY. REV. STAT. ANN. § 311.735 (Baldwin 1991); 18 PA. CONS. STAT. ANN. § 3209 (1989).

42. *See, e.g.*, ALA. CODE § 26-21-4 (1992); ILL. ANN. STAT. ch. 720, para. 515

Through its analysis of cases challenging these statutes, the Court more closely defined the scope of the right to privacy as it applies to abortion.[43] Without overturning *Roe*, the Court thus narrowed a woman's privacy right to obtain an abortion.[44] Although the right to obtain an abortion prior to the viability of the fetus remained, the Court had opened the door for restrictive state legislation in peripheral areas.

1. *Parental Consent Statutes*

Beginning in the late 1970s, the United States Supreme Court heard a series of cases involving parental consent statutes.[45] In the first of these cases, *Planned Parenthood of Cent. Missouri v. Danforth*,[46] the Court struck down a parental consent statute,[47] holding that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[48] The Court found that the

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(Smith-Hurd 1993); IND. CODE ANN. § 16-34-2-4 (Burns 1993).

43. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (waiting period); Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (spousal notification).

44. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (waiting period); Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (spousal notification).

45. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

46. 428 U.S. 52 (1976). Planned Parenthood of Central Missouri and two physicians whose practice included performing abortions challenged the Missouri statute. *See id.* at 56.

47. *See* MO. ANN. STAT. § 188.020 (Vernon 1978). The statute provided a criminal penalty for physicians performing abortions, other than those abortions which were required to protect the life of the mother. The statute also required that the spouse of the woman seeking an abortion give written consent for the abortion and "the *written consent of one parent* or person in loco parentis of the woman *if the woman is unmarried and under the age of eighteen years . . . .*" *Id.* (emphasis added).

48. *Danforth*, 428 U.S. at 74. Regarding the spousal consent provision, the Court held that the state could not give the spouse such a unilateral veto: "[W]e cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." *Id.* at 70.

The Court applied the same reasoning to the parental consent provision:

> Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional author-

blanket parental consent provision at issue granted an absolute third party veto, and thus, violated the minor's constitutional right to privacy.[49] Nevertheless, the Court explained that states need only prove that parental consent statutes meet a significant state interest in order to stand.[50]

The Court clarified its view of the constitutional requirements for a valid parental consent statute in *Bellotti v. Baird*.[51] In *Bellotti*, the Court reviewed a statute containing a judicial bypass procedure as a substitute for parental consent.[52] The judicial bypass procedure allowed a minor whose parents refused consent to bring a suit in the superior court.[53] If the minor proved to the judge that an abortion was in her best interests, the judge had the authority to permit the abor-

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> ity to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Id. at 74.

49. *See id.* at 75. The Court explained: "The fault with [the parental consent provision] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction." *Id.*

50. *Danforth*, 428 U.S. at 75. Although the Court acknowledged that minors share the constitutional rights of adults, it concluded that states have greater discretion in regulating minors than adults: "The Court . . . long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. It remains, then, to examine whether there is any *significant* state interest in conditioning an abortion on the consent of a parent . . . ." *Id.* at 74-75 (citations omitted) (emphasis added).

51. 443 U.S. 622 (1979). William Baird, acting as the director of a parents group, a physician who performed abortions, and a pseudonymous pregnant minor going by the name "Mary Moe," challenged the statute as unconstitutional. *Id.* at 626. As quoted by the Court, the statute required, in part: "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required." *Id.* at 625 (quoting MASS. GEN. LAWS ANN., ch. 112, § 12S (West Supp. 1979)).

52. *Bellotti*, 443 U.S. at 643-44. The Court accepted the Supreme Judicial Court of Massachusetts' certification of several questions regarding the application of the statute as authoritative. First, the statute required parental notice in every case where it was possible. Second, the statute gave the judge the authority to refuse to grant permission for the abortion even when the minor had demonstrated that she had sufficient maturity to make the decision for herself. *Id.* at 631-32.

53. *Id.* at 625 (quoting MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979)) ("If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown . . . .").

tion.[54]

In rejecting the parental consent statute at issue in *Bellotti*, the Supreme Court held that the statute's judicial bypass procedure failed to adequately protect the rights of the minor.[55] The plurality, in what four concurring Justices called an "advisory opinion,"[56] described the constitutional requirements for a judicial bypass procedure that would sufficiently protect the privacy interests of the minor.[57] In the system de-

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54. *See Bellotti*, 443 U.S. at 630 (citing Baird v. Attorney General, 360 N.E. 2d 288, 293 (Mass. 1977)).

55. *Id.* at 651. The Court held:

> Although it satisfies constitutional standards in large part, [Massachusetts' parental consent law] falls short of them in two respects: First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.

Id.

56. *Id.* at 656 n.4. In his concurring opinion, in which Justices Brennan, Marshall and Blackmun joined, Justice Stevens noted that, "[u]ntil and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme." *Id.*

The same group of Justices argued that the Massachusetts statute permitted a unilateral third-party veto and thus fell under the holding of *Danforth*: "[N]o minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both her parents or a superior court judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto." *Id.* at 653-54.

57. *See Bellotti*, 443 U.S. at 647-48. The plurality explained:

> [E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. *If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.* If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

scribed, if a minor proved to the trial court that she was sufficiently mature to decide whether to have an abortion, the court would be required to grant permission.[58]

2. *Parental Notification Statutes*

Some states passed statutes requiring that parents be notified before their minor children could obtain an abortion.[59] The United States Supreme Court reviewed the constitutionality of several of these parental notification statutes.[60]

In the first of the parental notification cases, *H.L. v. Matheson*,[61] the Court noted that parental involvement in a minor's decision regarding abortion is desirable because parents can "provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."[62] Thus, the Court upheld the parental notification statute in that case.[63]

Id. (emphasis added).

58. *Id.*

59. Unlike parental consent statutes, parental notification statutes do not require that minors obtain the permission of a parent. *See, e.g.*, UTAH CODE ANN. § 76-7-305 (1995). So long as the specified number of parents have been notified of the minor's plans, she can act on her own decision. *See id.*

60. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (reviewing OHIO REV. CODE ANN. § 2919.12(b)(1) (1987), which allows a physician to perform an abortion on a minor only if he or she provided twenty-four hours notice to one of the minor's parents. In the alternative, the minor's adult brother, sister, stepparent, or grandparent could be notified as a substitute for the parent if the minor and the other relative each filed an affidavit stating that the minor feared physical, sexual, or severe emotional abuse from one of her parents. *See Akron Ctr.*, 497 U.S. at 507.); Hodgson v. Minnesota, 497 U.S. 417 (1990) (reviewing MINN. STAT. § 144.343(2)-(7) (1988), which provides: "[N]o abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified." *Hodgson*, 497 U.S. at 422.); H.L. v. Matheson, 450 U.S. 398 (1980) (reviewing UTAH CODE ANN. § 76-7-305 (1978), which provides: "To enable the physician to exercise his best medical judgment he shall . . . notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.").

61. 450 U.S. 398 (1980). *See supra* note 60.

62. *Matheson*, 450 U.S. at 411.

63. *Id.* at 413. The Court reasoned: "[T]he statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution." *Id.*

In *Hodgson v. Minnesota*,[64] however, the Court struck down a statute's requirement that *both* parents of a minor seeking an abortion be notified before the procedure can be performed.[65] The Court explained that the asserted benefits of parental notification could be met adequately without requiring notification of both parents.[66]

In *Ohio v. Akron Ctr. for Reprod. Health*,[67] decided on the same day as *Hodgson*, the Court held that any parental notification statute which includes a judicial bypass procedure that meets the standards set in *Danforth* and *Bellotti* is constitutional.[68] A majority of the Court in each of the parental notification cases adopted the "advisory opinion" from *Bellotti*, which set forth the elements of a constitutionally valid parental consent statute.[69]

3. *California Legislature's Response to Federal Jurisprudence*

In enacting its own parental consent statute, the California Legislature tailored its efforts to meet the requirements of *Danforth, Bellotti*, and their progeny.[70] These efforts led sev-

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64. 497 U.S. 417 (1990). *See supra* note 60.

65. *Hodgson*, 497 U.S. at 450. The Court stated: "[T]he requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest." *Id.* The Court emphasized that any legitimate state interest served by a two-parent notification requirement would be met adequately by notifying only one parent. *Id.* The Court noted the potential impact of the two-parent notification requirement in dysfunctional families, where it foresaw the possibility of physical and emotional abuse. *See id.* at 451 n.36.

66. *Id.* at 450.

67. 497 U.S. 502 (1990). *See supra* note 60 for a description of the relevant statute.

68. *Akron Ctr.*, 497 U.S. at 511. *See supra* notes 48-58 and accompanying text for a discussion of these standards. The Court acknowledged that parental notification statutes are not as intrusive as parental consent statutes. *Akron Ctr.*, 497 U.S. at 511. However, since the judicial bypass permitted by the statute at issue met the requirements of *Danforth* and *Bellotti*, the Court did not address the issue of whether parental notification statutes are exempted from the need for an adequate bypass procedure. *See Akron Ctr.*, 497 U.S. at 510.

69. *See, e.g.*, *Matheson*, 450 U.S. at 411; *Hodgson*, 497 U.S. at 420; *Akron Ctr.*, 497 U.S. at 511.

70. The legislature took its stated interests in passing the statute directly from the United States Supreme Court cases. Appellants' Opening Brief at 20-21, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994)

eral commentators to predict that the statute would meet a federal constitutional challenge.[71] Although the statute appears to pass federal constitutional muster, respondents in *American Academy of Pediatrics II* claim that conformity with federal standards is not the pertinent issue;[72] rather, they argue, the California Supreme Court should evaluate the statute under the right to privacy found in the California Constitution and related California cases.[73] Commentators have, for the most part, agreed that the statute would fail to withstand such a challenge under the California Constitution.[74]

(No. S041459). The California statute avoids the absolute third party veto that proved fatal to the statute in *Danforth*. Malena R. Calvin, Note, *The Constitutionality of California's Parental Consent to Abortion Statute*, 21 GOLDEN GATE U. L. REV. 591, 604 (1991). Calvin noted:

> Consistent with *Danforth*, California's statute does not impose an absolute veto power which may be exercised by someone other than the pregnant minor and her physician. The statute provides that if the minor's parents refuse to grant their consent, the minor may file a petition with the juvenile court for a hearing on whether she may avoid the parental consent requirement.

Id. The wording of the California statute, especially the judicial bypass procedure, tracks the language of the *Bellotti* plurality in a clear attempt to follow the "advisory opinion" issued in that case. *See supra* notes 51-58 and accompanying text for a discussion of *Bellotti*.

