Nos. 06-3187, 06-3188 & 06-3202

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AID FOR WOMEN, *et al.*,

Plaintiffs-Appellees and Cross-Appellants,

v.

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, and PAUL MORRISON, in his official capacity as Attorney General of the State of Kansas,

Defendants-Appellants and Cross-Appellees.

NOTICE OF JOINDER BY THE AMERICAN PSYCHIATRIC ASSOCIATION

IN THE BRIEF OF *AMICI CURIAE* THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN MEDICAL ASSOCIATION, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN NURSES ASSOCIATION, AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS, KANSAS CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, KANSAS MEDICAL 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, KANSAS CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND SOCIETY FOR ADOLESCENT MEDICINE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court of Kansas
The Honorable J. Thomas Marten, United States District Judge
No. 03-CV-1353-JTM

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The American Psychiatric Association hereby joins in the Brief of *Amici Curiae* The American Academy of Family Physicians, *et al.* in support of Plaintiffs-Appellees and Affirmance.

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Kansas Medical Society
Kansas Public Health Association
Kansas Section of District VII of the American College of Obstetrician sand Gynecologists
Kansas State Nurses Association
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CERTIFICATE OF DIGITAL SUBMISSION

I certify that no privacy redactions are necessary and that this PDF format is an exact copy of the written document filed with the Clerk and has been scanned for viruses using Norton Anti Virus, Corporate Edition, last updated January 28, 2007.

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This is to certify that on February 13, 2007, two true and correct copies of the Notice of Joinder by the American Psychiatric Association in the Brief of *Amici Curiae* American Academy Of Family Physicians, *et al.* were e-mailed and mailed via U.S. Mail, proper postage prepaid, to the following:

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Notice of Attachment

Attachment is included in Digital Form

CORPORATE DISCLOSURE STATEMENT

None of the *Amici Curiae* has a parent corporation, nor does any publicly held company own 10% or more of the stock of any *Amici Curiae,* except that (1) the American Academy of Pediatrics is the parent organization of the Kansas Chapter of the American Academy of Pediatrics, (2) 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, (3) the Kansas State Nurses Association is a constituent member association of the American Nurses Association ("ANA"), but is a separately incorporated organization, and (4) the Kansas Chapter of the National Association of Social Workers is a chapter of the National Association of Social Workers.

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CONSENT OF PARTIES TO FILING OF BRIEF

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

INTEREST OF *AMICI CURIAE*

The American Academy of Family Physicians, American Medical Association, American Medical Women's Association, American Nurses Association, American Society for Adolescent Psychiatry, Association of Reproductive Health Professionals, Kansas Chapter of the American Academy of Pediatrics, Kansas Medical 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, Kansas Chapter of National Association of Social Workers, 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, mental health and social services. Attachment A is a list identifying each *Amicus Curiae* with a statement of its specific interest.

The professionals represented by *Amici Curiae* ("*Amici* Members") are mandatory reporters of child abuse under Kan. Stat. Ann. § 38-1522 (2003) (the "Reporting Statute"). Each of the *Amici Curiae* has members practicing in the State of Kansas ("State") who provide services to adolescents under the age of 16. According to the June 18, 2003 Opinion of the Reporting Statute ("Opinion") issued by the Kansas Attorney General's Office during the recent term of former

Attorney General Phill Kline, "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). The Opinion removes all professional discretion from the mandatory reporters represented by *Amici Curiae*.[1]

If the District Court's grant of a permanent injunction is reversed and the Attorney General's interpretation is enforced, *Amici* Members 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 the patient or client has engaged in consensual sexual activity with an age-mate, even if the professional concludes that the behavior was neither abusive nor injurious.[2]

In fact, the Attorney General's Opinion will force the *Amici* Members to breach the confidentiality of their adolescent patients, thereby harming their professional relationships with, and threatening the health of, those adolescents. Therefore, this Court's decision will have a direct impact on the practice of the

[1] Although Mr. Kline is no longer Kansas' Attorney General, having lost his bid for re-election during the pendency of this appeal, his successor has not formally withdrawn the Opinion issued during Mr. Kline's term of office.

[2] For purposes of this proceeding, age-mates are "persons separated by three years of age or less." *Aid for Women v. Foulston*, 427 F.Supp.2d 1093, 1107 n.4 (D. Kan. 2006).

professionals represented by *Amici Curiae*, and *Amici Curiae* have a direct interest in the outcome of this appeal.

PRELIMINARY STATEMENT

This appeal arises from the Attorney General's attempt to, in effect, amend the Kansas Reporting Statute by unilaterally opining that the statute applies to *all consensual* underage sexual activity, even if the adolescent was not injured or abused. The Attorney General's Opinion jeopardizes the health and welfare of the very adolescents whom the statute was intended to protect. Moreover, it subjects the *Amici* Members to criminal prosecution for exercising their professional judgment – which is contemplated by the plain language of the statute – to determine whether there is "*reason to suspect* that a child has been *injured* as a result of sexual abuse." Kan. Stat. Ann. § 38-1522 (emphasis added).

The *Amici* Members are health care professionals who provide medical, social and mental health services to adolescents, and are uniquely qualified to address the impact of the Attorney General's interpretation. The *Amici* Members know that many adolescents engage in consensual sexual behavior with their age-mates and that they require critical health services such as contraception, testing and treatment for sexually transmitted diseases ("STDs"), counseling, and prenatal care.

Many adolescents would be deterred from seeking these services if they were not confidential and, indeed, if, as required by the Attorney General's Opinion, their sexual behavior were reported to the State. As the District Court

correctly recognized, foregoing or delaying medical care jeopardizes adolescents' health and safety by resulting in the worsening of existing medical conditions and the spreading of undiagnosed diseases. *Aid for Women v. Foulston*, 427 F.Supp.2d 1093, 1107-08 (D. Kan. 2006). Indeed, applying the Reporting Statute to all adolescent sexual activity would have devastating public health consequences, as discussed below.

