No. 04-3310

In The

United States Court of Appeals

for the

Tenth Circuit

AID FOR WOMEN, on its own behalf; and TERI AUGUSTUS, L.M.S.W.; MARGOT BRECKBILL, R.N.; TRACY COWLES, M.D.;

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS, THE HONORABLE J. THOMAS MARTEN, UNITED STATES DISTRICT JUDGE, NO. 03-CV-1353-JTM

BRIEF OF THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN MEDICAL ASSOCIATION, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN NURSES ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, KANSAS CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, KANSAS MEDICAL SOCIETY, KANSAS PSYCHIATRIC SOCIETY, KANSAS PUBLIC HEALTH ASSOCIATION, KANSAS SECTION OF DISTRICT VII OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, KANSAS STATE NURSES ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS KANSAS CHAPTER, AND SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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* Attachments are Included in Scanned PDF Format *

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Plaintiffs-Appellees,

– against –

NOLA FOULSTON, in her official capacity as District Attorney, 18th Judicial District of Kansas, and as representative of a class of all county and district attorneys in the state of Kansas,

Defendant-Appellant.

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CONSENT OF PARTIES TO FILING OF BRIEF

Both Appellants and Appellees have consented to the filing of this Brief by *Amici Curiae*.

CORPORATE DISCLOSURE STATEMENT

None of the *Amici Curiae* have a parent corporation, nor does any publicly held company own 10% or more of the stock of any *Amici Curiae,* except that the American Academy of Pediatrics is the parent organization of the Kansas Chapter of the American Academy of Pediatrics and the Kansas Section of District VII of the American College of Obstetricians and Gynecologists is a section within the American College of Obstetricians and Gynecologists.

INTEREST OF *AMICI CURIAE*

The American Academy of Family Physicians, American Medical Association, American Medical Women's Association, American Nurses Association, American Psychiatric Association, American Society for Adolescent Psychiatry, Kansas Chapter of the American Academy of Pediatrics, Kansas Medical Society, Kansas Psychiatric Society, Kansas Public Health Association, Kansas Section of District VII of the American College of Obstetricians and Gynecologists, Kansas State Nurses Association, National Association of Social Workers and its Kansas Chapter, and Society for Adolescent Medicine (collectively, "*Amici Curiae*") submit this Brief as *Amici Curiae* with the consent of the parties in support of Appellees. *Amici Curiae* are associations of medical, mental health, and public health professionals who provide physical and mental health and social services. Attached as Exhibit A is a list identifying each *Amici Curiae* with a statement of its specific interest.

The professions represented by *Amici Curiae* are all mandatory reporters of child abuse under Kan. Stat. Ann. § 38-1522 (the "Reporting Statute"). Each of the *Amici Curiae* has members practicing in the state of Kansas who provide services to adolescents under the age of 16. According to the Attorney General's recent interpretation of the Reporting Statute, "injury as a result of sexual abuse should be inferred as a matter of law whenever sexual intercourse, whether

voluntary or involuntary, has occurred" with a person under the age of 16. *See* Kan. Atty. Gen. Op. No. 03-17, *4 (2003). This interpretation removes all professional discretion from the mandated reporters represented by *Amici Curiae*.

If the District Court's grant of a preliminary injunction is reversed and this interpretation is enforced, the professions represented by *Amici Curiae* will be required to report to the Kansas Department of Social and Rehabilitation Services ("SRS") when they learn from a patient or client under the age of 16 or discover upon examination that he or she has engaged in consensual sexual activity, even if the professional concludes that the behavior was neither abusive nor injurious. In fact, the Attorney General's interpretation will force the professions represented by *Amici Curiae* to breach the confidentiality of their adolescent patients, thereby harming the professional relationship and threatening adolescent health. As a result, the practice of the professions represented by *Amici Curiae* is impacted by the Court's decision, and *Amici Curiae* have a direct interest in the outcome of this appeal.

PRELIMINARY STATEMENT

Amici Curiae recognize that mandatory child abuse reporting laws – like the Reporting Statute – are an important component of child protection systems. The Attorney General's new-found interpretation of the Reporting Statute, however, is a dramatic departure from the traditional use and intent of mandatory reporting.

Mandatory reporting laws – which require certain professions to report child abuse to state child protection authorities – have their origins in the 1960s, with increased public awareness of child abuse and the recognition of a "battered child syndrome" with recognizable symptoms. *See* Seth C. Kalichman, *Mandated Reporting of Suspected Child Abuse, Ethics, Law, & Policy* 12-15 (Am. Psychological Ass'n 2 ed. 1999). *Amici Curiae*, as professional organizations, represent a diverse group of health, mental health and public health professionals ("Professionals") who are subject to these mandatory reporting laws. These laws have, since their inception, been expanded to encompass child neglect and sexual abuse.

The Attorney General's interpretation rests on an unrebuttable presumption that abuse has occurred whenever a person under age 16 (referred to herein as an "Adolescent"[1]) has engaged in certain sexual activity. The statutory definition of sexual abuse includes a broad range of sexual activity. *See* Kan. Stat. Ann. §§ 38-1502(c), 21-3503, 21-3504. The range of sexual activity (hereinafter referred to as "Sexual Behavior") includes sexual intercourse and any touching with the intent to arouse, all of which could be considered reportable abuse under the Attorney General's opinion when engaged in with an Adolescent. This presumption of

[1] The defined term "Adolescent(s)" used herein refers to persons under 16 years of age referenced in the Attorney General's interpretation. The general word "adolescent(s)" used herein reflects a variety of age ranges as defined in cited research.

abuse removes all professional discretion from members of *Amici Curiae* because it applies regardless of whether the mandatory reporter, by the terms of the Reporting Statute, "has reason to suspect that [the adolescent] has been injured[,]" and regardless of whether he or she consented or of the age of the other person. Kan. Stat. Ann. § 38-1522(a).