71. *See, e.g.*, Calvin, *supra* note 70; Gregory W. Herring, Comment, *Eroding Roe: the Politics and Constitutionality of California's Parental Consent Abortion Statute*, 20 PAC. L.J. 1167, 1191 (1989) (each predicting that the California parental consent statute would pass federal constitutional muster); *but see* Robert W. Lucas, Comment, *Aborting the Rights of Minors? Questioning the Constitutionality of California's Parental Consent Statute*, 19 PAC. L.J. 1487, 1507-10 (1988) (predicting that the California parental consent statute would fail to meet federal constitutional standards).

72. Respondents' Answer to Petition for Review at 4, *American Academy of Pediatrics II*, (No. A058627). Respondents note that, "the State maintains, once again, that the contours of state constitutional privacy rights should be defined by current interpretations of federal law. This position ignores both decades of precedent and the autonomy of the state judiciary to independently interpret the California Constitution." *Id.*

73. *See id.* at 3. Respondents contend: "The real issue here is whether, under the California Constitution, the statute's severe burden on the fundamental reproductive rights of California's young women is justified." *Id.*

74. *See, e.g.*, Calvin, *supra* note 70, at 606; Lucas, *supra* note 71, at 1513-16; Herring, *supra* note 71, at 1204-05.

B. CALIFORNIA'S RIGHT TO PRIVACY JURISPRUDENCE

In 1969, four years prior to the United States Supreme Court's decision in *Roe v. Wade*,[75] the California Supreme Court determined that a woman's right to choose an abortion represents a fundamental privacy interest.[76] In *People v. Belous*,[77] the California Supreme Court rejected a section of the California Penal Code that made it illegal for a physician to perform an abortion for any reason other than when "necessary to preserve" the life of the mother.[78] The California Supreme Court held that the law violated a woman's fundamental right to make reproductive choices.[79]

Three years later, the people of California passed the "Privacy Initiative."[80] This initiative amended the California Con-

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75. 410 U.S. 113 (1973).

76. *See* People v. Belous, 458 P.2d 194, 199 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970). The *Belous* court noted that both the United States Supreme Court and the California Supreme Court had repeatedly recognized that the right to privacy concerning marriage, family, and sex constituted a fundamental right. *Id.* It was not until four years later, however, in *Roe*, that the United States Supreme Court applied that same reasoning to the right to obtain an abortion. *See supra* notes 37-39 and accompanying text for a discussion of *Roe*.

77. 458 P.2d 194 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970).

78. *Id.* The Penal Code read:

> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act of the Health and Safety Code, is punishable by imprisonment in the state prison.

CAL. PENAL CODE § 274 (West 1988).

79. *Belous*, 458 P.2d at 206. The California Supreme Court reasoned that the original purpose of the law, to protect women's lives, was no longer furthered. Rather, the incidence of illegal abortions, and the higher rate of death and serious infection associated with them, showed that the law in fact harmed the stated interests. *Id.* at 200-02. The supreme court cited a letter from medical professionals and deans of the California medical schools: "These recorded facts bring one face-to-face with the hard, shocking—almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge." *Id.* at 201.

80. CAL. CONST. art. I, § 1. The initiative added an explicit right to privacy to the California Constitution. The relevant constitutional section, as later amended, reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." *Id.*

stitution to explicitly include the right to privacy.[81]

The ballot pamphlet argument written by the Privacy Initiative's proponents indicates the intended scope of the explicit right to privacy.[82] This pamphlet clarifies that the new right to privacy applies to minors: "There should be no ambiguity about whether our constitutional freedoms are for every man, woman *and child* in this state."[83]

In one of the earliest California Supreme Court cases to interpret this amendment, the supreme court explained that the intent of the Privacy Initiative's proponents was to create "a legal and enforceable right of privacy for *every* Californian."[84] Thus, minors apparently share in the privacy protections guaranteed by the California Constitution.[85]

In general, the federal right to privacy "appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution."[86] Specifically in the area of reproductive rights, the California Supreme Court has held the California privacy right to be more exten-

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Whether this new explicit right is broader in scope than the implicit federal right to privacy presents a pivotal issue in *American Academy of Pediatrics II*.

81. *Id.* The ballot pamphlet argument advanced by proponents of the initiative has been cited to explain the reasoning behind the initiative. The ballot pamphlet reads, in part: "The right of privacy is the right to be left alone. It is a *fundamental and compelling interest*." KENNETH CORY & GEORGE R. MOSCONE, PROPOSED AMENDMENTS TO CONSTITUTION. PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS. GENERAL ELECTION Nov. 7, 1972, at 27 (1972) (emphasis added).

82. *See* CORY & MOSCONE, *supra* note 81, at 26-27. The California Supreme Court noted the value of ballot pamphlets as sources of information regarding the rationale for public initiatives: "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." White v. Davis, 533 P.2d 222, 234 n.11 (Cal. 1975).

83. Respondents' Answer to Petition for Review at 18, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 54 (Ct. App. 1994) (No. A058627) (quoting CORY & MOSCONE, *supra* note 81, at 27) (emphasis added).

84. *White*, 533 P.2d at 234 (emphasis added). The supreme court emphasized that the pamphlet arguments represented "in essence, the only 'legislative history' of the constitutional amendment available to us." *Id.*

85. *See id.* The scope of minors' rights to privacy under the California Constitution, contrasted with the United States Constitution, poses an important issue in *American Academy of Pediatrics II*.

86. City of Santa Barbara v. Adamson, 610 P.2d 436, 439 n.3 (Cal. 1980).

sive than its federal counterpart: "Certainly it is true that our State Constitution has been construed to provide California citizens with privacy protections encompassing procreative decisionmaking—broader, indeed, than those recognized by the Federal Constitution."[87] Thus, the California Supreme Court has viewed the addition of an explicit right to privacy to the California Constitution as an expansion of the federal right.[88]

The expanded scope of California's right to privacy was put to the test in the court of appeal in *American Academy of Pediatrics II*. Respondents reminded the court of California's independent jurisprudence in the area of privacy rights.[89] The court of appeal accepted respondents' argument and applied a "compelling interest" test.[90]

IV. THE CALIFORNIA COURT OF APPEAL'S ANALYSIS: *AMERICAN ACADEMY OF PEDIATRICS v. LUNGREN*

In affirming the permanent injunction against the statute, the court of appeal in *American Academy of Pediatrics II* considered and rejected several of appellants' theories.[91] Specifically, the court considered whether the case must be remanded to be tested against the requirements of a new California Supreme Court decision.[92] The court also reviewed appellants' assertion that compelling state interests justify any infringement by the parental consent statute upon the right to priva-

87. Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993), *cert. denied*, 114 S. Ct. 206 (1993).

88. *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981).

89. *See* Respondents' Brief at 12-14, *American Academy of Pediatrics II* (No. A058627).

90. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 555 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). The court of appeal held that the compelling interest standard was applicable, instead of the federal "significant interest" standard which had been required in *Danforth* and its progeny. *See id. See supra* notes 46-69 and accompanying text for a discussion of *Danforth* and its progeny.

91. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

92. *See id.* at 551. The court of appeal noted that the California Supreme Court's recent decision in Hill v. NCAA, 865 P.2d 633 (Cal. 1994), requires all California right to privacy cases to be analyzed under its reasoning. *See id.*

cy.[93] Finally, the court considered appellants' contention that parents' right to be involved in decisions concerning their children supersedes minors' privacy interests.[94] Based upon its analysis of these issues, the court of appeal held that the statute impermissibly violates minors' right to privacy under the California Constitution.[95] Accordingly, the court of appeal affirmed the permanent injunction against enforcement of the parental consent statute.[96]

A. THE EFFECT OF *HILL V. NCAA*

In January 1994, the California Supreme Court rejected the traditional rule that a "compelling interest" analysis be applied to all right to privacy cases.[97] In place of the traditional rule, the court devised a new three-part test.[98] Thus, in order to determine whether there has been a violation of the right to privacy guaranteed by the California Constitution, California courts must now evaluate three factors: first, a le-

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93. *See id.* at 558-59.

94. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 558-59.

95. *Id.* at 555-56.

96. *Id.* at 559.

97. Hill v. NCAA, 865 P.2d 633, 654-56 (Cal. 1994). The California Supreme Court, analyzing several of its previous decisions which applied the compelling interest standard, held:

> The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.

Id. at 653.

98. *See id.* at 654-56. The California Supreme Court summarized the new rule:

> Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.

Id. at 656.

gally protected privacy interest must be involved; second, the complaining party must have a reasonable expectation of privacy; and third, the alleged violation must constitute a serious invasion of the privacy interest.[99] If a court analyzing these elements determines that a prima facie case for invasion of privacy has been established, the court must then consider any defenses asserted.[100]

The court of appeal in *American Academy of Pediatrics II* interpreted this new "*Hill*" test as a balancing test, in which a strong showing in one element could make up for a weaker showing in another.[101]

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99. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 554 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (citing *Hill*, 865 P.2d at 654-56). *Hill* involved a challenge to the NCAA mandatory drug-testing rules for student athletes. Applying the three parts of its newly announced test, the supreme court reasoned that student athletes have legally protected privacy interests in not being observed directly during urination. Nevertheless, the supreme court held that the drug-testing program did not violate students' reasonable expectation of privacy, because student athletes commonly come to expect to be observed unclothed by team personnel and to be subjected to various physical and medical examinations. By voluntarily joining a team which was a member of the NCAA, the supreme court noted, a student athlete implicitly agreed to a lesser expectation of privacy. Finally, the supreme court reasoned that, despite the lessened expectation of privacy, direct monitoring of urination constituted a serious invasion of privacy. *See Hill*, 865 P.2d at 657-59.

100. *Hill*, 865 P.2d at 655-56. In describing the new method for evaluating right to privacy cases, the California Supreme Court noted:

> The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test . . . .' Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.

Id.

101. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 554. The court of appeal noted:

> For example, where it is shown that the privacy interest at issue is very strong, a plaintiff will be able to make out a prima facie case even though his or her expectation of privacy is not extremely strong, or the invasion of the privacy interest is not extremely serious.

Id.

In its application of *Hill*'s three-part test to the facts of *American Academy of Pediatrics II*, the court of appeal held that the importance of the privacy interest at issue bolstered the other two elements:

> The plaintiffs in this case clearly made a prima facie showing of an unconstitutional invasion of the right to

Discussing each of the three *Hill* elements as they applied to *American Academy of Pediatrics II*,[102] the court of appeal emphasized that the right to choose whether to obtain an abortion is "an exceedingly fundamental privacy interest."[103] Although a minor was acknowledged to have a reduced general expectation of privacy, the court stated that her privacy expectations regarding procreative choices are strong and valid.[104] Finally, the court of appeal found that the statute seriously infringes upon two separate privacy interests: the right to choose privately to obtain an abortion and the right actually to obtain an abortion.[105] Because "this legislation creates the possibility that a minor will be compelled to bear a child against her wishes,"[106] the court of appeal felt that "[i]t would be hard to imagine a more egregious breach of social norms."[107]

Upon balancing the *Hill* elements, the court held that plaintiff-respondents had established a prima facie case that the parental consent statute violates minors' constitutionally protected privacy interests.[108]

> privacy. Moreover, although all three elements of the cause of action have been established, the strength of the interest at issue is such that the plaintiffs need only have shown that the minors have some expectation of privacy albeit not as great an expectation as an adult might have, and that the invasion of that interest is real—as opposed to overwhelming.