In addition to endangering public health and the welfare of the adolescents, the Attorney General's Opinion would result in an unwarranted invasion of the professional–patient relationship. Health care professionals would be forced to choose between adhering to their ethical confidentiality obligations when providing critical health services, or obeying the Attorney General's interpretation of the statute. Moreover, the Attorney General's Opinion precludes health care professionals from exercising their professional judgment in determining whether a given patient was "*injured* as a result of sexual abuse" (as required by the Reporting Statute), Kan. Stat. Ann. § 38-1522 (emphasis added), and would force them to presume that all adolescents who engage in sexual behavior are "inherently injur[ed]." Kan. Atty. Gen. Op. No. 03-17, 4 (2003).

The health and welfare of adolescents, and the public health at large, require that this Court affirm the District Court's judgment granting a permanent injunction to prevent enforcement of the Attorney General's Opinion.

ARGUMENT

I. THE ATTORNEY GENERAL'S OPINION WOULD DEFEAT – NOT FURTHER – THE STATE'S INTERESTS IN PROMOTING THE HEALTH AND WELL-BEING OF ITS ADOLESCENTS.

In its earlier decision in this case, *Aid for Women v. Foulston*, 441 F.3d 1101, 1116 (10th Cir. 2006), this Court recognized for the first time that the right of informational privacy extends to minors, relying, in part, on *Carey v. Population Servs., Int'l*, 431 U.S. 678, 693 (1977), in which a plurality of the Supreme Court opined that "the right to privacy in connection with decisions affecting procreation extends to minors as well as adults," and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

In so doing, this Court joined other circuits that also have recognized that minors possess privacy rights. *Aid for Women,* 441 F.3d at 1116 (citing to *Planned Parenthood of S. Az. v. Lawall*, 307 F.3d 783, 789 (9th Cir. 2002) (recognizing "a young woman's privacy interest in avoiding disclosure of sensitive personal information")); *Doe v. Irwin*, 615 F.2d 1162, 1166 (6th Cir. 1980) ("Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy"); *Wynn v. Carey*, 582 F.2d 1375, 1384 (7th Cir. 1978) ("[A] minor possesses the right of privacy, defined as the right of the individual ... to be free of unwarranted

governmental intrusion into ... the decision whether to bear or beget a child, [but] that right is not unqualified") (internal citations omitted) (alterations in original)).

In reversing the District Court's grant of a preliminary injunction, however, this Court suggested that a minor's right to informational privacy may be outweighed by the State's *parens patriae* interest in protecting the best interests of minors, and the State's concomitant interest in promoting public health, particularly the health of minors. *Id.* at 1119. That is not the case here, however. *Amici Curiae* submit that the Attorney General's unilateral interpretation of the Reporting Statute harms the very adolescents that he purportedly seeks to protect and that his Opinion therefore defeats, rather than furthers, the State's *parens patriae* interest and its interest in promoting public health. The Attorney General's Opinion also undermines the strong State interest in furthering confidential communications between health care professionals and their patients. Hence, rather than being outweighed by these other State interests, the minors' right to informational privacy in this case is consistent with, and indeed advances, the State's interests in promoting the health and well-being of its citizens.

A. The District Court Correctly Determined That The Attorney General's Opinion Would Harm The Health And Welfare Of Adolescents.

This Court has firmly recognized that "the state has a strong *parens patriae* interest in protecting the best interests of minors." *Aid for Women*, 441 F.3d at

1119. "[S]afeguarding the physical and psychological well-being of a minor is a compelling interest." *Id.* (brackets and quotations omitted). On remand from this Court's earlier decision, the District Court appropriately considered the State's *parens patriae* interest and determined that the health and welfare of adolescents would be harmed – and certainly not furthered – by the Attorney General's Opinion. *Aid for Women*, 427 F.Supp.2d at 1107-09. Based on the evidence adduced at trial and as discussed below, the District Court correctly recognized the undeniable reality that many adolescents are sexually active and that they require medical, psychological and social services for their health and welfare. *Id.* The District Court correctly determined that the Attorney General's Opinion would impede or delay adolescents in obtaining important services that are critical to their health and welfare. *Id.*

The District Court's conclusion that adolescents would be irreparably harmed by the Attorney General's Opinion was directly supported by the evidence adduced at trial. The Court credited the testimony of several medical experts who presented evidence that:

- There is a substantial decline in adolescents seeking medical care for contraception and sexually transmitted diseases when service providers require parental involvement or notification. The consequences of reporting all sexual activity to a state agency would

result in even more dire consequences than laws requiring parental involvement in a minor obtaining contraceptives or testing for the human immunodeficiency virus ("HIV"). *Aid for Women*, 427 F.Supp.2d at 1108.

- The Attorney General's Opinion would cause a significant decrease in minors seeking care and treatment related to sexual activity. *Id.*
- Foregoing or delaying medical care leads to risks to minors including the worsening of existing medical conditions and the spreading of undiagnosed diseases. *Id.*
- Adolescents would engage in riskier behavior if confidential care and treatment were not available. *Id.*

Further, the District Court expressly rejected the testimony presented by the States' experts that "sexual activity of minors is inherently injurious." *Id.* at 1111-12. The court observed that the States' experts "testified that they personally do not report all cases of underage sexual activity," and that even *they* exercise professional discretion in determining whether the adolescents were actually injured. *Id.* "To provide sweeping generalizations on what constitutes an injury and then testify that they do not apply a similar standard in their own clinical practices undermines these doctors' credibility…." *Id.* at 1112.

B. The District Court's Findings Are Consistent With Clinical Experiences As Reported In Published Studies.

The District Court's findings – which are based on the expert testimony adduced at trial and should not be disturbed now on appeal – are also well supported by numerous published studies, as discussed below.

1. Amici Curiae Routinely Confront The Reality That Many Adolescents Engage In Consensual Sexual Activity With Their Age-Mates.

As health care professionals who are on the front lines of providing medical, social, and mental health services to adolescents, the *Amici* Members confront the reality that many adolescents are sexually active with their age-mates.

The sexual behavior of adolescents is well documented in numerous published studies. *See*, *e.g.,* Jo Anne Grunbaum, *et al., Youth Risk Behavior Surveillance – United States 2003*, 53:55-2 MORBIDITY & MORTALITY WEEKLY REPORT 1 (May 21, 2004) at 71 (33% of ninth graders surveyed had already experienced sexual intercourse); 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 are involved in consensual sexual activity by age 15 and approximately one-half by age 16); Alan Guttmacher

Institute, *Facts on American Teens' Sexual and Reproductive Health* (updated Sept. 2006) (hereinafter "AGI Fact Sheet").