Amici Curiae, both in the course of their members' professional practice and by their submission of this Brief, fully support the goal of protecting Kansas Adolescents from sexual abuse. *Amici Curiae* believe, however, that the Attorney General's recent interpretation will have precisely the opposite effect. *Amici Curiae* recognize the direct relationship between confidentiality and the quality of physical and mental health and social services (collectively the "Services"[2]) their members offer. Protecting Adolescents entails reinforcing, rather than weakening, the confidentiality of the Professional-patient relationship. Because the Attorney General's interpretation undermines (if not eliminates) confidentiality in communications between Professionals and Adolescents, it necessarily harms the Adolescents it claims to protect.

The District Court's grant of a preliminary injunction should be affirmed. If the preliminary injunction is lifted, members of *Amici Curiae* will be required to

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[2] The defined term "Services" used herein refers to those specific services performed by members of *Amici Curiae*. The general word "services" used herein reflects a variety of services as defined in cited research.

breach the confidence of their patients and clients, who will therefore be deterred from seeking Services, thereby damaging their health and well-being and the public health of Kansas. As this Brief demonstrates, any alleged benefit that may come from Professionals' reporting non-injurious Sexual Behavior, only for SRS to screen it out, does not outweigh the significant harm that requiring such reports will bring to Adolescents.

ARGUMENT

I. BACKGROUND: ADOLESCENT SEXUAL BEHAVIOR

In providing Services to Adolescents, members of *Amici Curiae* confront the reality that Adolescents have consensual sex and engage in sexual touching, often with age-mates. The professional practice of members of *Amici Curiae* does not require, nor do *Amici Curiae* offer herein, a judgment as to the propriety of such Sexual Behavior. *Amici Curiae* address, by profession, the physical and mental health issues that Sexual Behavior raises and this appeal must be considered in light of that reality.

Research has consistently shown that a considerable proportion of Adolescents have engaged in sexual intercourse. *See* Alan Guttmacher Institute, *Facts in Brief Teen Sex and Pregnancy* (1999) (hereinafter "AGI Fact Sheet") (24% of girls and 27% of boys have had intercourse at age 15); Harold Leitenberg

& Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29:3 ARCHIVES OF SEXUAL BEHAVIOR 203, 205 (2000) (hereinafter "Leitenberg & Saltzman") (approximately one-third of adolescent girls sexually active by age 15 and approximately one-half by age 16) (citations omitted).

According to the 2003 Youth Risk Behavior Survey conducted by the federal Centers for Disease Control, 33% of ninth graders surveyed had already experienced sexual intercourse (28% of girls and 37% of boys). Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance – United States 2003*, 53:55-2 MORBIDITY & MORTALITY WEEKLY REPORT May 21, 2004, at 71 (age of ninth graders not available).

In addition, a nationally representative school-based study found that 12% of students aged 12 to 14 who had never had sexual intercourse reported engaging in touching under clothes in a romantic relationship with a partner of the opposite sex in the preceding 18 months. Hannah Bruckner & Peter Bearman, *Dating Behavior and Sexual Activity of Young Adolescents: Analyses of the National Longitudinal Study of Adolescent Health*, in *National Campaign to Prevent Teen Pregnancy, 14 and Younger: The Sexual Behavior of Young Adolescents* 31, 38-39 (Bill Albert et al. eds. May 2003). The percentage was much higher for 14 year olds (16%) as

compared to 12 year olds (10%). *Id.* In addition, 6% of 12 to 14 year olds (and 10% of 14 year olds) who had never had sexual intercourse reported engaging in touching genitals in a romantic relationship with a partner of the opposite sex in the preceding 18 months. *Id.* at 39-40.

A considerable percentage of the partners of sexually-active Adolescent girls are their age-mates. In fact, "more recent studies suggest that the vast majority of male sexual partners of teenage girls are . . . about the same age or only several years older than the girls with whom they are having sex." Leitenberg & Saltzman at 204; *see also* Christine E. Kaestle et al., *Sexual Intercourse and the Age Difference Between Adolescent Females and Their Romantic Partners*, 34:6 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 304, 306 (Nov./Dec. 2002). Therefore, a significant percentage of Adolescents are engaging in activity reportable under the Attorney General's interpretation, given the breadth of its reach, and doing so with age-mates.