Id. at 555-56.

102. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 554-56. *See id.* at 554 (discussing the "legally protected privacy interest" requirement). *See id.* at 555 (discussing the "reasonable expectation of privacy" requirement). *See id.* at 555-56 (discussing the "seriousness of invasion of privacy interest" requirement).

103. *Id.* at 554. The court of appeal reasoned: "There can be no question but that the right to choose whether or not to give birth, including the right to choose an abortion, is not only an interest involving autonomy privacy, but an exceedingly fundamental privacy interest." *Id.*

104. *Id.* at 555. The court of appeal noted: "Many adolescents, even those in the most functional of homes, do not discuss their procreative choices with their parents, and they certainly have no expectation of discussing them with a judge." *Id.*

105. *Id.*

106. *Id.*

107. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 555.

108. *Id. See supra* note 101 for discussion that the strength of the privacy issue allowed for a lesser showing in the other two elements of the *Hill* test.

B. THE JUSTIFICATION FOR VIOLATING THE RIGHT TO PRIVACY

After determining that respondents had established a prima facie case for invasion of privacy, the court of appeal next considered whether the state had a sufficient justification for the statute's infringement upon minors' right to privacy.[109] Under *Hill*, the burden of proof falls on the defendant, here, appellants, to show that the invasion of the right to privacy is justified.[110] *Hill* requires that a compelling countervailing interest must be substantially furthered where the privacy interest at issue is "fundamental to personal autonomy."[111]

Because appellants failed to prove that *any* interests, compelling or otherwise, would be furthered by the parental consent statute, the court of appeal held that the statute's infringement of minors' right to privacy is unconstitutional.[112] Moreover, the court of appeal echoed the trial court's determination that the current health care system provides a less burdensome alternative to the parental consent statute.[113]

Although *Hill* was decided after the trial court in *Ameri-*

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109. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 556 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

110. *Hill*, 865 P.2d at 657. The California Supreme Court explained in *Hill* that a defendant can prevail in a right to privacy case by proving, as an affirmative defense, "that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." *Id.*

111. *Id.* at 653. The *Hill* opinion is somewhat unclear as to whether the fundamental nature of the privacy interest should be evaluated prior to application of the new three-part test (thus supplanting the three-part test in some cases), or is simply part of the analysis of defenses following establishment of plaintiff's prima facie case. The court of appeal in *American Academy of Pediatrics II* applied the compelling interest test to the State's defense of justification. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 556.

112. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 556.

113. *Id.* The court of appeal noted that the current system, in which neither parental consent nor a judicial bypass procedure is required for a minor to obtain an abortion, protects minors' interests without infringing upon protected privacy rights: "It also appears that the existing medical system in fact serves these asserted interests and that the legislation therefore is not the least intrusive means available of furthering them." *Id.* at 550.

can Academy of Pediatrics II had announced its opinion, the court of appeal held that there was no need to remand the case to apply the new *Hill* test.[114] The court believed that the trial court had, in its compelling interest analysis, substantially addressed each element of *Hill*'s balancing test.[115]

The court of appeal also rejected appellants' argument that the trial court had erred in considering evidence that the parental consent statute would harm state interests rather than further them.[116] Appellants had argued that, in a facial attack, the legislature's rational belief that a statute would achieve its desired results makes moot any evidence to the contrary.[117] The court of appeal disagreed, however, explaining that acceptance of the legislative facts at face value would be inappropriate in this case because a fundamental right was implicated[118]

C. THE MINOR'S PRIVACY INTEREST VERSUS THE PARENTS' INTEREST

Lastly, the court of appeal rejected appellants' argument that parents' interests in being involved in their children's medical decisions supersede minors' privacy interests.[119]

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114. *Id.* at 554.

115. *Id.* The court of appeal stated: "[T]he reasoning and conclusions of the superior court remain valid under the [*Hill*] test, and that the judgment, accordingly, should be affirmed without remand." *Id.*

116. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 556-57.

117. *Id.* at 557. The court of appeal summarized appellants' argument: "The State's position is that where, as here, there is a facial challenge to a law, the only question is whether the Legislature rationally could believe that the law will further a compelling state interest." *Id.*

118. *Id.* The court of appeal explained:

> When legislation invades a fundamental right, the courts have the duty to look behind and legislative finding and independently determine whether a particular invasion is justified . . . . [Thus, u]nder the circumstances of the present case, it was entirely appropriate for the superior court to consider such evidence as was presented to determine if [California's parental consent statute] in fact furthered a compelling interest, and if that interest might be furthered by less restrictive means.

Id. at 557-58.

119. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 558 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

While recognizing parents' strong interest in being involved in important decisions regarding their children, the court of appeal held that minors' constitutionally protected privacy interests must take precedence.[120] Specifically in the area of procreative decisions, the court noted that, "even under the more limited right of privacy guaranteed by the Federal Constitution, a child's right of privacy exceeds the parent's right to be involved in the abortion decision."[121] According to the court of appeal, California, with its more stringent privacy standard, should protect the minor's privacy interest even more vigorously.[122]

D. CONCLUSION OF THE CALIFORNIA COURT OF APPEAL

Because appellants failed to prove at trial that the statute would further any of its stated interests, the court of appeal affirmed that California's parental consent statute is an unnecessary and impermissible violation of minors' protected right to privacy under the California Constitution.[123] On appeal to the California Supreme Court, the parties renew their respective arguments.[124]

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120. *Id.* at 559. The court of appeal cited a California Supreme Court case to support its finding: "In some situations, however, there may be a conflict of interests (between parent and child). In these situations, the legal system should protect the child's interests." *Id.* (citing *In re* Angelia P., 623 P.2d 198, 202 (Cal. 1981)).

121. *Id.* The court of appeal cited the federal parental consent cases to demonstrate that even under the United States Constitution's reduced privacy protection, parents may not be afforded an absolute veto over the minor's decision to obtain an abortion. *Id.* (citing Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976); Bellotti v. Baird, 443 U.S. 622, 643-44 (1979)). *See supra* notes 45-69 and accompanying text for a discussion of federal parental involvement cases. *See generally* Jennifer Wohlstadter, Note, Madsen v. Women's Health Center, Inc.: *The Constitutionality of Abortion Clinic Buffer Zones*, 25 GOLDEN GATE U. L. REV. 543 (1995) (discussing the standard of review applying to abortion clinic buffer zones).

122. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559. The court of appeal stated: "We have concluded that the right of privacy guaranteed by the California Constitution permits less intrusion than does the federally guaranteed right. There is, accordingly, even greater reason to conclude that any parental interests in the child's decisions or welfare must bow to the child's right of privacy." *Id.*

123. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 559 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

124. *See* Appellants' Opening Brief at 7-45, American Academy of Pediatrics v.

V. APPELLANTS' ARGUMENTS

Appellants argue that the court of appeal mistakenly considered evidence that the parental consent statute would be harmful rather than beneficial.[125] Appellants further contend that minors' privacy interests are less protected than those of adults.[126] Thus, citing a long line of federal cases, appellants argue that the proper judicial standard for evaluating parental consent cases is the significant interest standard, rather than the compelling interest standard.[127] Even if the compelling interest standard is appropriate, appellants maintain California's parental consent statute meets that standard.[128] Appellants further contend that the court of appeal misapplied the elements of the new *Hill*[129] test.[130] According to appellants, the court of appeal improperly ignored parents' interests in maintaining the parent-child relationship and in being involved in important decisions regarding their child's upbringing.[131] Finally, appellants argue that the parental consent

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Lungren, 882 P.2d 247 (Cal. 1994) (No. S041459). *See* Respondents' Answer to Petition for Review at 15-28, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). *See infra* note 180 for explanation of use of Respondents' Answer to Petition for Review as the latest available articulation of respondents' arguments.

125. *See* Appellants' Opening Brief at 19-22, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). *See infra* notes 134-39 and accompanying text.

126. *See* Appellants' Opening Brief at 22-35, *American Academy of Pediatrics II* (No. S041459). *See infra* notes 142-46 and accompanying text.

127. *See* Appellants' Opening Brief at 9, *American Academy of Pediatrics II* (No. S041459) (citing Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976)). Appellants argue that both federal and California cases have recognized the significant interest test as the proper measure of whether minors' privacy rights have been violated. *See id. See infra* notes 141-46 and accompanying text for a discussion of this argument.

128. *See* Appellants' Opening Brief at 10, *American Academy of Pediatrics II* (No. S041459). *See infra* notes 147-54 and accompanying text for a discussion of this argument.

129. Hill v. NCAA, 865 P.2d 633 (Cal. 1994).

130. *See* Appellants' Opening Brief at 19-38, *American Academy of Pediatrics II* (No. S041459). *See infra* notes 155-69 and accompanying text for a discussion of appellants' contention.

131. *See* Appellants' Petition for Review at 12, *American Academy of Pediatrics II* (No. A058627). Appellants argue:

> There is no balancing with the child's need for parental guidance and support. There is no mention of, let alone balancing with, the societal norms underlying parent-child

statute does not violate minors' rights to informational privacy or equal protection.[132]

A. STATE NEED ONLY SHOW A RATIONAL BASIS FOR LEGISLATIVE FACTS

According to appellants, in a facial challenge of a statute,[133] the State merely needs to show that the legislature could rationally have believed the statute would further its stated interests.[134] Thus, appellants repudiate the relevance of evidence presented at trial that the parental consent statute would instead injure its stated interests.[135] Instead, appellants contend that the California Supreme Court should "accord significant weight and deference"[136] to the legislature's findings because they were taken from language found in United States Supreme Court cases.[137] Indeed, appellants argue

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> relationships and the responsibilities of parents . . . . The decision below does not recognize any constitutionally permissible mandatory role for parents in unemancipated minors' abortion decision making.

Id.

132. *See* Appellants' Opening Brief at 38-45, *American Academy of Pediatrics II* (No. S041459). *See infra* notes 172-73 and accompanying text for a discussion of appellants' informational privacy argument. *See infra* notes 174-79 and accompanying text for a discussion of appellants' equal protection argument.

133. Because the statute has been enjoined since it was initially passed, there is no data available concerning its real-world impact. Consequently, any challenge must be a "facial" attack; a challenge based on the statute's inherent unconstitutionality rather than upon any impermissible impact.

Appellants argue: "The statutory provisions under review have never been implemented and the determinations of their validity by the lower courts have consequently been limited to analysis of their facial validity." Appellants' Petition for Review at 8, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627).

134. Appellants' Opening Brief at 19-20, *American Academy of Pediatrics II* (No. S041459). Appellants argue, "[T]he validity of a statute does not depend on the actual existence of legislative facts but on whether the Legislature could rationally believe such facts to be established." *Id.* (citing People v. Mistriel, 241 P.2d 1050, 1051 (Cal. Dist. Ct. App. 1952)).