A considerable percentage of the partners of sexually active adolescents are their age-mates. In fact, "studies suggest that the vast majority of male sexual partners of teenage girls are . . . about the same age or less than five years older than the girls with whom they are having sex." Leitenberg & Saltzman at 204.

Contrary to the suggestion advanced by the Attorney General, there is absolutely no basis to conclude that consensual sexual activity is "synonymous" with sexual abuse. As the leading organizations of adolescent health care professionals have determined, "it should not be assumed that adolescents who are sexually active are, by definition, being abused." Position Paper of the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, & the Society for Adolescent Medicine, *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. ADOLESC. HEALTH 421 (2004) (hereinafter "Provider Position Paper").

Because the Attorney General's Opinion would require reporting of all sexual activity involving a minor under age 16, regardless of whether the acts were consensual and regardless of the age of the partners, a significant percentage of

adolescents are engaging in sexual activity that would be required to be reported under the Attorney General's interpretation of the Reporting Statute.

2. Adolescents Will Avoid Or Delay Seeking Services If Confidentiality Is Not Assured.

Adolescents will avoid or delay seeking health services if confidentiality is not assured, especially when the services relate to *sexual* health concerns. Numerous published studies confirm that adolescents forego or delay seeking services for sexual health concerns if they think the information they share will not be kept confidential. *See, e.g.,* Carol A. Ford & Abigail English, *Limiting Confidentiality of Adolescent Health Services: What are the Risks?*, 288:6 JAMA 752-53 (Aug. 14, 2002) (citing numerous studies); 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.

A recent national study published in the *Journal of the American Medical Association* found that 18% of teenagers would engage in risky sexual behavior and five percent would forego sexually transmitted disease ("STD") services if parental involvement were required. Rachel K. Jones, *et al.*, *Adolescents' Reports of Parental Knowledge of Adolescents' Use of Sexual Health Services and Their Reactions to Mandated Parental Notification for Prescription Contraception*, 293:3 JAMA 340, 345 (Jan. 19, 2005). Teenagers whose parents found out about

their use of a clinic for sexual health services involuntarily or did not know about it were more likely to engage in risky sexual behavior than those whose parents found out voluntarily or suggested it. *Id*.

One study of ninth through twelfth graders "confirms the notion that [even] 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, 1404, 1406 (Mar. 17, 1993) (emphasis added).

In another study, 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.*, *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288:6 JAMA 710, 713 (Aug. 14, 2002). Only one percent of these girls would stop having sexual intercourse after terminating treatment with a health clinic that had a parental notification policy. *Id.*

Not only does confidentiality play a significant role in adolescents' decisions to seek care in the first instance, it also greatly diminishes the extent to which adolescents remain in care after beginning treatment. *See* D.M. Reddy, *et al.*, at

710-14; 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.[3]

The significant extent to which adolescents will refuse care without a guarantee of confidentiality is also well documented. Many adolescents who are not assured of confidential care will, for example, forego pelvic examinations and testing for STDs and 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. 1072-73 (2001); Thera M.

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[3] The English & Ford article relies on several studies published in respected medical journals, including for example, J. Klein, L. McNulty & C. Flatau, *Teenager's Self-Reported Use Of Services And Perceived Access To Confidential Care*, ARCHIVES OF PEDIATRICS & ADOLESCENT MED., 152(7):676-682 (1998); J. Klein, *et al.*, *Access To Medical Care For Adolescents: Results From The 1997 Commonwealth Fund Survey Of The Health Of Adolescent Girls*, JOURNAL OF ADOLESCENT HEALTH, 25(2):120-130 (1999); C. Ford, P. Bearman & J. Moody, *Foregone Health Care Among Adolescents*, JAMA 282(23):2227-2234 (1999); D. M. Reddy, R. Fleming & C. Swain, JAMA, 288(6):710-714 (2002); S. Sugerman, *et al.*, *Family Planning Clinic Clients: Their Usual Health Care Providers, Insurance Status, And Implications For Managed Care*, JOURNAL OF ADOLESCENT HEALTH, 27(1):25-33 (2000); A. Marks, *et al.*, *Assessment Of Health Needs And Willingness To Utilize Health Care Resources Of Adolescents In A Suburban Population*, JOURNAL OF PEDIATRICS, 102(3):456-460 (1983); T. Cheng, *et al.*, *Confidentiality In Health Care: A Survey Of Knowledge, Perceptions, And Attitudes Among High School Students*, JOURNAL OF THE AM. MED. ASS'N, 269(11):1404-1407 (1993); C. Ford, *et al.*, *Influence Of Physician Confidentiality Assurances On Adolescents' Willingness To Disclose Information And Seek Future Health Care*, JAMA 278(12):1029-1034 (1997).

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. 2001); Rachel K. Jones *et al.*, *supra* at 345.

Those procedures are essential components of routine health care for many adolescents and the impact of their absence for a sexually-active teenager cannot 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).

3. Adolescents Will Not Communicate Openly And Fully With Health Professionals If Confidentiality Is Not Assured.

Adolescents 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* 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).

Conversely, adolescents who believe that their communications will not be held in confidence are unlikely to confide fully in medical professionals. *See* Karen E. Adams, *supra* at 87. Published studies have 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,* at 1029-34.

Open communication is essential for effective screening, accurate diagnosis, and risk reduction counseling. Health 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 health professionals necessarily receive a quality of care compromised by incomplete information. *Id.* 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 diagnostic tests. Knowledge of sexual behavior in an adolescent, for example, may alert a physician to the need to test for chlamydia, which is often asymptomatic but is curable if detected early, and for human papilloma virus ("HPV"), which is a serious precursor to cervical cancer that can now can be treated and/or prevented with timely vaccination. *See* AGI Fact Sheet; Laurie Barclay, MD, *Guidelines Issued for HPV Vaccine Use to Prevent Cervical Cancer*, Medscape Medical News, Jan. 25, 2007 (available at http://x.medscape.com/viewarticle/551247). Up

to 15% of teens are infected with HPV. *Id.* Without the knowledge that adolescent patients are engaged in sexual behavior, professionals may not perform tests for infections such as chlamydia or discuss HPV with their adolescent patients, thereby unnecessarily placing adolescents at risk for long-term consequences that could be avoided.