II. PROFESSIONAL HEALTH ORGANIZATIONS IN THIS COUNTRY RECOGNIZE THAT CONFIDENTIALITY IS AN ESSENTIAL COMPONENT OF PROVIDING SERVICES

A. Professional Codes Require Confidentiality Protection for Patient and Client Information

The paramount importance of confidentiality is evident from the codes of conduct adopted by numerous associations of Professionals. The principle finds

perhaps one of its oldest expression in the Hippocratic Oath, written in the fourth or fifth century B.C., which provides: "Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoke abroad, I will not divulge, as reckoning that all such should be kept secret." Alexander M. Capron & Irwin M. Birnbaum, 3 TREATISE ON HEALTH CARE LAW, § 16.02[1][a] (2004). Many physicians today have sworn to the Hippocratic Oath. *Id.*

The principle of confidentiality enumerated in the Hippocratic Oath has survived in contemporary codes of various Professionals that require information from patients or clients to be held in confidence. For example:

- The Principles of Medical Ethics of the American Medical Association ("AMA") mandate that "[a] physician . . . shall safeguard patient confidences and privacy within the constraints of the law."[3] The AMA's Code of Ethics states that "[t]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the

[3] Available at http://www.ama-assn.org/ama/pub/category/2512.html.

physician in order that the physician may most effectively provide needed services."[4]

- The American College of Obstetricians and Gynecologists Code of Professional Ethics provides that "[t]he patient-physician relationship has an ethical basis and is built on confidentiality, trust, and honesty" and the "obstetrician-gynecologist must respect the rights and privacy of patients . . . and safeguard patient information and confidences within the limits of the law."[5]
- The American Academy of Family Physicians recognizes that the "right to privacy is personal and fundamental" and that a "confidential relationship between physician and patient is essential for the free flow of information necessary for sound medical care. Only in a setting of trust can a patient share the private feelings and personal history that enable the physician to comprehend fully, to diagnose logically and to treat properly."[6]

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4 Available at http://www.ama-assn.org/ama/pub/category/8353.html.

5 Available at http://www.acog.org/from_home/acogcode.pdf.

6 Available at http://www.aafp.org/x6686.xml.

- The American Nurses Association Code of Ethics for Nurses With Interpretive Statements states "the nurse has a duty to maintain confidentiality of all patient information."[7]
- The American Psychiatric Association recognizes the particular importance of the confidentiality code to mental health services. Its Principles of Medical Ethics direct "[p]sychiatric records, *including even the identification of a person as a patient*, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient."[8] (emphasis added.)
- The American Psychological Association Code of Conduct states "[p]sychologists have a primary obligation and take reasonable precautions to protect confidential information . . . recognizing that the extent and limits of confidentiality may be regulated by law[.]"[9]

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7 Available at http://www.nursingworld.org/ethics/code/ethicscode150.htm#3.1.

8 Available at http://www.psych.org/psych_pract/ethics/ppaethics.pdf.

9 Available at http://www.apa.org/ethics/code2002.pdf.

- The National Association of Social Workers Code of Ethics provides that "[s]ocial workers should respect clients' right to privacy. "[10]

While many professional codes of confidentiality have a proviso regarding legal obligations, these provisions were not intended to endorse a policy – like the Attorney General's interpretation – that would remove all possibility of exercising professional judgment.

B. Major Professional Health Organizations Recognize that Confidentiality Must be Afforded to Adolescents

Adolescents are not excluded from the codes of confidentiality binding Professionals. National associations of Professionals serving adolescents agree that confidentiality is an essential component of providing Services to this population. In fact, four prominent national medical societies – the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the Society for Adolescent Medicine – recently reaffirmed the importance of confidentiality in the context of reporting adolescent sexual activity, stating "[i]t is critical that adolescents who are sexually active receive appropriate confidential health care and counseling." Position Paper of the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and

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[10] Available at http://www.socialworkers.org/pubs/code/code.asp.

Gynecologists, & the Society for Adolescent Medicine, *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. ADOLESC. HEALTH 420, 420 (2004) (the "Provider Position Paper," attached hereto as Exhibit B). The Provider Position Paper provides the following guidance to its members and to policymakers: "Open and confidential communication between the health professional and the adolescent patient, together with careful clinical assessment, can identify the majority of sexual abuse cases." *Id.*

The AMA recently endorsed the Provider Position Paper, stating that "[m]andatory reporting laws can lead to outcomes that are unintended and potentially damaging to the health of adolescents" and that the Provider Position Paper "ensures that adolescents who are sexually active receive the health care they need and identifies adolescents who have been sexually abused or exploited and protects them from harm[.]" *See* AMA House of Delegates, Resolution 825 (adopted as amended Dec. 7, 2004)[11] (attached hereto as Exhibit C). The AMA independently has "reaffirm[ed] that confidential care for adolescents is critical to improving their health." AMA, H-60.965 *Confidential Health Services for Adolescents*[12] (attached hereto as Exhibit D).

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11 Available at http://www.ama-assn.org/ama1/pub/upload/mm/465/825i04.rtf.

12 Available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n= result Link&doc=policyfiles/HnE/H-60.965.HTM&s_t=60.965&catg=AMA/HnE &catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1&.

The Society for Adolescent Medicine position paper recognizes that "[c]onfidentiality protection for adolescents' health care information is important both to adolescents and to the health care professionals who care for them." Society for Adolescent Medicine, *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine*, 35 J. ADOLESC. HEALTH 160, 160 (Aug. 2004) (hereinafter "SAM Position Paper," attached hereto as Exhibit E).[13] Complete information – necessary for Professionals to do their jobs and for adolescents to get the care they need – can be obtained from adolescents only in the context of a confidential relationship. Moreover, "[p]rotecting the confidentiality of adolescents' health information is a professional duty that derives from the moral tradition of physicians and the goals of medicine." *Id.* at 163.