135. *Id.* at 21. Appellants argue: "It is irrelevant to that process that these facts may be disputed or opposed." *Id.* (citing People v. Oatis, 70 Cal. Rptr. 524, 528 (Ct. App. 1968)).

136. *Id.* at 22.

137. Appellants' Opening Brief at 20, *American Academy of Pediatrics II* (No. S041459). Appellants describe the legislative findings and their origins:

> In enacting AB 2274 the Legislature made five specific findings. These were (a) the medical, emotional, and psy-

that these findings should be considered presumptively constitutional due to their source.[138] Appellants maintain: "Under such circumstances it cannot be assumed that the Legislature acted irrationally in relying upon determinations of the nation's highest court."[139]

B. "SIGNIFICANT STATE INTEREST" IS THE APPLICABLE STANDARD

Appellants argue that a long line of federal cases, beginning with *Planned Parenthood of Cent. Missouri v. Danforth*,[140] establishes that the significant state interest test applies to alleged violations of minors' constitutional rights.[141] The federal cases hold that minors' privacy interests are not coextensive with those of adults.[142] Due to minors'

> chological consequences of an abortion are serious and can be lasting, particularly when the patient is an immature minor; (b) the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of an abortion are not logically related; (c) minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their action; (d) parents ordinarily possess information essential to a physician's exercise of his or her best medical judgment concerning a minor child; and (e) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention subsequent to her abortion . . . . Findings (a) and (b) come directly from . . . H.L. v. Matheson, *supra*, 450 U.S. 398 at 408, finding (c) comes from Bellotti v. Baird, *supra*, 443 U.S. at 640, and finding (d) comes from H.L. v. Matheson, *supra*, at 411.

Id. at 20-21.

138. *Id.* at 21-22. Appellants argue: "Moreover, although the ultimate constitutional interpretation rests with this court, a presumption of constitutional sufficiency is particularly appropriate in circumstances where the Legislature has enacted a statute with the relevant constitutional limitations clearly in mind." *Id.*

139. *Id.* at 21.

140. 428 U.S. 52 (1976).

141. Appellants' Opening Brief at 9, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. 1994) (No. S041459). Appellants invoke the United States Supreme Court opinions in *Danforth* and its progeny: "*Danforth* was the first of the eight parental involvement cases and established that the appropriate standard against which to measure parental involvement in an unemancipated minor's abortion decision making is the significant state interest." *Id.* (citing *Danforth*, 428 U.S. at 74). *See supra* notes 46-69 and accompanying text for a discussion of *Danforth* and its progeny.

142. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979). In *Bellotti,* the United

"special vulnerabilities,"[143] states may exercise more discretion in regulating minors' behavior than would be acceptable if applied to adults.[144] This discretion, according to appellants:

> is justified by the minor's need for parental concern, sympathy and attention, by the recognition 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, and by the important recognition that parents nurture and direct the upbringing of their children and have the right and high obligation to prepare their children for additional obligations and this duty includes the inculcation of moral standards, religious beliefs and elements of good citizenship.[145]

Thus, because the federal jurisprudence suggests the application of a significant interest standard, appellants contend that the court of appeal erred in applying the compelling interest standard in *American Academy of Pediatrics II*.[146]

C. THE STATUTE FURTHERS THE STATE'S INTERESTS

Appellants maintain that, even if a compelling state interest must be met, California's parental consent statute satisfies that requirement.[147] Appellants point out that both the trial

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States Supreme Court noted: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.*

143. Appellants' Opening Brief at 10, *American Academy of Pediatrics II* (No. S041459).

144. *Bellotti*, 443 U.S. at 635. The Court noted: "[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability . . . ." *Id.*

145. Appellants' Opening Brief at 9-10, *American Academy of Pediatrics II* (No. S041459) (citing *Bellotti*, 443 U.S. at 635, 642-43).

146. *Id.* at 7.

147. Appellants' Opening Brief at 10, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). Appellants assert: "Assuming arguendo a compelling state interest is required under *Hill*, [the parental consent statute] satisfies such a standard." *Id.*

court and the court of appeal acknowledged the state has two valid compelling interests: the interest in protecting minors and the interest in maintaining the parent-child relationship.[148] Again citing language from federal cases, appellants argue that these compelling interests are furthered by the parental consent statute.[149] Appellants assert that, by providing parents the opportunity to participate in their daughter's abortion decision, the statute furthers both stated interests.[150] Relying once more on pronouncements by the United States Supreme Court, appellants maintain that the state can safely depend "on the presumption the parents will act in the best interests of the minor."[151]

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148. *Id.* at 10-11. The court of appeal agreed with the trial court:

> [W]e agree with the superior court that the health and welfare of minors is indeed a compelling state interest. We also agree that the related interest of fostering parent-child relationships may be compelling, and that the State may have a legitimate interest in involving parents in the decisions of their children . . . .

American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 558 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994).

149. Appellants' Opening Brief at 11, *American Academy of Pediatrics II* (No. S041459). Appellants argue that for "some minors the abortion decision raises profound moral and religious concerns and parental consultation can assist the minor." *Id.* (citing *Bellotti*, 443 U.S. at 640). Furthermore, "some minors will be lonely and even terrified. Parents can provide compassionate and mature advice." *Id.* (citing Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990)). Finally, appellants argue that parents can provide doctor with psychological and health data. *Id.* (citing H.L. v. Matheson, 450 U.S. 398, 419 (1980)).

150. *Id.* at 11.

151. Appellants' Opening Brief at 11, *American Academy of Pediatrics II* (No. S041459) (citing Hodgson v. Minnesota, 497 U.S. 417, 495(1990)). In the context of his separate opinion in *Hodgson*, Justice Kennedy discussed the presumption that parents act in the best interests of their children:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children . . . . As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this. That some parents "may at times be acting against the best interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. [citation omitted] *The only cases in which a majority of*

Furthermore, appellants assert, the parental consent statute is the least intrusive method of furthering these compelling interests.[152] Appellants point out that the statute allows for a judicial bypass, as well as for the consent of only one parent.[153] Apparently due to its compliance with these two federal requirements, appellants argue that the statute represents the least intrusive means available.[154]

D. AUTONOMY PRIVACY: APPELLANTS' *HILL* ANALYSIS

Appellants further argue that the court of appeal incorrectly applied the three-step analysis required by *Hill*.[155] In analyzing the first *Hill* element, the existence of a legally protected privacy interest, appellants acknowledge that minors enjoy a right to privacy regarding reproductive choices under both the Federal and the California Constitutions.[156] Appellants contend, however, that these rights are limited in scope.[157] Citing the United States Supreme Court cases which have addressed parental consent and parental notification statutes, appellants note that, "[i]n each of these cases the

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> *the Court has deviated from this principle are those in which a State sought to condition a minor's access to abortion services upon receipt of her parent's consent to do so.*

Hodgson, 497 U.S. at 495 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). Thus, Justice Kennedy explicitly excluded parental consent statutes from the general presumption that parents act in the best interests of their children. *See id.*

152. Appellants' Opening Brief at 15, *American Academy of Pediatrics II* (No. S041459).

153. *Id.* at 15-16. The allowance for a judicial bypass brings the statute within the requirements of *Bellotti's* advisory opinion. *See supra* notes 51-58 and accompanying text for a discussion of *Bellotti*. The permissibility of a statute that requires only one parent to give consent is derived from *Hodgson*. *See supra* notes 64-66 and accompanying text for a discussion of *Hodgson*.

154. Appellants' Opening Brief at 15, *American Academy of Pediatrics II* (No. S041459).

155. *See* Appellants' Opening Brief at 17-38, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). *See supra* notes 97-115 and accompanying text for discussion of the *Hill* test.

156. Appellants' Opening Brief at 22-23, *American Academy of Pediatrics II* (No. S041459).

157. *Id.* Appellants note: "The United States Supreme Court has recognized that an unemancipated minor enjoys a protectable autonomy privacy interest in her decision making on whether to undergo an abortion *to the extent* of not permitting an absolute veto over such decision by a parent." *Id.*

Supreme Court approved parental involvement. The Supreme Court's identification of the social norms involved and the protectable interests arising therefrom should be dispositive herein."[158]

After reviewing the federal jurisprudence,[159] appellants argue that the California Supreme Court should follow the lead of its federal counterpart: "The analysis and precedent of the United States Supreme Court cases provide not only the policy fountainhead for AB 2274, they provide brilliant illumination to this court's task of judicial interpretation."[160] Finally, appellants contend that the legislature, rather than the Judiciary, is the appropriate body "to weigh social science studies and opinions."[161]

Next, appellants address the second *Hill* element: whether the parental consent statute violates a reasonable expectation of privacy.[162] Appellants argue that, in our society, minors have less reasonable expectations of privacy than do adults.[163] Without specifically discussing the existence of

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158. *Id.* at 23.

159. *See id.* at 23-32 (citing Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398 (1980); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976)). Appellants review the United States Supreme Court's analysis of the issues throughout each of these parental involvement cases. *Id. See supra* notes 45-69 and accompanying text for a discussion of the United States Supreme Court's parental consent and parental notification jurisprudence.

160. Appellants' Opening Brief at 33, *American Academy of Pediatrics II* (No. S041459).

161. *Id.* Appellants apparently refer to the evidence introduced at trial and summarized by the court of appeal in the appendix following the court's opinion. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559-62 app.

162. *See* Appellants' Opening Brief at 35-37, *American Academy of Pediatrics II* (No. S041459).

163. *Id.* at 36. Appellants contend: "There is a diminished expectation of privacy in minors consenting to medical care to the extent of their parents knowledge of or indeed, in most instances, making of the decision." *Id.*

While citing cases dealing with minors' privacy rights concerning general medical care, appellants assert that minors' privacy rights in choosing whether to have an abortion are similarly curtailed: "[I]t cannot be concluded that minors have the same expectation of privacy in abortion decision making as adults. It is not. It is diminished in this arena of decision making as it is generally." *Id.*

minors' reasonable expectation of privacy in abortion decisions, appellants once again invoke the United States Supreme Court's analysis of parents' responsibility for the "nurture, support and guidance" of minors.[164] Appellants apparently see the combination of this parental responsibility with minors' limited privacy right as justifying the conclusion that minors have no reasonable expectation of privacy in their decision whether to obtain an abortion.[165]

Hill's third element requires that the invasion of the right to privacy must be a serious one.[166] Rather than dispute the seriousness of the parental consent statute's infringement upon privacy rights directly, appellants incorporate the arguments from the prior two elements: "[t]he analysis of this final element of a cognizable privacy claim, in the context presented here, is closely interwoven with the identification of a protectable privacy interest and the recognition of a reasonable expectation of privacy and the foregoing analysis of these issues is incorporated here."[167] Appellants' only addition to this discussion is that the state can rationally assume that parents will in fact "facilitate" their minor's abortion decision.[168] Otherwise, appellants do not contend that the parental consent statute's invasion of minors' privacy interests is not serious. Rather, the thrust of appellants' argument seems to be that, despite the seriousness of any privacy invasion, countervailing parental and state interests justify the statute.[169]

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164. Appellants' Opening Brief at 35, *American Academy of Pediatrics II* (No. S041459). Appellants note: "The United States Supreme Court has . . . identified in its analysis of this identical issue our societal norms that the primary responsibility for the nurture, support and guidance of children lies in the parents." *Id.* (citing *Bellotti*, 443 U.S. at 643-44).