4. Adolescents Will Not Communicate Fully And Openly With Mental Health Professionals If Confidentiality Is Not Assured.

Among sexually active adolescent clients, mental health counseling often includes frank discussions of sexual behavior. For such counseling to be successful, the patient must be willing to reveal intimate life details. A therapist or social worker cannot build the trust necessary for disclosure of such private information without being able to assure confidentiality.

The United States Supreme Court recognized the importance of confidentiality in the course of psychotherapy in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The *Jaffee* Court correctly observed the following:

> [B]ecause 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.

Mental health experts have similarly long recognized that "the inviolable maintenance of confidentiality is essential for psychotherapy to be effective. It is difficult to underestimate the sensitivity of the information revealed during psychotherapy or the vulnerability of the patient." Samuel J. Knapp & Leon VandeCreek, *Privileged Communications For Psychotherapists In Pennsylvania: A Time For Statutory Reform*, 60 TEMP. L.Q. 267, 271-272 (1987); *see also* Ryan D. Jagim, *et al.*, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure,* 9 PROF. PSYCHOL. 458-59 (Aug. 1978) ("[t]he concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship").

"The unauthorized disclosure of patient communications may hamper severely the effectiveness of psychotherapy and its usefulness to society. Empirical studies show that some persons, perceiving a lack of confidentiality, are reluctant to initiate contact with a psychotherapist. Other psychotherapy patients might be selective or cautious about what information they revealed. Fearing later disclosure, they might withhold important information and, as a consequence, limit severely the potential benefits of psychotherapy." *Id*. (footnotes omitted); *see also* Jessica G. Weiner, *And The Wisdom To Know The Difference: Confidentiality Vs. Privilege In The Self-Help Setting*, 144 U. PA. L. REV. 243, 263 (1995-96) ("various studies indicate that potential candidates for therapy and current therapy

patients would be substantially less inclined to reveal certain aspects about themselves, particularly those with legal ramifications, if confidentiality could not be guaranteed") (citing studies).

Under the Attorney General's Opinion, a counselor cannot assure the confidentiality that is the cornerstone of mental health counseling. Indeed, the Attorney General's Opinion may effectively terminate a counseling relationship by requiring the counselor to divulge the clients' intimate secrets to State authorities. The adolescents who are most in need of mental health services – and, indeed, are among the most at-risk segments of the population – are the ones who would suffer as a result of this breached confidence.

II. THE ATTORNEY GENERAL'S OPINION WOULD HARM THE PUBLIC HEALTH BY THWARTING IMPORTANT PUBLIC HEALTH INITIATIVES.

The Attorney General's Opinion not only runs counter to the best interests of adolescents, but also harms the public health at large. This Court has recognized the State's interest in promoting public health. *Aid for Women*, 441 F.3d at 1119-20 ("the government has an interest in promoting public health"); *Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999) (noting "the government's strong interest in public health").

The District Court heard testimony from numerous public health experts and correctly determined that the public health would be impaired – not furthered – by

the Attorney General's Opinion. *Aid for Women*, 427 F.Supp.2d at 1108. Indeed, the Attorney General's Opinion thwarts the important public health initiatives of reducing adolescent pregnancies, preventing the spread of diseases, and promoting healthy pregnancies.

First, reducing teenage 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*.

Adolescents need to consult with health professionals 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 health care professionals. By requiring such extensive reporting and chilling adolescents' willingness to be candid with health care professionals, the Attorney General's

Opinion thwarts the objectives of the community programs established by the Kansas Legislature.

Second, preventing the spread of disease is another significant public health goal. Teens have higher rates of certain sexually transmitted diseases 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).

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"). AGI Fact Sheet. PID is often caused by untreated chlamydia and gonorrhea and can lead to infertility and ectopic pregnancy. AGI Fact Sheet. When one adolescent is not diagnosed or does not receive treatment for an STD, the public health and the health of other adolescents is jeopardized. 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 health care professionals.

Third, promoting healthy pregnancies is another important public health goal. 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 Sept. 2006).

Healthy pregnancies and babies require adolescents to seek early prenatal care, which necessarily involves disclosing prior sexual behavior to physicians. In 2004, 28% of teen mothers in Kansas did not receive prenatal care in the first trimester. Center for Health and Environmental Statistics, Kansas Department of Health and Environment, *2004 Annual Summary of Vital Statistics* at 20. The Attorney General's Opinion exacerbates these problems by causing adolescents to delay or forego seeking critical prenatal care.

III. THE ATTORNEY GENERAL'S OPINION SUBSTANTIALLY AND UNJUSTIFIABLY INVADES THE PROFESSIONAL-PATIENT RELATIONSHIP.

The Attorney General's Opinion not only injures the health and welfare of adolescents and the public at large, but it also represents an unjustified encroachment into the sanctity of the professional–patient relationship. Kansas has expressly recognized a State interest in protecting physician-patient confidentiality. Kan. Civ. Proc. Code § 60-427 (2006); *Werner v. Kliewer*, 710 P.2d 1250, 1254

(Kan. 1985) ("the confidentiality of the physician-patient relationship is a matter of *strong public policy* in Kansas") (emphasis added).

The Attorney General's Opinion would force health care professionals to violate their ethical obligations of confidentiality – and would undermine this strong public policy – even though the Reporting Statute, on its face, anticipates the exercise of professional discretion consistent with these ethical confidentiality obligations.

A. Confidentiality Is A Fundamental Precept Of Health Care Practice.

The doctrine of physician-patient confidentiality can be traced as far back as the fourth century B.C. to the Hippocratic Oath, which is still recited by medical students when they enter the medical profession.[4] The underlying reason for a health care professional's duty to maintain patient confidentiality is that it is necessary to ensure that patients freely divulge personal information, however sensitive, that is necessary for their treatment.