Finally, and significantly, "[u]ncertainty about whether health services will be confidential is perceived by both physicians and adolescents as a factor that may lead some adolescents to suppress relevant information or delay or avoid medical

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[13] The Society for Adolescent Medicine previously stated that "[a]dolescents should be encouraged to involve their families in health decisions whenever possible; however, when such involvement is not in the best interest of the adolescent or when parental involvement may prevent the adolescent from seeking care, confidentiality must be assured." Society for Adolescent Medicine, *Access to Health Care for Adolescents: A Position Paper of the Society for Adolescent Medicine*, 13 J. ADOLESC. HEALTH 162, 168 (Mar. 1992).

visits." AMA Council on Scientific Affairs, *Confidential Health Services for Adolescents*, 269:11 JAMA 1420 (Mar. 17, 1993). This concern is shared by the four national associations in the Provider Position Paper and is discussed in detail in Section III.A. *See also* American Academy of Pediatrics: *Policy Statement Confidentiality in Adolescent Health Care* (RE9151) (Apr. 1989) ("confidentiality has been identified, both by providers and young people themselves, as a significant access barrier to health care").

The Attorney General seems to argue that the interpretation of the Reporting Statute does not violate confidentiality because "nothing in K.S.A. 38-1522 requires reports of the type of health care sought by a minor." AG Brief at 4, 25. From the perspective of *Amici Curiae*, this argument fails because all information provided by a patient or client to a Professional in the context of seeking Services is confidential, including the person's name and the mere fact of receiving the Service.[14]

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[14] This definition of what is confidential information is consistent with the privacy regulations of the federal Health Insurance Portability and Accountability Act, which define "protected health information" broadly to include individually identifiable health information that is created or received by a health care provider and "[r]elates to the past, present, or future physical or mental health or condition of an individual; [or] the provision of health care to an individual[.]" *See* 45 C.F.R. § 160.103 (Oct. 1, 2004 ed.).

For example, the AMA's Principles of Medical Ethics safeguard "patient confidences and privacy" rather than simply the treatment provided. Its Code of Ethics protects "information disclosed to a physician during the course of the relationship between physician and patient." The AMA's Council on Scientific Affairs stated, "[c]onfidentiality refers to the privileged and confidential nature of information provided during the health care transaction." AMA Council on Scientific Affairs, *Confidential Health Services for Adolescents*, 269:11 JAMA 1420 (Mar. 17 1993). The Code of the American College of Obstetricians and Gynecologists safeguards "patient information and confidences." The principles of the American Psychiatric Association protect "even the identification of a person as a patient[.]" Confidential information is not limited to what kind of Services the individual seeks or receives and includes information regarding his or her sexual history, which must be reported under the Attorney General's interpretation of the Reporting Statute.

III. THE ATTORNEY GENERAL'S INTERPRETATION IS HARMFUL TO ADOLESCENTS

A. The Health and Well-Being of Adolescents Will Be Harmed

The Attorney General's interpretation of the Reporting Statute harms the health of Adolescents. For a Kansas Adolescent, the Attorney General's interpretation sends two important signals: first, that the State will have unlimited

access to their communications regarding Sexual Behavior, and second, that any Professional in whom an Adolescent would likely confide cannot be trusted to keep private communications regarding Sexual Behavior. From the perspective of a Kansas Professional, the Attorney General's interpretation inhibits communications with Adolescents and also creates a disincentive for would-be patients and clients to seek Services. The impact of these harms is significant and far outweighs any alleged benefit of reporting non-injurious Sexual Behavior.

Simply stated, the Attorney General's interpretation detrimentally affects the health of Adolescents in Kansas in two distinct ways: first, some Adolescents, knowing that their Sexual Behavior will be reported to the State, will avoid or delay seeking Services, and second, some Adolescents who seek Services despite the reporting requirement will not be honest in discussing their Sexual Behavior with Professionals.

1. Adolescents Will Avoid or Delay Seeking Services

It is well-documented that many adolescents forego or delay seeking needed health care if they are not assured that they will receive confidential services. Carol A. Ford & Abigail English, *Limiting Confidentiality of Adolescent Health Services: What are the Risks?*, 288:6 JAMA 752-53 (Aug. 14, 2002); Karen E. Adams, *Mandatory Parental Notification: The Importance of Confidential Health Care for Adolescents*, 59:2 J. AM. MED. WOMEN'S ASS'N 87 (2004); Provider

Position Paper at 422. Studies consistently document that teens will not obtain Services for sexual health concerns if they think the information they share will not be kept confidential. *Id.* One study of ninth through twelfth graders "confirms the notion that the *perceived* lack of confidentiality may be a barrier to health care for some adolescents." Tina L. Cheng et al., *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269:11 JAMA, at 1406 (Mar. 17, 1993) (emphasis added). Because the Attorney General's interpretation eliminates the possibility for an Adolescent to have truly confidential communications regarding Sexual Behavior with a Professional, the Reporting Statute will deter Adolescents from seeking Services.

Confidentiality plays a significant role in adolescents' decisions both to seek care in the first instance and to remain in care after beginning treatment. *See* Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36:2 PERSPECTIVES ON SEXUAL & REPROD. HEALTH, Mar./Apr. 2004, at 80; D.M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288:6 JAMA 710-14 (Aug. 14, 2002); Catherine Wright, *Riskier behavior linked to notification: Teens would shun sexual health clinics if parents were informed*, NATION'S HEALTH, OCT. 2002, at 29. It is widely accepted among providers of Services to adolescents that confidentiality is essential. *See* Section II.B. The

SAM Position Paper states that "[c]onfidentiality protection is an essential component of health care for adolescents because it is consistent with their development of maturity and autonomy and without it, some adolescents would forgo care." SAM Position Paper at 160. The Provider Position Paper more specifically asserts that "mandatory reporting of sexual activity will likely raise barriers and prevent adolescents from seeking health care[.]" Provider Position Paper at 422.