165. *See id.* at 35-37.

166. *See Hill*, 865 P.2d at 655.

167. Appellants' Opening Brief at 37, *American Academy of Pediatrics II* (No. S041459).

168. *Id.*

169. *See id.* at 37-38. Appellants argue that balancing the parents' and state's interests with the minors' privacy interest leads to the conclusion that the invasion of privacy interests does not constitute "an egregious breach of the social norms . . . ." *Id.*

E. THE PARENTAL CONSENT STATUTE DOES NOT VIOLATE INFORMATIONAL PRIVACY OR EQUAL PROTECTION PRINCIPLES

Although the court of appeal explicitly declined to decide the issues of the statute's violation of rights to informational privacy and equal protection,[170] appellants argue that the California Supreme Court should address these issues.[171] Appellants contend that the parental consent statute does not violate minors' informational right to privacy because the only information collected is limited to court documents involved in the judicial bypass procedure.[172] Furthermore, appellants argue, because the purpose of the judicial bypass is to afford "minimum due process protection," any incidental invasion of the informational privacy interest is justified.[173]

Appellants also request that the California Supreme Court reverse the trial court's determination that the parental consent statute violates the California Constitution's equal protection guarantee.[174] The trial court reasoned that the statute

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170. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 559 (Ct. App. 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). The court noted:

> Plaintiffs contended that by creating and maintaining records relating to the bypass procedures, A.B. 2274 violates the right to informational privacy. The superior court did not analyze this argument, concluding that, because the State had been unable to justify the burden on privacy rights in general, it also could not justify the burden placed on informational privacy. Having concluded that this legislation unconstitutionally interferes with autonomy privacy, we need not also consider whether it places an impermissible burden on informational privacy. Nor shall we consider the constitutional question of whether A.B. 2274 also violates equal protection guarantees.

Id.

171. Appellants' Opening Brief at 38, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). Appellants point out: "It is important that they be decided since each formed an additional independent basis for the trial court's decision to enjoin AB 2274." *Id.*

172. *Id.* at 39. Appellants argue: "The forms adopted by the Judicial Council seek no more information than is necessary for a court to properly perform its duties under the statute." *Id.*

173. *Id.* at 39-40. Appellants note: "There can be no serious dispute that due process requirements are a compelling state interest." Appellants' Opening Brief at 40, *American Academy of Pediatrics II* (No. S041459).

174. *Id.* at 38. The equal protection guarantee of the California Constitution

regulates pregnant minors who choose to obtain an abortion, while not regulating pregnant minors who choose to bring their pregnancy to term.[175] Appellants argue that this distinction is permissible because the two groups are not similarly situated.[176] Appellants cite two specific differences between these groups: first, appellants argue that there is a public health interest in minors receiving prenatal care, while there is no such interest in minors obtaining an abortion.[177] Second, appellants maintain that an abortion decision involves moral and ethical choices which are not involved in the decision to continue a pregnancy to term.[178] Because those choosing to end pregnancy by abortion and those choosing to continue the pregnancy to term are differently situated, appellants argue, the parental consent statute's regulation of only one of these groups does not violate equal protection.[179]

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reads: "A person may not be deprived of life, liberty or property without due process of law *or denied equal protection of the laws* . . . ." CAL. CONST. art. I § 7(a) (emphasis added).

175. American Academy of Pediatrics v. Lungren, No. 884-574, slip op. at 31-34 (Cal. Super. Ct. June 5, 1992). Again, the court of appeal declined to rule on the equal protection issue. *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559.

176. Appellants' Opening Brief at 41, *American Academy of Pediatrics II* (No. S041459).

177. *Id.* Appellants argue:

> It is critical to the health of the fetus and the unemancipated minor that prenatal care begin as early in the pregnancy as possible. It is this risk to the as yet unborn, but developing, fetus that justifies providing this care without parental consent. The health risks to the pregnant unemancipated minor are personal health risks. The health risks to the developing fetus, being taken to term, are public health concerns.

Id. at 42.

178. *Id.* at 41. Appellants once again return to the United States Supreme Court's opinions, this time citing *Roe v. Wade*: "One's philosophy, one's experience, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion." *Id.* at 44 (citing *Roe*, 410 U.S. at 116).

179. Appellants' Opening Brief at 45, *American Academy of Pediatrics II* (No. S041459). Appellants argue: "The differences between these two classes of unemancipated minors are significant and fundamental and it is submitted demonstrate they are not similarly situated for purposes of equal protection analysis." *Id.*

VI. RESPONDENTS' ARGUMENTS

According to respondents,[180] the unanimous decisions of the trial and appellate courts that the statute is unconstitutional should be affirmed by the California Supreme Court.[181] Respondents argue that appellants mischaracterize the crucial issues, fail to confront the lower courts' factual findings, and substitute dicta from opinions of the United States Supreme Court for thorough analysis of the constitutional issues presented.[182] The real issue under consideration, according to respondents, is *not* "whether the California Constitution 'prohibit[s] parental involvement' in a teenager's reproductive decision."[183] Rather, respondents contend, the California Supreme Court must decide whether the parental consent statute's burden on minors' right to privacy under the California Constitution is justified.[184] Respondents argue that each element of

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180. At the time of this writing, Respondents' Reply Brief to the Appellant's Opening Brief had not yet been filed at the California Supreme Court. Thus, the most recent available articulations of respondents' arguments were Respondents' Answer to Petition for Review and Respondents' Brief from the earlier proceeding at the court of appeal.

181. Respondents' Answer to Petition for Review at 29, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). Respondents argue: "The Superior Court and Court of Appeal have thoroughly and correctly resolved the issues presented by this case. The statute invades the fundamental reproductive rights of California's young women without justification, and, therefore, violates the California Constitution." *Id.* at 4-5.

182. *Id.* at 2. Respondents contend that, "the State offers no basis for doubting the unanimous conclusions of the trial and appellate courts that this restrictive law violates the California Constitution. Instead, the State distorts the issues central to this case, disregards extensive empirical findings and denigrates the independence of our state Constitution." *Id.*

183. *Id.* (quoting Appellants' Petition for Review at 2, *American Academy of Pediatrics II* (No. A058627)). Appellants repeatedly asserted that the court of appeal's decision, if left to stand, would "prohibit," parental involvement. *See* Appellants' Petition for Review at 2, 3, 11, 12, 13, *American Academy of Pediatrics II* (No. A058627). Respondents reply that there is a difference between prohibiting involvement and striking down a statute that *mandates* such involvement: "Respondents have never challenged the right of parents to provide guidance to their children, and no court has ever ruled that the constitutional right to privacy 'prohibits' parental involvement in a daughter's reproductive decision. Such a decision would indeed be an extraordinary intrusion into family privacy." Respondents' Answer to Petition for Review at 23, *American Academy of Pediatrics II* (No. A058627).

184. Respondents' Answer to Petition for Review at 3, *American Academy of Pediatrics II* (No. A058627).

the test set forth in *Hill v. NCAA*[185] was properly analyzed by the court of appeal.[186] Moreover, respondents urge the California Supreme Court to independently evaluate the validity of the statute under California law, rather than bow to proclamations from the United States Supreme Court.[187] Because the current system does a better job than the parental consent statute of furthering the state's interests, respondents contend, the parental consent statute is not justified.[188] Finally, respondents renew their arguments that the parental consent statute violates constitutional rights to informational privacy and equal protection.[189]

A. RESPONDENTS' *HILL* ANALYSIS

Respondents argue that the court of appeal properly applied the *Hill* test.[190] Respondents point to California Supreme Court holdings to support the argument that, "the intimate and life-altering decision of whether to become a parent is at the core of fundamental autonomy interests protected by the California constitutional right to privacy."[191] According to respondents, these cases conclusively establish minors' legally protected privacy interest in making reproductive choices.[192]

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185. 865 P.2d 633 (Cal. 1994).

186. *See* Respondents' Answer to Petition for Review at 17-21, *American Academy of Pediatrics II* (No. A058627).

187. *See id.* at 24-27.

188. *See id.* at 21-23.

189. *See id.* at 27-28.

190. Respondents' Answer to Petition for Review at 16-21, American Academy Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627).

191. Respondents' Answer to Petition for Review at 17, *American Academy of Pediatrics II* (No. A058627) (citing Conservatorship of Valerie N., 707 P.2d 760 (Cal. 1985) (sterilization as form of contraception); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (abortion); People v. Belous, 458 P.2d 194 (Cal. 1969) (abortion), *cert. denied*, 397 U.S. 915 (1970)).

Respondents point out that these same three cases were cited in *Hill* as concerning prime examples of fundamental autonomy privacy rights. *Id.* at 17-18 (citing *Hill*, 865 P.2d at 653 n.11 (majority opinion), 670 (Kennard, J., concurring in part and dissenting in the judgment)).

192. *Id.* Respondents discuss the broad nature of California's privacy right, arguing that it protects minors as well as adults. Moreover, respondents address appellants' argument that minors have a less extensive right to privacy than adults:

> In some instances, of course, the State has an interest in regulating conduct which is compelling as applied to chil-

Respondents next argue that minors have a reasonable expectation of privacy in their reproductive decision-making.[193] Respondents distinguish pregnant minors from plaintiffs in recent California Supreme Court cases, where the court held that those plaintiffs' voluntary actions, such as joining an athletic team or filing a law suit, invalidate their expectations of privacy.[194] Pregnant minors, according to respondents, perform no such voluntary action which should strip them of their otherwise reasonable expectation of privacy in reproductive decision-making.[195]

Finally, respondents contend that the parental consent statute's invasion of the right to privacy is indeed serious.[196] By putting substantial obstacles in the way of a minor seeking an abortion, respondents argue, the statute seriously invades a protected privacy right.[197] Furthermore, echoing the court of appeal's opinion, respondents note that the statute "creates the possibility that a minor will be compelled to bear a child against her wishes. It would be hard to imagine a more egregious breach of social norms."[198]

Accordingly, respondents point out, the court of appeal properly ruled on all three elements of the *Hill* test.[199] By satisfying these elements, respondents argue, they have established a prima facie violation of the right to privacy.[200]

> dren, but not adults. However, the State's greater authority results from the application of the constitutional standard in a particular context, not the standard itself, which does not vary with the age or cognitive capacity of the individual.