[4] The traditional version of the Oath states in pertinent part: "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 be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." 38 HARVARD CLASSICS 3 (Charles W. Elliot ed., P.F. Collier & Son 1910). In 1964, Louis Lasagna, the Academic Dean of the School of Medicine at Tufts University, wrote a modern version of the Hippocratic Oath that states in pertinent part: "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." Nova Online, Hippocratic Oath--Modern Version, available at http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (2006). This version of the Hippocratic Oath is recited today by many graduating medical students. *Id.*

This deeply rooted doctrine is codified in the Code Of Medical Ethics Of The American Medical Association (AMA) and the professional responsibility codes of other health care professionals. Health care professionals are *required* by their ethical obligations to preserve their patients' confidences. For example:

- The Principles of Medical Ethics of the AMA mandate that "[a] physician . . . shall safeguard patient confidences and privacy within the constraints of the law." *See* PRINCIPLES OF MED. ETHICS OF THE AM. MED. ASS'N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CURRENT OPINIONS WITH ANNOTATIONS § IV (updated Nov. 6, 2006). The AMA's Code of Medical Ethics states that "[t]he information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services." *See* CODE OF MED. ETHICS OF THE AM. MED. ASS'N § E-5.05 (2006). As to adolescent care in particular, the AMA has "reaffirm[ed] that confidential care for adolescents is critical to improving their health." POLICY OF THE AMA HOUSE OF DELEGATES H-60.965, Resolution 825 (Confidential Health Services for Adolescents) (Dec. 7, 2004).

- 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." *See* AM. ACAD. OF FAMILY PHYSICIANS, CONFIDENTIALITY, PHYSICIANS/PATIENT COMM. § 1A (2007).

- 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." *See* THE PRINCIPLES OF MED. ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 4.1 (2006) (emphasis added).

- The National Association of Social Workers' Code of Ethics states, in pertinent part, "[s]ocial workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons." *See* NASW CODE OF ETHICS, STANDARD 1.07(c) (1999).

- The American Nurses Association's Code of Ethics for Nurses provides, in pertinent part, that a "nurse has a duty to maintain confidentiality of all patient information. The patient's well-being could be jeopardized and the fundamental trust between patient and nurse destroyed by unnecessary access to data or by the inappropriate disclosure of identifiable patient information." *See* ANA CODE OF ETHICS FOR NURSES WITH INTERPRETIVE STATEMENTS, STANDARD § 3.2 (2006).

Four other 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 – have reaffirmed the importance of confidentiality in the context of reporting adolescent sexual activity. These organizations, which represent physicians who are on the front-line of adolescent care, concluded that "[i]t is *critical* that adolescents who are sexually active receive appropriate *confidential* health care and counseling." Provider Position Paper at 420 (emphasis added). The AMA has endorsed this

position. *See* AMA HOUSE OF DELEGATES POLICY, H-60.938 (Adolescent Sexual Activity).[5]

B. The Attorney General's Opinion Conflicts With *Amici* Members' Ethical Confidentiality Obligations And Precludes The Exercise Of Professional Judgment, In Contravention Of The Plain Meaning Of The Reporting Statute.

Many professional codes of confidentiality contain exceptions that allow the health professional to reveal confidential information when the professional is required to do so by law or overriding considerations. CODE OF MEDICAL ETHICS OF THE AM. MED. ASS'N § E-5.05 (updated Nov. 2006) (hereinafter "AMA CODE § E-5.05") ("The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations"); *see also* ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.05 (2006) ("psychologists [may] disclose confidential information without the consent of the individual only as mandated by law"). These exceptions, however, have no bearing here.

Such exceptions to confidentiality are intended to allow disclosures that are necessary to prevent *injury* to the patient or other individuals. For instance, AMA CODE § E-5.05 elaborates that the exception applies "[w]hen a patient threatens to inflict serious physical harm to another person or to him or herself and there is a

[5] *See* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-60.938.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/H-55.999.HTM&nxt_pol=policyfiles/HnE/H-60.935.HTM&.

reasonable probability that the patient may carry out the threat…." Similarly, section 4.05 of the Ethical Principles Of Psychologists states that a psychologist may divulge confidential information to "protect the client/patient, psychologist, or others from harm." *See also* CODE OF ETHICS FOR EMERGENCY PHYSICIANS § II.B.4 (2006) ("[s]ensitive information may only be disclosed when such disclosure is necessary to carry out a stronger conflicting duty, such as a duty to protect an identifiable third party from serious harm or to comply with a just law"); NASW CODE OF ETHICS, STANDARD 1.07(c) (1999) ("The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person"); Janet Leach Richard, *Medical Confidentiality And Disclosure Of Paternity*, 48 S.D. L. REV. 409, 419 (2002-03) ("Disclosure of medical information may be legally mandated in order to protect the patient, third parties, or the general public.").[6]

The plain meaning of the Reporting Statute mandates disclosure only where the health care professional has "reason to suspect that a child has been *injured* as a result of sexual abuse." Kan. Stat. Ann. § 38-1522 (emphasis added). Thus, the

[6] Nevertheless, "[w]hen breaches of confidentiality are compelled by concerns for public health and safety, those breaches must be as *narrow* in scope and content as possible, must contain the *least* identifiable and sensitive information possible, and must be disclosed to the *fewest* possible to achieve the necessary end." THE AMA HOUSE OF DELEGATES POLICY, H-315.983 (emphasis added) (Dec. 7, 2004).

statute on its face (and as has been interpreted by the Attorney General's predecessors) is totally congruous with the ethical principle, discussed above, that health care professionals may divulge confidential information to prevent injury to the patient or to others – *i.e.*, by preventing future acts of sexual abuse.

However, by requiring disclosure in the absence of actual or threatened injury, the Attorney General has interpreted the statute in a manner wholly inconsistent with the health professionals' ethical confidentiality obligations and professional judgment (and in a manner inconsistent with the terms of the statute). The interpretation represents an unjustified departure from established confidentiality principles, as it mandates health care providers to breach confidentiality without having any basis to believe that disclosure is necessary to avoid harm to the patient or third persons. Couched in the form of an Opinion, the Attorney General's policy preference cannot be reconciled with the Legislature's prerogative to vest discretion in the health care professional (or other reporter) to determine whether there was sexual abuse and injury in the first instance. *Aid for Women*, 427 F.Supp.2d at 1102 (holding that the phrase "vests a degree of discretion in the reporter not only to determine suspected sexual abuse, but also resulting injury").

Simply put, the Attorney General should not be permitted unilaterally to abrogate the fundamental precept of confidentiality, where such abrogation was

neither contemplated nor permitted by the plain language of the Reporting Statute. Accordingly, the exceptions that allow health care professionals to divulge confidential information when "required to do so by law" can not apply here because the statute, as enacted, is entirely consistent with the health professionals' confidentiality obligations.