The significant extent to which adolescents will refuse care without a guarantee of confidentiality is well documented. Adolescents who are not assured of confidential care will, for example, forego pelvic examinations and testing for sexually-transmitted diseases ("STDs") and the human immunodeficiency virus ("HIV"). Jeannie S. Thrall et al., *Confidentiality and Adolescents' Use of Providers for Health Information and for Pelvic Exams*, 154 ARCH. PEDIATRIC ADOLESC. MED. 885-92 (Sept. 2000); Carol A. Ford et al., *Confidentiality and Adolescents' Willingness to Consent to Sexually Transmitted Disease Testing*, 155 ARCH. PEDIATRIC ADOLESC. MED. 1072-7 (2001); Thera M. Meehan et al., *The Impact of Parental Consent on the HIV Testing of Minors*, 87:8 AM. J. PUB. HEALTH 1338-41 (Aug. 1997); S. Jackson & T.L. Hafemeister, *Impact of Parental Consent and Notification Policies on the Decisions of Adolescents to be Tested for HIV*, 29:2 J. ADOLESC. HEALTH 81-93 (Aug 29, 2001). Those procedures are

essential components of routine health care for many adolescents and the impact of their absence from a preventive health regimen for a sexually-active teen can not be overestimated. *Id.;* Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access for Adolescents*, 50 DEPAUL L. REV. 827, 844 (2001).

Public health goals regarding Adolescent health care are clear: "It is critical that adolescents who are sexually active receive appropriate confidential health care and counseling." Provider Position Paper at 420. In its Policy Statement on Adolescent Access to Comprehensive, Confidential Reproductive Health Care, the American Public Health Association urged "that a national policy on reproductive health care for adolescents include confidential health services tailored to the needs of adolescents, including sexually active adolescents."[15] The Attorney General's interpretation is counterproductive to these pronounced public health goals.

2. Adolescents Will Not Fully Communicate with Medical Professionals

An Adolescent who knows his or her communications will not be held in confidence is unlikely to confide fully in a Professional. Karen E. Adams, *supra* at 87. Even if an Adolescent engaged in Sexual Behavior decides to seek Services, the Attorney General's interpretation effectively destroys his or her capacity to

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[15] Available at http://www.apha.org/legislative/policy/policysearch/index.cfm?fuseaction=view&id=1212.

obtain confidential health care or counseling. For example, a 15-year-old sexually-active male in Kansas who turns to a trusted adult for counsel would legitimately worry that his doctor, teacher, psychologist or nurse will "tell on him." Under the Attorney General's interpretation, those trusted confidants are mandated to betray the teenager's confidence. Fearing the revelation of these most personal "secrets," the Adolescent in our example is likely to deny or distort the extent and details of his Sexual Behavior in his conversations with Professionals.

Adolescence is a unique and transitory stage in life but, as in all stages of life, health is a primary concern. Developmental models demonstrate adolescents' need for increased autonomy and their increasing capacity to provide informed consent. Karen E. Adams, *supra* at 88. Adolescents frequently act independently and, as such, are the best and often only source of information about their lives and behaviors that effect their health and well-being. Offering Services, as a Professional, is dependent on having access to this information.

For members of *Amici Curiae* to provide their Services successfully, complete communication of an Adolescent's sexual health history is essential. *See* Provider Position Paper at 420-21. Having access to this information is dependent on the Professional's ability to assure Adolescents that their communications are confidential. Among Adolescent clients and patients, sexuality is often the dominant area of concern for Professionals. Unsurprisingly, sexual activity is one

of the most often-cited reasons for adolescents to seek services. *See* Abigail English & Madlyn Morreale, *A Legal and Policy Framework for Adolescent Health Care: Past, Present and Future*, 1:1 HOUS. J. HEALTH L. & POL'Y 63, 66 (Symposium 2001).

Adolescent patients who are assured that the physician-patient relationship is confidential are more likely to trust their physician and to communicate in an open and honest manner about their activities and health care concerns. *See* D.A. Blandino, *Adolescents and Confidentiality*, 46:1 J. FAMILY PRAC. 15-16 (Jan. 1998); Carol A. Ford et al., *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care*, 278:12 JAMA 1029-34 (Sept. 24, 1997). It has been demonstrated that adolescents who do not believe that they are receiving confidential care do not communicate openly about substance use, mental health issues and sexual behaviors. Carol A. Ford et al., *supra* 278 JAMA at 1029-34. The SAM Position Paper states that "[c]onfidential health care should be available, especially to encourage adolescents to seek health care for sensitive concerns and to ensure that they provide complete and candid information to their health care providers." SAM Position Paper at 160. An open and honest relationship between the physician and patient increases the likelihood that people will seek future health care from that physician. Carol A. Ford et al., *supra* 278 JAMA at 1033.

As is true for the general patient population, open communication is essential for effective screening, accurate diagnosis, and risk reduction counseling. SAM Position Paper. Professionals need full and accurate information regarding the sexual history of Adolescents in order to provide the best quality of an array of Services. Adolescents who fear a lack of confidentiality and withhold sexual health information from Professionals necessarily receive a quality of care compromised by incomplete information.