Id. at 18 (citing *Valerie N.*, 707 P.2d 760).

193. *Id.* at 19.

194. Respondents' Answer to Petition for Review at 19, *American Academy of Pediatrics II* (No. A058627) (citing *Hill*, 865 P.2d 633; Heller v. Norcal Mut. Ins. Co., 876 P.2d 999 (Cal. 1994)).

195. *Id.*

196. *Id.* at 20. According to respondents, "[t]his penal statute clearly imposes a severe burden on a fundamental right which must satisfy the highest standard of constitutional justification." *Id.*

197. *Id.*

198. Respondents' Answer to Petition for Review at 20, *American Academy of Pediatrics II* (No. A058627) (quoting *American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 555).

199. *Id.* at 21.

200. *See id.* at 16-21.

Respondents next address appellants' justification for this invasion of minors' constitutional rights.[201] The fundamental nature of the privacy interest at issue led the court of appeal to rule that the parental consent statute must further a compelling interest.[202] Respondents point out that the State had "failed completely to show that the burden . . . was justified . . . ."[203] Indeed, respondents argue, the statute would injure state interests in protecting minors and maintaining the parent-child relationship.[204] Thus, according to respondents, the parental consent statute's violation of the right to privacy is not justified, regardless of the standard of review.[205]

B. THE INDEPENDENCE OF CALIFORNIA JURISPRUDENCE

Respondents further contend that California's constitutional jurisprudence has long been independent from federal doctrine, particularly in the area of the right to privacy and reproductive rights.[206] Because the California right to privacy has

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201. *See id.* at 21. Following establishment of the prima facie violation of the right to privacy, *Hill* requires defendants to demonstrate that countervailing interests justify the invasion of privacy. *See Hill,* 865 P.2d at 655-56.

202. Respondents' Answer to Petition for Review at 16, *American Academy of Pediatrics II* (No. A058627). Respondents quote the *Hill* majority opinion: "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest." *Id.* (quoting *Hill,* 865 P.2d at 653). Respondents also cite Justice Kennard's separate opinion in *Hill:* "[T]he majority recognizes and accepts the existing law that in appropriate circumstances the compelling interest standard continues to be applicable to governmental invasions of privacy rights, and holds that the compelling interest test must be applied when the interest invaded is fundamental to personal autonomy." *Id.* at 17 (quoting *Hill,* 865 P.2d at 670 (Kennard, J., concurring in part and dissenting in the judgment)).

203. *Id.* at 21 (quoting *American Academy of Pediatrics II,* 32 Cal. Rptr. 2d at 550).

204. Respondents' Answer to Petition for Review at 21, *American Academy of Pediatrics II* (No. A058627). Respondents note: "In unusually forceful terms, the [lower] courts agreed that the statute would damage California youth and their families." *Id.*

205. *Id.* at 22. Respondents note: "These findings are fatal to the constitutionality of the statute, even under a deferential standard of review." *Id.*

206. Respondents' Answer to Petition for Review at 25, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 546 (Ct. App. 1994) (No. A058627). Respondents point out that California had recognized that the right to choose whether to obtain an abortion constituted a fundamental right four years before the United States Supreme Court came to the same conclusion in Roe v. Wade, 410 U.S. 113

been viewed by the California Supreme Court as providing more protection than its federal counterpart,[207] respondents argue that holdings from federal cases cannot be substituted for the independent judgment of California's courts.[208] According to respondents, the Privacy Initiative's addition of an explicit right to privacy to the California Constitution indicates that California's right to privacy is not co-extensive with the federal right, but is, in fact, broader.[209]

C. ADVANTAGES OF THE CURRENT SYSTEM

Respondents also argue that the current system adequately addresses the state's interests in protecting minors.[210] Currently, physicians must ascertain whether *any* patient is capable of giving informed consent before performing any surgical procedures.[211] This ethical requirement extends to minors seeking abortions.[212] Furthermore, respondents argue that

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(1973). *Id.* (citing People v. Belous, 458 P.2d 194 (Cal. 1969)).

207. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 786 (Cal. 1993) (holding that the California Constitution has been construed to provide California citizens with broader privacy protections encompassing procreative decisionmaking than are recognized by the United States Constitution); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 783 n.4 (Cal. 1981) (holding that California's explicit right to privacy is broader than the implied federal right).

208. Respondents' Answer to Petition for Review at 24-25, *American Academy of Pediatrics II* (No. A058627). Respondents argue: "The State's effort to import federal privacy standards wholesale and without analysis into the California Constitution manifests a fundamental disregard for the independence of state constitutional law in our federal system." *Id.*

209. *Id.* at 26-27. Respondents point out: "This court did not derive *Hill*'s three-step analysis from federal precedent, and indeed, no federal case has applied such an approach to claims based on the implicit right to privacy in the United States Constitution." *Id.* Furthermore, respondents note, *Hill* removes the state action requirement that is still required under federal jurisprudence. *Id.* at 26 (citing *Hill*, 865 P.2d at 649 n.8). Respondents state: "*Hill*'s central holding establishes that the California constitutional right to privacy is broader than and independent of the implicit right to privacy in the United States Constitution." Respondents' Answer to Petition for Review at 26, *American Academy of Pediatrics II* (No. A058627).

210. Respondents' Brief at 26-27, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). Respondents explained: "Respondents proffered substantial evidence at trial demonstrating that the current system of reproductive health care and counseling adequately protects minors without transgressing their privacy rights." *Id.*

211. *See id.* at 27-29.

212. *Id.* at 29.

physicians are better situated than judges to evaluate minors' decision-making ability.[213] Moreover, respondents point out that under the current system, physicians and counselors commonly advise minors to consult parents about reproductive choices.[214] Thus, respondents argue, the status quo does a better job than the parental consent statute at furthering the state's interests, without infringing upon minors' privacy interests.[215]

D. THE PARENTAL CONSENT STATUTE VIOLATES INFORMATIONAL PRIVACY RIGHTS

Additionally, respondents argue, the parental consent statute violates minors' right to informational privacy.[216] Respondents claim that the parental consent statute requires that minors disclose intimate information regarding their "sexuality, pregnancy, and decision to choose abortion" to judicial officials.[217] This information, normally the province of only the minor and medical professionals, would be gathered and stored as a regular part of judicial record-keeping.[218] Because

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213. Respondents' Answer to Petition for Review at 22, *American Academy of Pediatrics II* (No. A058627). Respondents contrast the system created by the statute with the status quo:

> The State admits that the law will force the majority of adolescents to navigate through a stressful court proceeding that will delay access to abortion and thus subject them to a more complicated and potentially risky procedure . . . . The State does not dispute that the doctors and counselors who serve California's young people provide sensitive guidance to pregnant teenagers, assisting them to make sound reproductive decisions, encouraging them to consult their parents or other family members, and ensuring that they provide informed consent to the medical services they elect.

Id.

214. *Id.* at 22.

215. Respondents' Brief at 29, *American Academy of Pediatrics II* (No. A058627). Respondents argued: "Thus, because the State failed to show either that the statute protects minors or that no means less invasive of minors' rights, such as the present system, exist, the State failed to meet *both* aspects of its burden of proof." *Id.*

216. Respondents' Answer to Petition for Review at 27, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627).

217. *Id.*

218. *Id.* At the court of appeal, respondents argued: "The state-coerced disclosure of sensitive medical and reproductive information to the government, and its

the lower courts ruled that the parental consent statute furthers no legitimate state interest, respondents argue, mandatory disclosure of this sort of information cannot be justified.[219]

E. THE PARENTAL CONSENT STATUTE VIOLATES EQUAL PROTECTION PRINCIPLES

Lastly, respondents maintain that pregnant minors seeking an abortion and those seeking medical care in connection with the decision to bring their pregnancies to term are similarly situated for the purposes of equal protection analysis.[220] Respondents argue: "In the dimensions identified by the State, the two reproductive options are equivalent. Both require early access to health care and are profoundly important life choices."[221] Because the parental consent statute treats these two groups disparately, respondents contend that it violates the right to equal protection under California's Constitution.[222]

VII. AUTHOR'S RECOMMENDATIONS

In deciding whether the parental consent statute impermissibly violates minors' constitutional rights to privacy and equal protection, the California Supreme Court will weigh the aforementioned arguments.[223] In this analysis, the supreme court's primary task will be to evaluate the statute under prior judicial interpretations of the California Constitution.[224] Such an analysis, independent of sweeping United

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indefinite retention in official files, plainly constitute a prima facie violation of the California Constitution's guarantee of informational privacy." Respondents' Brief at 49-50, *American Academy of Pediatrics II* (No. A058627).

219. Respondents' Answer to Petition for Review at 28, *American Academy of Pediatrics II* (No. A058627). As respondents argued at the court of appeal, "the State failed to show that a statute forcing thousands of pregnant adolescents to juvenile court every year, and the creation of official abortion docket files, will promote *any* of the Legislature's stated objectives." Respondents' Brief at 51, *American Academy of Pediatrics II* (No. A058627).

220. Respondents' Answer to Petition for Review at 28, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627).

221. *Id.* at 28.

222. *Id.*

223. *See supra* notes 125-79 and accompanying text for appellants' arguments. *See supra* notes 181-222 and accompanying text for respondents' arguments.

224. *See* Respondents' Answer to Petition for Review at 25, American Academy

States Supreme Court generalizations, should lead the California Supreme Court to reject the parental consent statute. A pragmatic evaluation of the statute's likely impact leads to a similar conclusion; the statute simply would not accomplish its purported goals. Unfortunately, the parental consent statute would more likely have a disastrous effect upon those minors whom it regulates. Based upon such a constitutional and pragmatic review, the California Supreme Court should affirm the judgment of the court of appeal and maintain the permanent injunction against enforcement of the parental consent statute.

A. THE CALIFORNIA SUPREME COURT SHOULD CONSIDER EVIDENCE OF THE PARENTAL CONSENT STATUTE'S INEFFICACY

Appellants' argument, that the legislature's rational belief that a statute will further its goals sustains the statute from any facial challenge,[225] clashes with both California jurisprudence and common sense.[226] Particularly in the face of the "overwhelming evidence"[227] that the parental consent statute would in fact harm the state's interests, the California Supreme Court must consider appellants' failure to show ade-

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of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). Respondents contend: "California Courts have long recognized a special duty to construe California's constitutional provisions independent of any comparable federal rights, especially in the area of individual liberties." *Id.*

225. *See* Appellants' Opening Brief at 19-20, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. SO41459). *See supra* notes 133-39 for a discussion of appellants' argument.

226. *See* Respondents' Brief at 5, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). Respondents refuted appellants' argument at the court of appeal: "No principle of constitutional law supports the State's extraordinary argument that this court must accept as conclusively true legislative assumptions that the State could not defend at trial, that the trial court found to be false, and that even now the State does not try to justify." *Id.* Nevertheless, appellants renew this argument before the California Supreme Court. The author hopes that the state's highest court will be at least as concerned as the court of appeal with the real-world impact of the parental consent statute's invasion of California citizens' fundamental rights.

227. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559-62, app. *See supra* note 204 and accompanying text for discussion of respondents' arguments regarding the evidence presented at trial. *See infra* notes 233-53 and accompanying text for the author's analysis of the significance of the evidence that the statute will in fact harm the state's interests.

quate justification for such an intrusive statute.[228]

More specifically, the fundamental nature of the right involved obliges the California Supreme Court to consider the evidence presented at trial and accepted by the court of appeal.[229] In each of the supporting cases appellants cite, the interest involved was less than fundamental.[230] The right to choose whether to obtain an abortion, however, is "clearly among the most intimate and fundamental of all constitutional rights."[231] The California Supreme Court has held that "the ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened."[232] Thus, the California Supreme Court should acknowledge the evidence introduced at trial concerning the efficacy of the parental consent statute.

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228. Despite the strength of the evidence presented at trial, appellants ask the California Supreme Court to rely on legislative assumptions as to the efficacy of the statute. *See* Appellants' Opening Brief at 19-20, *American Academy of Pediatrics II* (No. SO41459).

As respondents pointed out to the court of appeal: "This Court thus 'would abandon [its] constitutional duty if [it] took at face value' the legislature's justifications for the statute." Respondents' Brief at 6, *American Academy of Pediatrics II* (No. A058627) (quoting Spiritual Psychic Science Church v. City of Azusa, 703 P.2d 1119, 1126 (Cal. 1985)).

229. Respondents' Brief at 4-8, *American Academy of Pediatrics II* (No. A058627). Because the challenged law burdens California citizens' fundamental rights, the supreme court cannot unquestioningly accept empirically untrue legislative assumptions. On the contrary, the supreme court must affirmatively evaluate whether the sacrifice of fundamental rights is actually justified. *Id.* at 6.

230. *See* Appellants' Opening Brief at 20, *American Academy of Pediatrics II* (No. SO41459) (citing People v. Mistriel, 241 P.2d 1050, 1051 (Cal. 1952) (legislature may pass law classifying marijuana as "narcotic"); People v. Oatis, 70 Cal. Rptr. 524, 528 (Ct. App. 1968) (legislature may pass law prohibiting possession of marijuana despite disputed evidence as to its danger); and National Org. for Reform of Marijuana Laws v. Gain, 161 Cal. Rptr. 181, 184-85 (Ct. App. 1979) (courts properly defer to legislative discretion when scientific debate exists as to health risks of marijuana)).

231. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 (Cal. 1981). The California Supreme Court held that, "under article 1, section 1 of the California Constitution all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or not to bear a child." *Id.* at 784.

232. *Spiritual Psychic Science Church*, 703 P.2d at 1126 (fortune-telling is protected free speech).

B. THE PARENTAL CONSENT STATUTE WOULD HARM THE STATE'S INTERESTS

It is bitterly ironic that the parental consent statute, ostensibly passed to protect minors from their "special vulnerabilities," would in fact injure minors' emotional and physical well-being if implemented.[233] Minors typically suffer no longterm psychological or physical effects from choosing to obtain an abortion;[234] rather, the most common reaction to an abortion among both minors and adults is relief.[235] Evidence shows that abortion is a medically safe procedure which is far safer than carrying a pregnancy to term.[236]

1. *The Parental Consent Statute Would Endanger Minors' Physical and Emotional Well-Being*

The statute's requirements would likely result in delayed abortions for many teenagers due to scheduling of the judicial bypass procedure.[237] Any delay increases the physical dan-

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233. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 550 (Ct. App. 1994), *modified*, 94 C.D.O.S. 5184 (Cal. Ct. App. 1994), *reh'g denied*, 1994 Cal. App. LEXIS 813 (Cal. Ct. App. Aug. 1, 1994), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994). The court of appeal noted: "The evidence was nothing less than overwhelming that the legislation would not protect these interests, and would in fact injure the asserted interests of the health of minors and the parent-child relationship." *Id.*

234. *See id.* at 559 app. The court stated: "[T]he evidence was that minors who choose to undergo abortion experience a sense of self-esteem and sense of control equal to, and ultimately greater than, that experienced by those who choose to carry to term." *Id.*

235. *See American Academy of Pediatrics II*, No. 884-574, slip op. at 7 (Cal. Super. Ct. June 5, 1992), *aff'd*, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627), *review granted*, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459). The trial court reviewed extensive findings from witnesses representing "a wide range of disciplines." *See id.* The court noted: "Both the American Psychological Association and the American Psychiatric Association have thoroughly reviewed the published research in this area and have concluded that for most women, abortion poses no threat to their psychological or emotional well-being." *Id.*

236. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 559 app. "[T]eenage girls are 24 times as likely to die of childbirth as of a first-trimester abortion . . . ." Margaret Carlson, *Abortion's Hardest Cases: Should Parents Have a Say in a Teenager's Decision to End her Pregnancy? Do Rape Victims Have Special Rights? In the Supreme Court and in Louisiana, the Abortion Battle Lines are Redefined*, TIME, Jul. 9, 1990, at 22.

237. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546,

gers involved in obtaining an abortion.[238] Testimony at trial further indicated that the judicial bypass procedure is extremely stressful for minors.[239] Thus, through delay and added stress, the parental consent statute would endanger the physical and emotional well-being of minors.[240]

2. *Parent-Child Relationships Would Be Injured by the Parental Consent Statute*

The parental consent statute would likely injure the parent-child relationship.[241] Cutting to the root of the issue, the court of appeal noted that "the decision by the minor not to involve a parent in the abortion decision does not *lead* to a poor familial relationship, but is the *result* of a poor familial relationship."[242] Appellants' argument, that the statute is

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561-62 app. (Ct. App. 1994). The court of appeal noted: "Minors in states having parental consent statutes delay the decision to undergo an abortion; the percentage of delayed abortions therefore increases following the implementation of such legislation." *Id.*

238. *See id.* at 562 app. The court of appeal explained:

> The medical risks of abortion, however, increase as a pregnancy advances. Any delay in obtaining an abortion caused by the minor's reluctance to go through with the judicial bypass procedure, accordingly, is potentially injurious to her health. From this evidence, it follows that the implementation of A.B. 2274 will harm at least one of the interests the legislation is intended to further: the physical well-being of the minor.

Id.

239. *See American Academy of Pediatrics II,* 32 Cal. Rptr. 2d at 556. The court of appeal explained that plaintiff's evidence at trial showed that, "forcing an unwilling minor to disclose her decision to abort to a parent or judge causes extreme stress . . . ." *Id.*

240. *See id.* at 562 app. The court of appeal summarized: "The result is that the evidence disclosed that the judicial bypass is a costly, unwieldy and essentially pointless procedure which achieves no purpose other than to cause stress to minors and delay the implementation of their decision to abort, thus rendering the abortion more dangerous." *Id.*

241. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 561 app. (Ct. App. 1994). The court of appeal noted: "[T]he evidence was that compelling a minor to consult a parent about an abortion decision cannot aid, and in many instances will in fact injure, the parent-child relationship." *Id.*

242. *American Academy of Pediatrics II,* 32 Cal. Rptr. 2d at 560 app. The natural implication of the court of appeal's observation is that the statute will have its primary impact on minors in precisely the sort of families which would pose the greatest physical and emotional danger. The court of appeal stated: "Plaintiffs presented evidence that a significant number of families are abusive or otherwise

needed so supportive parents can assist their daughter in her decision,[243] loses sight of the fact that supportive families have no need for a coercive statute to encourage communication.[244]

Unfortunately, the parental consent statute would have its primary impact on minors in families which are not so supportive.[245] In the context of those families, appellants' view of the parental consent statute's impact is unrealistic; despite the legislature's best efforts, "[i]t is unlikely that politicians could write laws to improve communications in unhappy families, or keep teenagers from becoming pregnant, or provide wise and caring parents when they do."[246] In fact, rigidly mandating communication between family members can lead to deadly results.[247] The potential danger to minors posed by the paren-

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dysfunctional. In a substantial number of these families, adolescent girls are at a particular risk for violence." *Id.* at 561 app.

243. *See* Appellants' Opening Brief at 9-10, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. SO41459).

244. *See* Respondents' Answer to Petition for Review at 26-27, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 546 (Ct. App. 1994) (No. A058627). Respondents observe:

> The law does not affect the majority of California families, in which the supportive relationship that has developed over years ensures that young women facing problem pregnancies will confide in their parents without government compulsion. Rather, the law affects the remaining teenagers, who live in families which cannot bear the stress of the news of a daughter's pregnancy.

Id. at 23-24.

245. *See id.* Constitutional scholar Laurence Tribe describes the unfortunate impracticalities of parental consent statutes:

> In families where real communication goes on, such laws are redundant or insulting. And in families where communication has broken down, such laws are unlikely to facilitate respectful dialogue between children in crisis and their parents. Perhaps a statute could successfully legislate a 'right' for parents to control a daughter's decision and to force an unwilling child to carry a fetus to term . . . . But no statute could realistically hope to legislate love or communication between parents and children.

LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 209 (1992).

246. Carlson, *supra* note 236, at 22.

247. One shocking incident illustrates the seriousness of the threat of violence to young women in dysfunctional families: in Idaho, a thirteen year-old girl was shot to death by her father when he learned that he had impregnated her. *See* TRIBE, *supra* note 245, at 202-03 (citing Margie Boule, *An American Tragedy*,

tal consent statute is serious and should not be underestimated.

3. *The Parental Consent Statute Would Not Reduce Teen Pregnancy*

Appellants argued at the court of appeal that the statute would reduce teen pregnancy.[248] Appellants had introduced evidence at trial demonstrating that teen pregnancy rates decreased in states which had similar parental consent statutes.[249] Other rational explanations exist for such statistics, however.[250] Although evidence shows that *abortion* rates dropped in those states, actual *pregnancy* rates remained steady.[251] Thus, rather than reducing the pregnancy rate, the primary impact of parental consent statutes was to send minors across state lines to obtain abortions in states without such restrictive laws.[252] Furthermore, during the same time period, the pregnancy rate also dropped in states without parental consent laws.[253]

PORTLAND OREGONIAN, Aug. 27, 1989, at E1).

248. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 561 app. (Ct. App. 1994).

249. *See id.* In Minnesota, Missouri, and Massachusetts, the teen pregnancy rate dropped following implementation of parent consent laws. *See id.*

250. *See id.* at 561 app. The court of appeal noted: "Plaintiffs, however, countered with evidence that in each instance the pregnancy rate had dropped for other reasons." *See infra* notes 251-53 and accompanying text for respondents' alternative explanations.

251. *See American Academy of Pediatrics II,* 32 Cal Rptr. 2d at 561 app.