C. The Attorney General's Opinion Creates A Conflict For Health Care Professionals By Forcing Them To Choose Between Their Ethical Obligations And Criminal Sanctions.

The Attorney General's Opinion further results in a serious intrusion into the professional–patient relationship by creating inherent and irreconcilable conflicts for health care professionals – conflicts that do not exist on the face of the Reporting Statute, nor under the opinions of the Reporting Statute issued by two of the Attorney General's predecessors and by SRS.[7]

[7] In 1992, Kansas Attorney General Robert Stephan issued an opinion which, in pertinent part, states: "Whether a particular minor in a particular case has been injured as a result of sexual intercourse and a resulting pregnancy must be determined on a case-by-case basis. The fact of pregnancy certainly puts one on notice that sexual abuse (as statutorily defined) has probably occurred, and requires persons listed in K.S.A.1991 Supp. 38-1522(a) to investigate further whether the child has suffered injury, physical or emotional, as a result of such activity. *If there is reason to suspect that the child has been injured*, that person is then required to report such suspicions and the reasons therefore." Kansas Att'y Gen. Op. No. 92-48, 1992 WL 613410 (April 6, 1992) (hereafter "Stephan Opinion") (emphasis added). Attorney General Stephan's successor, Carla Stovall, expressed a similar opinion in a letter dated June 3, 1999 (hereafter "Stovall Opinion"). *See Aid for Women*, 427 F.Supp.2d at 1099. *See also Id.* at 1103 ("SRS policy acknowledges sexual abuse to be coextensive with the statutory definitions, but it does not consider investigation of all illegal sexual activity involving a minor to be necessary or appropriate. SRS Manual § 1361. Where a report does not indicate a child 'has been harmed or is likely to be harmed' or where the report concerns ' 'lifestyle' issues that do

Under the Attorney General's Opinion, health care professionals would be required to report adolescent sexual behavior, even though doing so may be harmful to the interests of their patients and would violate the professionals' codes of confidentiality. Indeed, the Attorney General's Opinion creates an intolerable dilemma for health care providers – either risk a criminal conviction and face up to six months in jail by upholding the confidentiality that is an essential part of health care, *see* Kan. Stat. Ann. §§ 38-1522(f), 21-4502(b), or divulge their patients' confidences in compliance with the Attorney General's Opinion and possibly imperil their patients' health and well-being.

Health care professionals should not be forced to choose between their ethical obligations and criminal sanctions. They must be afforded the freedom to provide health services to their patients and to safeguard their patients' confidentiality without the fear of prosecutions, subpoenas, civil lawsuits, and criminal sanctions. The public health – and the welfare of adolescents – demands no less.[8]

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not directly harm a child or place a child in a likelihood of harm,' SRS screens out the report. SRS Manual § 1361. SRS does not extend services in cases of consensual, age-mate sexual exploration with no evidence of force, coercion, or significant age disparities. SRS Manual § 1361, Practice Notes").

[8] In contrast to the adverse consequences that Attorney General's Opinion would have on the public health, the interests of adolescents and the provider-patient relationship, the Stephan and Stovall Opinions were entirely consistent with the provider-patient relationship, allowed health care professionals to exercise their professional judgment,

IV. THE CONTENTIONS BY *AMICUS* NATIONAL CHILDREN'S ADVOCACY CENTER DO NOT SUPPORT REVERSING THE DISTRICT COURT'S JUDGMENT.

The National Children's Advocacy Center ("NCAC") has submitted an *Amicus* brief in support of the Attorney General's interpretation. A close examination of NCAC's *Amicus* brief demonstrates that none of NCAC's contentions supports reversing the District Court's judgment.

First, NCAC devotes a large portion of its brief to the contention that adolescents "are generally immature and inexperienced and are not capable of making mature, informed and intelligent decisions regarding important issues in their lives, including the decision of whether to engage in sexual activity." (Brief of *Amicus Curiae* NCAC, p. 3.) This unremarkable observation ignores the reality that many adolescents *are* having sex. More fundamentally, NCAC does *not* assert – nor does it provide any authority to support the suggestion – that mandatory reporting of consensual adolescent sexual practices would reduce the prevalence of adolescent sex or sexual abuse. As discussed herein, the published research demonstrates that the effect of such mandatory reporting would be to reduce access to critical health services – not to reduce sexual conduct.[9]

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provided adequate notice of what was expected of health care professionals and – most importantly – served the goal of protecting adolescents from injury.

[9] In contrast, to support its arguments, NCAC purports to rely on trial testimony by expert witnesses in unrelated cases in Alaska and Florida that were not part of the evidentiary record in this case. *See* NCAC Brief, Attachment A.

NCAC also contends that adolescents face significant risk of injury when they engage in voluntary sexual intercourse because, for example, adolescent sex is often forced or pressured (NCAC Br. 9-15) and there is a significant risk of sexually transmitted diseases among sexually active adolescents (NCAC Br. 16-21). However, that some adolescents may be forced or pressured to have sex does not support a blanket rule that *all* forms of consensual adolescent sex with age-mates are "inherently injurious" and that health care professionals must automatically divulge confidential patient information to the State in all circumstances. Provider Position Paper at 421-22. Further, though NCAC is rightly concerned about reducing sexually transmitted diseases, it fails to explain how mandatory reporting of sexual activity would accomplish this important public health goal – particularly where the published research (discussed above at Section I.B.2) demonstrates that adolescents would be *less* likely to seek treatment for STDs if confidentiality is not assured.

NCAC further argues that child abuse is prevalent and significantly underreported (NCAC Br. 25-30), contrary to the District Court's evidentiary finding that "there is no indication that under–reporting is or has been a problem under the Kansas statute." *Aid for Women,* 427 F. Supp. 2d at 1113. Even if, contrary to the record in this case, NCAC's assertion is accepted, it fails to explain how mandatory reporting of all adolescent sexual activity would result in increased

reporting of child abuse, particularly in light of the fact that SRS systematically screens out the reports of consensual sexual activity. The trial testimony established that when "the sexual activity with an age–mate is consensual, [SRS officials] screen out the reports and provide no services to the minor because they do not perceive a harm, *i.e.*, an injury." *Aid for Women,* 427 F.Supp.2d at 1112. Thus, there is no basis to believe that mandatory reporting of all adolescent sexual activity would decrease the problem of child abuse.