Without full information from a patient, a physician may not be able to make an accurate diagnosis. For example, physicians rely on patients to inform them of certain behavior, undetectable by physical examination, which triggers the need for an array of behavior-specific tests. Knowledge of Sexual Behavior in an Adolescent, for example, may alert a physician to the need to test for human papilloma virus ("HPV"). Failure to diagnose and treat HPV has serious long-term consequences including cervical cancer. *See* AGI Fact Sheet. Up to 15% of teens have HPV. *Id.* Without the knowledge that Adolescent patients are engaged in Sexual Behavior, Professionals may not seek HPV testing, thereby unnecessarily putting Adolescents at risk for long-term consequences.

Of relevance to the current question is a recent study showing that 59% of single, sexually-active girls under the age of 18 who were using family planning clinics indicated they would stop using all health services, discontinue use of

specific health services, or delay testing or treatment for HIV or other STDs if their parents were informed that they were seeking prescribed contraceptives. D.M. Reddy et al., *supra* at 713. That same study indicated that only 1% of these girls would stop having sexual intercourse after terminating treatment with a health clinic that had a parental notification policy. *Id.*

3. Adolescents Will Not Fully Communicate with Mental Health Professionals

For mental health counseling to be successful, the client must be willing to reveal intimate life details. Among sexually-active adolescent clients, counseling often includes frank discussions of Sexual Behavior. For social work professionals, the importance of confidentiality cannot be overstated: "The confidential nature of communications between social workers and their clients has been a cardinal principle of the social work profession from its earliest years and, indeed, is the framework of the social worker-client relationship." National Association of Social Workers, *Social Work Speaks: National Association of Social Workers, Policy Statements, 2003-2006* at 55 (6th ed. 2003).

For any client of counseling services, and Adolescents in particular, a confidential relationship unlocks the door to honest communication. A therapist cannot build the trust necessary for disclosure of such private information without being able to assure confidentiality. Under the Attorney General's interpretation, a counselor cannot assure that confidentiality. It is the Adolescents who seek mental

health counseling services who bear the negative impact of this breached confidence.

In *Jaffee v. Redmond,* 518 U.S. 1 (1996), the United States Supreme Court recognized a psychotherapist privilege for confidential communications made to licensed social workers (in addition to licensed psychiatrists and psychologists) in the course of psychotherapy. Citing numerous studies submitted by the *amici curiae* in that case, the Court noted "because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.* at 10. The Court also acknowledged the broader societal interests in confidential mental health services, stating that "the psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

In its Code of Ethics, the National Association of Social Workers states that "Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before

the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent."[16] By disclosing their duty to report, a Professional (as ethical obligations require) thereby alerts an Adolescent to the absence of confidentiality from their discussions. This perceived lack of confidential care leads to negative health consequences for Adolescents individually and, as discussed in Subsection B below, for the public more broadly.

B. The Health of the Public Will Be Harmed

1. The Attorney General's Interpretation Thwarts Important Public Health Initiatives

By deterring Adolescents from seeking care, the Attorney General's interpretation thwarts public health initiatives aimed at preventing Adolescent pregnancy, reducing the spread of STDs, and promoting early prenatal care. "The long-term consequences of limiting access to health care for sexually active adolescents may include an increase in the prevalence of [sexually transmitted infections], a rise in unintended teen pregnancy, and escalation in the number of mental and behavior health issues, including the potential of partner violence." Provider Position Paper at 422.

The Attorney General's interpretation carries an economic impact in addition to the more obvious human consequences discussed herein. Adolescents who avoid or delay care because of confidentiality concerns face a host of health

[16] Available at http://www.socialworkers.org/pubs/code/code.asp

consequences including unintended pregnancies and higher rates of STDs. These consequences in turn produce two additional costs: a serious impact on adolescent health and a high price tag. The costs of care required to address the various health issues resulting from confidentiality-related avoidance of or delay in seeking care are significant. For example, health care costs attributed to the loss of confidentiality resulting in pregnancy- and STD-related services for females under age 18 using publicly-funded family planning clinics in Texas have been projected to be as much as $43.6 million in one year. *See* Luisa Franzini et al., *Projected Economic Costs Due to Health Consequences of Teenagers' Loss of Confidentiality in Obtaining Reproductive Health Care Services in Texas*, 158:12 ARCH. PEDIATRIC ADOLESC. MED. 1140, 1144 (Dec. 2004). Eliminating access to confidential care for Adolescents therefore not only harms adolescent health, it also needlessly drains already limited financial resources.

a. Reducing Adolescent Pregnancy

Reducing Adolescent pregnancy is a public health goal established by the Kansas Legislature. *See* Kan. Stat. Ann. § 65-1,158(a) (directing the Kansas secretary of health and environment to "establish a comprehensive community-based teen pregnancy reduction program" through locally-controlled interventions). Recognizing that Adolescents will, in fact, engage in Sexual Behavior despite educational interventions, the Kansas Legislature provided

among the educational objectives of these programs, "preventing pregnancy by other means when the program has been unable to assist minor females and males in postponing or suspending sexual intercourse, including a description of the risks and benefits of different methods of contraception[.]" *Id*.