252. *See id.* The trial court explained: "One study published in 1986 in the American Journal of Public Health by Virginia Cartoof, Ph.D., and Lorraine Klerman, D.P.H., concluded that after the Massachusetts consent law went into effect, an average of 90 to 95 pregnant minors traveled out of that state each month to obtain an abortion." American Academy of Pediatrics v. Lungren, No. 884-574, slip. op. at 17 (Cal. Super. Ct. 1992).

253. *See American Academy of Pediatrics II,* 32 Cal. Rptr. 2d at 561 app. Evidence showed that in Missouri, the teen pregnancy rate had begun to drop before the statute went into place, and that in Minnesota, the adult pregnancy rate also dropped during the same time period. *American Academy of Pediatrics II,* No. 884-574, slip op. at 16.

C. THE PARENTAL CONSENT STATUTE FAILS TO FURTHER A COMPELLING INTEREST

The failure of the statute to further *any* stated interest makes an inquiry as to the proper standard of review practically moot.[254] Nevertheless, the California Supreme Court should apply the compelling interest test.[255] Under the three-part test mandated by *Hill v. Nat'l Collegiate Athletic Ass'n*,[256] the parental consent statute violates minors' constitutionally protected right to privacy.[257] Because the right to privacy involves a vital autonomy interest,[258] *Hill* requires

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254. Even if appellants are correct in arguing that a statute regulating minors need only be supported by significant state interests, the parental consent statute still must be rejected. Appellants consistently fail to address the parental consent statute's crucial inadequacy; the statute simply does not *further* any of the state's interests.

255. *See* American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 549-50 (Ct. App. 1994). The "compelling interest test," as applied by the court of appeal, requires that the State demonstrate that a compelling interest be furthered by the parental consent statute, that the burden upon privacy rights be justified by the benefits from the statute, and that those benefits could not be gained by less burdensome means. *See id.*

256. 865 P.2d 633 (Cal. 1994).

257. *See supra* notes 97-113 and accompanying text for a discussion of *Hill*'s three-part test. The State's arguments on the specific elements of the *Hill* test are mostly off-point; rather than arguing that there is no protected privacy interest involved, appellants argue that, according to United States Supreme Court decisions, parents also have an interest. *See* Appellants' Opening Brief at 22-35, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. SO41459). Rather than asserting that minors have no reasonable expectation of privacy in their reproductive decision-making, appellants argue that, according to federal jurisprudence, minors' expectations are *less* reasonable than those of adults. *See id.* at 35-37. Finally, rather than contending that the parental consent statute's invasion of the right to privacy is not serious, appellants simply incorporate the arguments from the first two elements. *See id.* at 37-38.

Conversely, respondents confront each element specifically and effectively: minors' right to privacy is protected by the California constitution as interpreted by California courts. *See* Respondents' Answer to Petition for Review at 17-19, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). Distinguishing minors who would be regulated by this statute from the voluntary athletes at issue in *Hill*, respondents argue that minors' reasonable expectation of privacy is not diminished by any voluntary course of action, such as joining a sports team. *See id.* at 19-20. Finally, respondents note that the invasion of the right to privacy is serious. The parental consent statute is "a law depriving young women of their ability to decide whether to terminate a pregnancy, enforced by the State's most coercive authority, criminal sanctions." *Id.* at 20. Respondents' serious discussion of the *Hill* elements establishes the prima facie violation of the constitutional right.

258. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 553. The court

the State to justify the invasion by demonstrating the furtherance of a compelling interest.[259]

The California Supreme Court should affirm the lower courts' rulings; the parental consent statute fails to meet the compelling interest standard,[260] and thus, unconstitutionally infringes upon minors' right to privacy.

D. THE PARENTAL CONSENT STATUTE VIOLATES INFORMATIONAL PRIVACY RIGHTS

The parental consent statute also violates minors' constitutionally protected right to informational privacy.[261] The records compiled by juvenile courts implementing the statute would consist of private information regarding minors' sexual and gynecological history.[262] Appellants' principal argument

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of appeal noted that in cases "involving an invasion of an interest fundamental to personal autonomy, a compelling state interest must be present to overcome the vital privacy interest." *Id.* (citing *Hill*, 865 P.2d at 653).

259. *See Hill*, 865 P.2d at 653. The California Supreme Court stated: "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, *e.g.*, freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a 'compelling interest' must be present to overcome the vital privacy interest." *Id.*

260. *See American Academy of Pediatrics II*, 32 Cal. Rptr. 2d at 558. The court of appeal explained:

> As we have stated, however, it is not enough for the Legislature to assert a compelling state interest as justification for the legislation; it also must show that the legislation will in fact further that interest. The trial court concluded, and we agree, that A.B. 2274 will not protect the health and welfare of minors, will not foster the parent-child relationship, and will provide only little, if any, support for any interest in involving parents in the decisions of their children.

Id.

261. *See* American Academy of Pediatrics v. Lungren, No. 884-574, slip op. at 31 (Cal. Super. Ct. 1992). The trial court held:

> With respect to Plaintiffs' additional argument that A.B. 2274 violates minors' rights to informational privacy, also guaranteed by article I, section 1, it follows from this Court's finding that the legislation itself furthers no compelling interest, that the State cannot demonstrate a compelling interest in maintaining records created solely to effectuate the procedures provided therein.

Id.

262. *See* Respondents' Answer to Petition for Review at 27, American Academy

is that the invasion of privacy is no more extensive than necessary.[263] Because the parental consent statute serves no state interests, however, no infringement of the right to informational privacy is justified.[264] Thus, the California Supreme Court should affirm the trial court's holding that the parental consent statute unconstitutionally violates informational privacy rights.[265]

E. THE PARENTAL CONSENT STATUTE VIOLATES THE RIGHT TO EQUAL PROTECTION

Finally, the parental consent statute violates the California Constitution's guarantee of equal protection.[266] Appellants argue that minors seeking prenatal or delivery care and those seeking abortions are not similarly situated, so the statute's disparate treatment of these groups is permissible.[267]

Appellants contend that there are no public interests in a minor's right to obtain an abortion, but that there are public interests in a minor's right to obtain prenatal or delivery care.[268] Appellants assert that choosing to obtain an abortion

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of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). Respondents argue: "This sensitive information, normally shared with medical professionals, will be recorded in court files and stored indefinitely." *Id.*

263. *See* Appellants' Opening Brief at 39, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. SO41459). "The minimal collection of data in furtherance of a compelling state interest does not violate a right of privacy even of adults." *Id.* (citing People *ex rel.* Eichenberger v. Stockton Pregnancy Control Medical Clinic, 249 Cal. Rptr. 762, 771 (Ct. App. 1988)).

264. *See* Respondents' Answer to Petition for Review at 27-28, *American Academy of Pediatrics II* (No. A058627).

265. Because the informational privacy argument constituted an independent ground for the trial court's issuance of a permanent injunction against the statute, it could be addressed by the California Supreme Court. The author notes, however, that if the supreme court were to strike down the parental consent statute as a violation of autonomy privacy, it is likely that the court would not reach the issue of informational privacy.

266. The author believes that the California Supreme Court will strike down the parental consent statute on privacy grounds; thus, the author believes, the supreme court will most likely not reach the issue of equal protection. *See supra* note 265.

267. Appellants' Opening Brief at 45, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. SO41459).

268. *Id.* at 41. Appellants assert: "[T]he health risks involved [in delaying an

involves moral issues, whereas obtaining prenatal care in connection with bringing a pregnancy to term involves no such moral issues.[269]

Despite appellants' arguments to the contrary, the California Supreme Court should recognize that the parental consent statute treats two similarly situated groups disparately.[270] Appellants' contentions, that a minor's right to privacy involves no public interest and that the decision to bring a pregnancy to term involves no moral decision-making,[271] illustrate the depth of appellants' misperception of the real-world issues at stake in this case. Both groups have a constitutionally protected privacy interest in their reproductive choice.[272] By applying the most coercive method available in regulating one group, while leaving the other group unregulated, the parental consent statute violates equal protection principles.[273]

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abortion in order to obtain parental consent] are personal to the minor and there are no public health reasons for not requiring parental consent." *Id.* at 42. However, the court of appeal recognized that the longer the decision to obtain an abortion is delayed, the more dangerous the procedure becomes for minors. American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546, 562 (Ct. App. 1994). The author believes that the danger the statute poses to the physical safety of young women of California constitutes precisely the sort of "public health reason" that justifies minors' current ability to obtain an abortion without third party consent.

269. Appellant's Opening Brief at 44, *American Academy of Pediatrics II* (No. S041459). Appellants argue: "Abortion involves moral decision making and that element of the equation is well recognized by our highest courts. The decisions involved in obtaining prenatal or delivery care simply are not recognized as involving such moral questions." *Id.* Appellants apparently consider the decision to become a parent devoid of any moral or ethical component.

Respondents counter: "However, there is an ethical dimension to *any* decision about pregnancy—whether the decision is to terminate an unplanned pregnancy by abortion or to bear a child and become a parent." Respondents' Brief at 58, American Academy of Pediatrics v. Lungren, 32 Cal. Rptr. 2d 546 (Ct. App. 1994) (No. A058627). The author agrees with respondents: because both groups have ethical decisions to make, the statute violates equal protection by regulating only one group. *See id.*

270. Respondents' Brief at 51, *American Academy of Pediatrics II* (No. A058627).

271. *See supra* notes 176-79 for a discussion of appellants' arguments.

272. *See* Respondents' Answer to Petition for Review at 28, *American Academy of Pediatrics II* (No. A058627). Respondents argue that, "the government is required to justify using its criminal law to place a disproportionate legal burden on one of two constitutionally protected reproductive choices." *Id.*

273. Respondents' Brief at 52, *American Academy of Pediatrics II* (No. A058627). Respondents argue:

> The State's disparate legal requirement for two alternative medical responses to pregnancy bears no relation to the consequences of each reproductive option, but reflects the

VIII. CONCLUSION

California's parental consent statute, which has so far been rejected by every judicial evaluation, violates the California Constitution. The statute endangers young women's physical and emotional health and threatens to compel these minors to bear children against their will. Appellants argue that the California Supreme Court should disregard the State's failure to prove that the parental consent statute would bring about any of its stated benefits. Instead, appellants contend, the supreme court should follow the "brilliant illumination" provided by opinions of the United States Supreme Court interpreting the United States Constitution.[274] To do so, the California Supreme Court would have to disregard the independence of California's Constitution, ignore the weight of precedent from California cases, and neglect the safety and well-being of thousands of California's young women.

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> government's ideological preference for childbirth over abortion. The State has imposed an elaborate consent requirement as a barrier to the disfavored reproductive choice of abortion. By using the criminal laws to influence teenagers to acquiesce in the state-favored alternative of childbearing, regardless of their personal aspirations, the government has violated the California Constitution's guarantees of privacy and equality.

Id.

274. *See* Appellants' Opening Brief at 33, American Academy of Pediatrics v. Lungren, 882 P.2d 247 (Cal. Sept. 29, 1994) (No. S041459); *see supra* notes 158-60 and accompanying text for a discussion of appellants' suggestion.

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