

No. 06-3188

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

AID FOR WOMEN, *et al.*,

Plaintiffs-Appellees,

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 PHILL KLINE, Attorney General of the State of Kansas,

Defendants-Appellants.

On Appeal from the District of Kansas, No. 03-1353

BRIEF OF *AMICI CURIAE* KANSAS LEGISLATORS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*¹

Amici Senators Karin Brownlee, Les Donovan, Mark Gilstrap, Tim Huelskamp, Phil Journey, Ralph Ostmeyer, and Dennis Pyle and Representatives Virginia Beamer, Steve Brunk, Pat George, Steve Huebert, Dick Kelsey, Mike Kiegerl, Lance Kinzer, Peggy Mast, Jim Morrison, Melvin Neufeld, Rob Olson, Bill Otto, Virgil Peck, Jr., Mary Pilcher-Cook, and Arlen Siegfroid are legislators in the State of Kansas. As legislators, *Amici* recognize their role in protecting minors within the State. *Amici* affirm the Attorney General's opinion at issue in this cause and agree that, under the State's statutory rape law, all sexual intercourse between minors constitutes illegal activity. *See generally* Op. Att'y Gen. Kan. 2003-17 (2003). *Amici* also affirm that sexual abuse is so inherently injurious that the State's interest in protecting minors from such injury is valid and compelling.

Amici maintain that the judgment of the lower court is premised upon a mistaken notion that legislators were unconcerned about, or ignorant of, the differing nature of harms that can arise from sexual activity between minors who are close in age and such activity involving a teen and an adult. Yet Kansas law clearly notes this distinction in the statute governing "unlawful voluntary sexual relations." "Unlawful voluntary relations" is defined as engaging in voluntary

¹ Pursuant to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief. Letters from the parties accompany the filing of this brief.

sexual intercourse with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child, and the offender and the child are the only parties involved (commonly known as the “Romeo and Juliet” law). *See* KAN. STAT. ANN § 21-3522.² The existence of this provision clearly evidences attention to the concerns raised by the Plaintiffs, and the legislative judgment regarding the proper balance between the state's compelling interest in protecting Kansas minors from sexual abuse and the contemporary reality of mutual sexual exploration by teens.

With the best interest and protection of minors in mind, *Amici* urge this Court to reverse the judgment of the court below.

SUMMARY OF THE ARGUMENT

The United States Supreme Court differentiates minors from adults when determining Constitutional rights, and states have a compelling interest in protecting minors from sexual abuse and the evils that accompany such abuse. However, granting an informational privacy right in the illegal, “consensual,” age-mate sexual activity of minors would lead to legal and social ramifications devastating to the State’s advancement of its compelling interest in the protection of minors. Not only does such a right undermine statutory rape laws across the

² The Kansas Supreme Court has upheld this statute generally, striking only its restriction to members of the opposite sex. *See State v. Limon*, 280 Kan. 275, 306 (Kan. 2005).

nation, but the general rule that there is no privacy right in criminal activity is also undermined. In addition, such a right undermines other areas of law aimed at protecting minors from manipulative adults and also from themselves.

Because most minors do not report sexual abuse, the pressure, manipulation, and coercion inherent in sexual exploitation between minors will be exacerbated by a broad informational privacy right. Furthermore, such a right and the accompanying silence of minors will foster the harmful consequences of sexual abuse. For these reasons, this Circuit should reverse the decision of the court below.

ARGUMENT

The United States Supreme Court has held that, while minors are protected by the Constitution and possess constitutional rights, “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Carey v. Population Serv. Int’l*, 431 U.S. 678, 692 (1977) (quoting *Prince v. Mass.*, 321 U.S. 158, 170 (1944)).³ While the right to privacy “in connection with decisions affecting procreation extends to minors,” states may restrict the privacy rights of minors when such restrictions “serve ‘any significant state interest

³ The Supreme Court has acknowledged that the peculiar vulnerability of minors, their inability to make critical decisions in an informed, mature manner, and the importance of parents in child-rearing justify the conclusion that minors’ constitutional rights are not equal to those of adults. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

... that is not present in the case of an adult.” *Carey*, 431 U.S. at 693 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976)).