Many professionals working with Adolescents in these programs are mandatory reporters under the Reporting Statute. In addition, Adolescents need to consult with physicians in order to receive necessary services and prescriptions, which the Kansas Legislature sanctioned in establishing the objectives of Adolescent pregnancy prevention programs. In order for these programs to work, Adolescents need to disclose Sexual Behavior to mandatory reporters. By chilling their ability to do so, the Attorney General's interpretation thwarts the objectives of the community programs established by the Kansas Legislature.

b. Preventing the Spread of Disease

Preventing the spread of disease is another basic public health goal. Teens have higher rates of certain STDs than older persons who are sexually active. For example, sexually-active teens are more likely to have chlamydia and gonorrhea than sexually-active adults. AGI Fact Sheet. In 2002, Kansas had a 9% increase in diagnosis of chlamydia, with 6,758 cases diagnosed. In 2002, 2,700 cases of gonorrhea were diagnosed in Kansas. Bureau of Epidemiology and Disease Prevention, Kansas Department of Health and Environment, *The Community*

Planning Group's Guide to the Impact of HIV/AIDS on Kansas Residents at 58, 60 (2003).[17]

In addition to being more prevalent among teens, the consequences for these STDs are more severe for them; female teens have a higher hospitalization rate than do adult women for acute pelvic inflammatory disease ("PID"). PID is often caused by untreated chlamydia and gonorrhea and can lead to infertility and ectopic pregnancy. AGI Fact Sheet.

When one Adolescent does not receive treatment for a STD, the public health and the health of other Adolescents is jeopardized. According to data from the Centers for Disease Control, 10% of ninth graders surveyed in 2003 had four or more sex partners in their lifetime. Grunbaum et al. at 71. In order for Adolescents to receive treatment and counseling to prevent the spread of STDs, they must seek Services and disclose their Sexual Behavior to Professionals.

c. Promoting Healthy Pregnancies

Adolescents do become pregnant and have babies. In 2000, the birth rate in Kansas for women aged 15 to 17 was 23 per 1,000 women. Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity and State-by-State Information* at 8 (updated Feb. 19, 2004) (data on

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[17] Available at http://www.kdhe.state.ks.us/hiv-std/download/epi_profile2003.pdf.

teens under age 16 not provided). Healthy pregnancies and babies require Kansas Adolescents to disclose Sexual Behavior.

Healthy pregnancies require Adolescents to seek early prenatal care, which necessarily involves disclosing prior Sexual Behavior to physicians. For the reasons set forth in Section III.A.1, Adolescents will delay or forego seeking care if confidentiality is not assured. In fact, already one-third of pregnant teens receive inadequate prenatal care. AGI Fact Sheet. In Kansas in 2003, only 75% of teen mothers received prenatal care in the first trimester, while 89% of non-teen mothers (of live births) received prenatal care in the first trimester. Center for Health and Environmental Statistics, Kansas Department of Health and Environment, *2003 Annual Summary of Vital Statistics* 20.[18] Babies born to young mothers have higher rates of low birth weight, childhood health problems, and hospitalization. AGI Fact Sheet.

2. The Attorney General's Interpretation Diverts Resources from Actual Abuse

In fiscal year 2003, roughly 40,000 cases of possible abuse and neglect were reported to SRS. AG Brief at 10. Resources expended to screen and investigate consensual Sexual Behavior between age-mates in Kansas necessarily divert resources away from investigating reports of abuse and neglect that involve actual

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[18] Available at http://www.kdhe.state.ks.us/hci/as03/AS03PREG.PDF.

injury and away from interventions to address abusive behavior. By increasing the number of reports SRS will receive, the Attorney General's interpretation will jeopardize the well-being of those children who desperately need SRS intervention. The interpretation will funnel resources away from the investigation of reports of actual child abuse.

"The purported goal of identifying every possible case of child abuse comes at an expense to the very system designed to help children. From this view, resources expended on investigating reports are understood to be mischanneled and contribute to the gutting of other child abuse prevention and intervention services. For instance, studies show that a majority of child protection workers are unable to provide services in a majority of *substantiated* cases of child abuse" (emphasis added). Kalichman at 31 (citation omitted). The Attorney General's response to this resource diversion argument is that reports of non-injurious Sexual Behavior will be "screened out" immediately. AG Brief at 11. This response is unpersuasive because significant resources of Professionals will be expended to make reports, only to have significant resources of SRS expended to screen them out.

C. The Attorney General's Interpretation Will Detrimentally Impact the Professional-Patient Relationship

1. The Attorney General's Interpretation Removes Professional Discretion

Professionals are trained to exercise professional judgment and routinely do so in decision-making regarding their patients and clients. The Kansas Legislature has recognized the value of professional discretion. For example, one statute regarding treatment of minors for venereal disease provides that the physician "*may*, but shall not be obligated to, *in accord with his opinion of what will be most beneficial* for such person" inform certain others. Kan. Stat. Ann. § 65-2892 (emphasis added).[19] Deference by the Legislature to professional discretion allows health professionals to function most effectively.

The Provider Position Paper explains that health care professionals, "[i]n meeting [their] ethical obligations to [their] adolescent patients, as well as to all of [their] patients who are children under the age of majority, . . . rely on [their] professional judgment, informed by clinical assessment, training, and experience, to address a patient's health conditions or a sensitive situation." Provider Position

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[19] Statutory requirements that require a license in order to practice a profession are based on the premise that only licensed professionals should be permitted to exercise such discretion. *See, e.g.,* Kan. Stat. Ann. § 65-2803(a) ("[i]t shall be unlawful for any person who is not licensed under the Kansas healing arts act . . . to engage in the practice of the healing arts as defined in the Kansas healing arts act").