And, indeed, mandatory reporting of all adolescent sexual activity could *exacerbate* the problem of child abuse as it would divert precious resources from actual abuse. By substantially increasing the number of reports that SRS will receive, the Attorney General's interpretation of the Reporting Statute will jeopardize the well being of those children who desperately need SRS's services. *See* Seth Kalichman, *Mandated Reporting of Suspected Child Abuse*, ETHICS, LAW & POLICY 31 (2nd Ed.1999) ("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.").

Finally, NCAC contends that "[m]andatory reporting of adolescent sexual activity is necessary, if for no other reason, than to assist in informing parents that

there are important reasons for concern about the lives of their children who are engaged in high risk behavior." (NCAC Br. 27.) Though increasing parental involvement in the lives of their children is a laudable goal (subject, of course, to the minor's right to informational privacy recognized by this Court, *Aid for Women*, 441 F.3d at 1116), NCAC ignores the wealth of published research (and the District Court's factual findings) that (1) there is a substantial decline in adolescents seeking medical care for contraception and sexually transmitted diseases when service providers require parental involvement or notification; and (2) the consequences of reporting all sexual activity to a State agency would result in even more dire consequences than laws requiring parental involvement in a minor obtaining contraceptives or HIV testing. *Aid for Women*, 427 F.Supp.2d at 1108.

Accordingly, the contentions advanced by NCAC do not support reversing the District Court's judgment.

V. CONCLUSION

The Attorney General's Opinion harms the health and welfare of adolescents, jeopardizes the public health, and infringes upon the professional-patient relationship. For all the foregoing reasons, and the reasons set forth in Plaintiffs-Appellees' Brief, the District Court's judgment granting a permanent injunction should be affirmed.

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Kansas Medical Society
Kansas Public Health Association
Kansas Section of District VII of the American College of Obstetrician sand Gynecologists
Kansas State Nurses Association
National Association of Social Workers
National Association of Social Workers, Kansas Chapter
Society for Adolescent Medicine

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 6,863 words, as determined by the Microsoft Word word-processing program.

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I certify that no privacy redactions are necessary and that this PDF format is an exact copy of the written document filed with the Clerk and has been scanned for viruses using Norton Anti Virus, Corporate Edition, last updated January 28, 2007.

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Attachment A

Interests of *Amici Curiae*

Attachment A

Interests of Amici Curiae

American Academy of Family Physicians

The American Academy of Family Physicians ("AAFP"), founded in 1947 and headquartered in Leawood, Kansas, is the national association of family doctors. It is comprised of approximately 94,000 physician, resident and student members in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and the Uniformed Services of the United States. The overall mission of the AAFP is to improve the health of patients, families and communities by serving the needs of members with professionalism and dignity.

As the primary providers of health care to adolescents, the AAFP supports the consideration of certain principles in the development of public policy:

- Sexual activity and sexual abuse are not synonymous, and it should not be assumed that adolescents who are sexually active are, by definition, being abused.
- It is critical that adolescents who are sexually active receive appropriate confidential health care and counseling.
- 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.
- Federal and state laws should support physicians and other health care professionals and their role in providing confidential health care to their adolescent patients.
- Federal and state laws should affirm the authority of physicians and other health care professionals to exercise appropriate clinical judgment in reporting cases of sexual activity.

American Medical Association

The American Medical Association (the "AMA"), with approximately 240,000 members, is the nation's largest professional organization of physicians and medical students. AMA members practice in all fields of medical specialization and in every state, including Kansas. Founded in 1847, the AMA is an Illinois not-for-profit organization. The purpose of the AMA is to promote the science and art of medicine and the betterment of public health.

A confidential relationship between adolescent patients and their physicians is critical for the maintenance of children's health. Mandatory reporting laws may cause adolescents to suppress relevant information from their physicians and forego necessary medical care. The AMA believes that the medical care and safety of adolescents is best protected if physicians are allowed professional discretion in determining whether to report incidents of sexual activity to public authorities. The AMA joins this Brief in order to make its views on this subject known to this Court.

American Medical Women's Association

The American Medical Women's Association ("AMWA") is a national organization of women in medicine, including physician and student members. Founded in 1915, AMWA is dedicated to advancing women in medicine and improving women's health. AMWA members include all types of specialties including primary care, gynecologic and other specialist physicians. AMWA has both local and student branches across the United States. AMWA believes its members - as women and as physicians - have a unique contribution to make to national health care debates. Given the essential nature of confidentiality to ensuring that adolescents have access to critically important health care, AMWA joins in submitting this brief.

American Nurses Association

The American Nurses Association ("ANA") was founded over a century ago, and today it represents the interests of the Nation's 2.9 million registered nurses. The ANA is comprised of 54 constituent member associations, including one in every state of the United States. ANA has approximately 155,000 members. In addition, there are eight specialty nursing organizations with a combined membership of several hundred thousand RNs that are Organizational Affiliates of the ANA. The ANA is a strong proponent of the confidentiality of patient communications, because confidentiality fosters full disclosure of relevant information to the practitioner, thereby leading to better health care.

American Society for Adolescent Psychiatry

The American Society for Adolescent Psychiatry ("ASAP") is a professional organization representing 600 psychiatrists specializing in the care and treatment of adolescents and their families. Founded in 1967 as a non-profit, scientific, professional organization, its mission is to speak for and represent the needs of adolescents and adolescent psychiatrists within psychiatry and the larger community. In so doing, ASAP advocates the importance of confidentiality to the provision of psychiatric services to adolescents.

Association of Reproductive Health Professionals

The Association of Reproductive Health Professionals (ARHP) is a non-profit membership association comprised of highly qualified and committed experts in reproductive health. Its members are professionals who provide reproductive health services and education, conduct reproductive health research, and influence reproductive health policy. ARHP members include physicians, advanced practice clinicians (nurse practitioners, nurse midwives, and physician assistants), researchers, educators, pharmacists, and other professionals in reproductive health. The organization reaches this broad range of health care professionals both in the United States and abroad with education and information about reproductive health science, practice, and policy. ARHP joins in this brief because its members are committed to preserving confidentiality in providing reproductive health services to their patients.