Importantly, this test is “less rigorous” than the compelling interest test, because the states have greater latitude in regulating the conduct of children. *Carey*, 431 U.S. at 693n.15 (citing *Prince*, 321 U.S. 158; *Ginsberg v. New York*, 390 U.S. 629 (1968)). When a minor’s privacy interest relates to “independence in making certain kinds of important decisions”—such as the decision to be sexually active—“the law has generally regarded minors as having a lesser capability for making important decisions.” *Id.* No Supreme Court or Tenth Circuit decisions have extended informational privacy rights of minors to equal those rights of adults.

Clearly, the interests of the State of Kansas in protecting minors against the harms of sexual abuse constitute significant interests not present in the case of an adult. Even allegedly “consensual” sexual activity between minors can have devastating effects on a minor.⁴ By mandating the reporting of illegal sexual activity among minors, Kansas provides “protection of children who have been

⁴ In addition, studies have suggested that minor females cannot truly “consent” to sexual activity. *See infra* Part II.A. Furthermore, the CDC has reported that unprotected adolescent sexual activity is a major cause of morbidity and mortality among minors. Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance: United States*, 49 MORBIDITY & MORTALITY SURVEILLANCE SUMMARIES 1-96 (1999).

subject to ... sexual abuse,” ensures “the thorough and prompt investigation of these reports,” provides “preventative and rehabilitative services when appropriate,” and seeks to enable families to remain together without further threat to minors. KAN. STAT. ANN. § 38-1521.

Yet finding an informational privacy right in illegal, “consensual,” age-mate sexual activity drastically inhibits the State from advancing these significant—indeed, compelling⁵—interests in protecting minors. This Circuit has already

⁵ See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982); *Prince*, 321 U.S. at 168), where the Court stated the following:

It is evident beyond the need for elaboration that a State’s interest in “safeguarding the physical and psychological well-being of a minor” is “compelling.” “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

In this Circuit’s previous ruling in this case, it quoted *Palmore v. Sidoti* for the proposition that “[t]he State, of course, has a duty of the highest order to protect the interests of minor children....” *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (quoting *Palmore*, 466 U.S. 429, 433 (1984)) (emphasis added). This Circuit has indicated that the state interest in protecting minors from the physical and psychological impairment resulting from sexual abuse is “compelling,” “traditional,” and “transcendent.” *Giffin v. Strong*, 983 F.2d 1544, 1548 (10th Cir. 1993) (citing *Maryland v. Craig*, 497 U.S. 836 (1990); *State v. Jordan*, 665 P.2d 1280 (1983)). See also, e.g., *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 798 (7th Cir. 1987) (finding that a state’s interests supporting a child abuse reporting statute

acknowledged that the State’s reporting statute “enables the government to gain information about sexual abuse and violations of the criminal law that allow it to promote the best interests of minors.” *Aid for Women*, 441 F.3d at 1119.

However, the legal and social ramifications of finding such a broad privacy right for minors would undermine the State’s compelling interests and its efforts at protecting minors and curbing sexual abuse.

I. FINDING AN INFORMATIONAL RIGHT TO PRIVACY IN THE ILLEGAL, “CONSENSUAL,” AGE-MATE SEXUAL ACTIVITY OF MINORS WILL LEAD TO LEGAL RAMIFICATIONS DEVASTATING TO THE ADVANCEMENT OF THE STATE’S COMPELLING INTERESTS

A. Such a broad informational privacy right undermines existing statutory rape laws in all 50 states.

Statutory rape laws—which originated as early as the 13th century⁶—are designed to protect minors from sexual exploitation and are based upon the theory

were compelling and stating that “[a] state serves a compelling interest in protecting abused children”).