Paper at 420. The Attorney General's interpretation of the Reporting Statute removes all discretion from these Professionals.[20]

The Attorney General's interpretation requires a presumption, unrebuttable by the treating Professional, that an Adolescent who has engaged in Sexual Behavior is a victim of child abuse. The Attorney General's interpretation essentially requires the Professional to make a determination devoid of professional judgment or discretion that, in the terms of the Reporting Statute, the Adolescent has been "injured as a result of . . . sexual abuse." As the Provider Position Paper advises, "[s]exual activity and sexual abuse are not synonymous. It should not be assumed that adolescents who are sexually active are, by definition, being abused." Provider Position Paper at 420. The determination of injury in this regard is one that Professionals are uniquely qualified to make.

2. A Mandate to Report Creates a Conflict for Professionals

Professionals' elemental role as caretaker is challenged by the Attorney General's interpretation of the Reporting Statute. The Attorney General's interpretation creates a conflict for the Professional between acting in the best interests of his or her patient/client and obeying the State's reporting requirement.

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[20] In addition to removing discretion from providers, the Attorney General's interpretation removes discretion from families and interferes with the ability of parents to supervise their child's access to Services. *See* Provider Position Paper at 421.

"Physicians and other health care professionals confront difficult choices in meeting their ethical obligations and complying with applicable laws." Provider Position Paper at 421. The conflict between ethical and legal obligations is exacerbated by the Attorney General's interpretation, which requires reports of *all* Sexual Behavior. This interpretation also exposes Professionals to a class B misdemeanor, punishable by up to six months in jail, if they adhere to their ethical obligations of confidentiality and fail to make such a report. *See* Kan. Stat. Ann. §§ 38-1522(f), 21-4502(b).

Professionals are likely to experience a role conflict under the Attorney General's interpretation because their dual duties are at odds with one another. It is documented that "[p]rofessionals may experience conflicts between their perceived responsibilities as mandated reporters and their roles of helper, service provider, and keeper of sensitive information." *See* Kalichman, 52. Professionals serving Adolescents in Kansas will experience this conflict in light of their legal obligation to report Adolescent Sexual Behavior, knowing that reporting such conduct will have a harmful impact on their patient or client and violate their professional codes of confidentiality (which are set forth in Section II).

Under the Attorney General's interpretation, Kansas Professionals, including members of *Amici Curiae*, are likely to feel tension in the course of discussing Sexual Behavior with Adolescent patients and clients. Professionals will

necessarily contemplate an "investigatory" role for themselves under the reporting requirement. There is no proper place in the course of a Professional-Adolescent interaction for the Professional to investigate on behalf of the State. The Professional should, ethically and professionally, remain loyal to the needs and interests of the Adolescent. *See id.*

CONCLUSION

Clearly "[p]rotection of children and adolescents from predatory, coercive, or inappropriate sexual contact is an important goal of all physicians and health professionals." Provider Position Paper at 420. *Amici Curiae* do not waiver in their support of mandatory reporting of minors who have been injured by abuse. But under the Attorney General's interpretation of the Reporting Statute, all consensual Sexual Behavior – including behavior that is not, in the determination of the Professional, abusive – must be reported to the State by Professionals. The acknowledged harmful health effects associated with the loss of confidential health communications under the Attorney General's interpretation are in fact unnecessarily and unfairly borne by Adolescents. If the District Court's decision is reversed and the Attorney General's interpretation enforced, the unintended consequence will be that the health of Adolescents in Kansas, the group the Reporting Statute intends to protect, will be compromised. For the foregoing

reasons, *Amici Curiae* ask this Court to affirm the District Court's grant of a preliminary injunction.

Dated: New York, New York
January 5, 2005

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CERTIFICATE OF COMPLIANCE

As required by Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned attorney certifies that the foregoing brief complies with the type-volume limitation in the above-cited rule, specifically, the brief contains 6,877 words, as determined by the Microsoft Word word-processing system.

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CERTIFICATE OF SERVICE
Docket No. 04-3310

I, Natasha Johnson, having been retained by Counsel for American Academy of Family Physicians, et al., Amici Curiae in this matter, hereby certify that on January 6, 2005, I caused to be served by U.S. Postal Service Express Mail, two true and correct paper copies and one true and correct copy in PDF format on CD-ROM of the **Brief for Amici Curiae Academy of Family Physicians, et al**. on the following:

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On January 6, 2005, I caused the original and seven copies of the **Brief for Amici Curiae Academy of Family Physicians, et al**. to be filed by U.S. Postal Service Express Mail, and caused the digital PDF version of the foregoing brief to be filed with the clerks office via e-mail to esubmission@ca10.uscourts.gov.

Dated: January 6, 2005

s/ Natasha Johnson
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CERTIFICATE OF DIGITAL SUBMISSION
Docket No. 04-3310

I, Natasha Johnson, on January 6, 2005, having been retained by Counsel for American Academy of Family Physicians, et al., Amici Curiae in this matter, hereby certify the following:

1. Every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk.
2. The Digital Submissions have been scanned for viruses using Norton 2002 Antivirus Software, updated January 5, 2005, and according to this program, are free of viruses.
3. The digital PDF version of the foregoing brief was filed with the clerks office via e-mail to esubmission@ca10.uscourts.gov.

Dated: January 6, 2005

s/ Natasha Johnson
Natasha Johnson