Kansas Chapter of the American Academy of Pediatrics

The Kansas Chapter of the American Academy of Pediatrics ("KAAP") was founded in 1953 and incorporated in 1977. KAAP has 317 members representing close to 90% of the board certified pediatricians across the state. Our mission is the attainment by all infants, children, adolescents, and young adults of their full potential for physical, mental, emotional, and social health. Together with those who share this purpose, the Kansas Chapter pledges its efforts and expertise to a fundamental goal; all children and youth have the opportunity to grow up safe and strong, with faith in the future and in themselves. KAAP has signed onto this amicus Brief noting that confidentiality is essential in providing comprehensive services. KAAP supports this brief to uphold their "pledge" to the children of Kansas.

Kansas Medical Society

The Kansas Medical Society ("KMS") is a not-for-profit professional association of physicians. Incorporated in 1859, KMS is dedicated to promoting the science and art of medicine, and protecting the health of Kansas citizens. Currently, KMS has approximately 4,600 members, all of whom are licensed to practice medicine in the state and deemed a mandatory reporter of child abuse. It follows that the vast majority of our membership is directly affected by the Tenth Circuit's decision in this case. Because this appeal will directly affect how our membership renders treatment, KMS is compelled to join in the Amici Brief in an effort to share with the Court its position on this very important and serious issue.

KMS is staunchly against child abuse. It shares the Attorney General's ("AG") desire to protect children of Kansas and report child abuse to the proper authorities. However, KMS does not agree with the AG's interpretation of the Reporting Statute because it will have the direct effect of causing adolescents to withhold important health care information from their physicians, and will further cause adolescents to avoid receiving necessary medical care out of fear that such treatment will result in being reported. The goals of delivering high quality health care and protecting the adolescents of this state are best served by encouraging candid discussions between patients and their physicians, and then allowing

physicians to exercise their professional discretion and judgment in determining whether certain activity constitutes abuse and should be reported.

Kansas Public Health Association

The Kansas Public Health Association ("KPHA") is the oldest and largest public health organization in the state of Kansas. The association represents over 500 individuals and organizations within the association membership. The purpose of the KPHA is to promote improvement in the health and environment which will allow Kansans to achieve optimum health in a desirable environment. The association is devoted to assuring access to the best possible public health practices within the state of Kansas. Because confidentiality is essential to ensuring that adolescents have such access, the association joins in submitting this Brief.

Kansas Section of District VII of the American College of Obstetricians and Gynecologists

The Kansas Section of District VII of the American College of Obstetricians and Gynecologists is committed to the advancement of women's health through education, practice, research and advocacy. Obstetrics and gynecology is a discipline dedicated to the broad, integrated medical and surgical care of women's health throughout their lifespan. Members of the Kansas Section are obstetricians and gynecologists licensed to practice medicine in the state of Kansas and are mandatory reporters of child abuse. Confidentiality in the context of the physician-patient relationship is essential for obstetricians and gynecologists to provide services to women of all ages, including adolescents.

Kansas State Nurses Association

The Kansas State Nurses Association ("KSNA") is the professional organization for registered nurses in Kansas. Established in 1912, KSNA's mission is to promote professional nursing, to provide a unified voice for nursing in Kansas, and to advocate for the health and well-being of all people. The KSNA is a constituent member association of the American Nurses Association ("ANA"), and is a separately incorporated organization; as such, KSNA is not in a parent–subsidiary relationship with the ANA. There are over 27,000 RN's licensed and residing in Kansas. Registered nurses in caring for clients receive confidential medical and health histories. The mandatory reporting statute on sexual abuse was designed to rely on health professionals, including RN's, to make a "professional judgment" in responding to the statutory requirement. The removal of professional judgment from the mandatory reporting statute for sexual abuse will require RN's to divulge what would otherwise be considered confidential, with the full knowledge that no abuse occurred, nor will it be adjudicated. The risk of reporting all sexual activity of those under 16 years of age has a "chilling affect" on candid and honest self-reporting of health histories, particularly sexual exploration and activity.

National Association of Social Workers &

National Association of Social Workers, Kansas Chapter

With about 150,000 members, the National Association of Social Workers ("NASW") is the largest organization of professional social workers in the world. The Kansas Chapter of NASW represents 1,450 members. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole.

In furtherance of these purposes, NASW promulgates professional standards and criteria. Additionally, NASW enforces the NASW Code of Ethics, which NASW members are required to honor. NASW also conducts research, prepares studies of interest to the profession, and provides opportunities for continuing education. NASW also offers a credentialing program to enhance the professional standing of social workers.

NASW's members are highly trained and experienced professionals who counsel individuals (including adolescents), families, and communities in a variety of settings, including schools, hospitals, mental health clinics, and private practices. Confidentiality is essential to the ability of NASW's members to

practice in these settings, and NASW and its Kansas Chapter have an interest in preserving confidentiality for its members and their clients.

Society for Adolescent Medicine

The Society for Adolescent Medicine ("SAM") is a national multidisciplinary organization of health professionals who are committed to advancing the health and well-being of adolescents. Established in 1968, SAM has 1500 members in the United States and internationally. Through education, research, clinical services, and advocacy activities, members of SAM work to enhance public and professional awareness of adolescent health issues among families, educators, policy makers, youth-serving organizations, and other health care professionals. Mansy SAM members are health care professionals who provide medical and mental health services to adolescents of all ages. SAM supports confidential access to quality health care, including services related to sexual health issues, for all adolescents.

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Tenth Circuit
Nos. 06-3187, 3188 & 3202
----------)
Aid for Women, *et al*.,

Plaintiffs-Appellees,

v.

Nola Foulston, *et al*.,

Defendants-Appellants.
----------)

I, David Weeden, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Proskauer Rose LLP, Attorneys for Amici Curiae.

On the **5th day of February 2007**, I served 2 copies of the within **Brief of Amici Curiae** in the above captioned matter upon:

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via Federal Express, by causing 2 true copies of each, enclosed in a properly addressed wrapper, to be deposited in an official depository of the Federal Express.

Unless otherwise noted 8 copies of this brief have been filed with the Court, on the same date and in the same manner as above.

This same day counsel for Amici has complied with the electronic filing and service requirements of this court by sending to the court for filing, and each of the counsel listed on the attached service list, via email, an exact duplicate of the paper filing in Digital Form.

February 5, 2007

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