⁶ Some sources date statutory rape laws “at least as ancient as the 4000-year-old Code of Hammurabi.” M. Oberman [Oberman I], *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 119 (2004) (citing R. Eidson, *The Constitutionality of Statutory Rape Laws*, 27 U.C.L.A. L. REV. 757, 762 (1980)). While the reasoning behind statutory rape laws has fluctuated over the centuries, for more than 100 years the laws have been “predicated upon the premise that girls need and deserve the chance to grow into women free from coercion and exploitation.” M. Oberman [Oberman II], *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFFALO L. REV. 703, 757 (2000).

that *all* sexual activities involving minors below a certain age *are coercive*. Lewin Group, *Statutory Rape: A Guide to State Laws and Reporting Requirements* ES-1, 2 (2004).⁷ Below that designated age,⁸ individuals are incapable of providing consent to sexual activities.⁹ *Id.*

Mandatory reporting laws go hand-in-hand with statutory rape laws. In fact, reporting laws have been recognized as “one of the most significant measures ever taken to protect abused and neglected children,” “the underpinnings of our child protection system,” and “a critical part of discovering and responding to child abuse.” National Association of Counsel for Children [NACC], *Child Maltreatment* (2006);¹⁰ NACC, *Reporting Child Abuse* (2006).¹¹

Even if both parties to a sexual act believe they are voluntarily participating, statutory rape laws deem that act illegal. Lewin Group, *supra*, at ES-1. Indeed,

⁷ *Available at:* <http://www.lewin.com> (last visited Nov. 14, 2006). The report was researched and published for the Office of the Assistant Secretary for Planning and Evaluation in the U.S. Department of Health and Human Services.

⁸ The age designation varies among the 50 states.

⁹ This is analogous to other areas of law, which deem allegedly voluntary acts unenforceable because minors lack the decision-making capacity to protect themselves from coercion. *See infra* Part I.C.

¹⁰ *Available at:* <http://www.naccchildlaw.org> (last visited Nov. 14, 2006).

¹¹ *Id.*

there is no dispute in the case at hand that the “consensual,” age-mate sexual activity of minors is illegal under Kansas law. Statutory rape laws are aimed at protecting minors both from “those who would prey upon their vulnerability” as well as from themselves.¹² Oberman II, *supra*, at 710. Modern statutory rape laws are based upon the nationwide belief that minors are “so vulnerable to sexual exploitation that they are incapable of consenting to sex.” *Id.* at 737.

Furthermore, much literature has been devoted to the proposition that so-called “consensual” sexual activity among minors is not truly “consensual.” *See infra* Part II.A. Statutory rape laws are designed to protect minors who “consent” to sex but are too young and immature to understand the nature and consequences of that “consent.” Oberman III, *supra*, at 822. At common law, consensual sex with a minor was unheard of. Oberman I, *supra*, at 118 (citing Eidson, *supra*, at 762n.35). This is the very essence of statutory rape laws: minors *cannot* consent.

¹² It is suggested that statutory rape laws represent a “necessary complement to conventional rape law,” because conventional rape law offers little protection to minors who are victims of unwanted sex with acquaintances. Oberman II, *supra*, at 710. Assuming that sex among peers causes no real injury to victims “saddles statutory rape law with all of the problems of prosecuting acquaintance rape.” *Id.* at 752. While the problems with conventional acquaintance rape prosecutions are “notorious,” as society tends to blame the victim, statutory rape laws provide prosecutors with an alternate route to conviction. M. Oberman [Oberman III], *Girls in the Master’s House: Of Protection, Patriarchy and the Potential for Using the Master’s Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 816, 820-21 (2001). Depriving minors of the protection of statutory rape laws not only subjects them to the problems of conventional rape laws, but also holds them to the standards applicable to adult victims.

All 50 states maintain statutory rape laws, making sexual activity with a minor criminal behavior. The “overwhelming majority” of states bar sexual contact with minors under the age of 16. Oberman III, *supra*, at 809 (citing R.J.R. Levesque, *Adolescents, Sex, and the Law: Preparing Adolescents for Responsible Citizenship* 232-33 (2000)). In two-thirds of the states, statutory rape is a reportable offence regardless of the relationship between the victim and the defendant. Lewin Group, *supra*, at ES-3.

Nationwide, healthcare providers are required to report instances of suspected child sexual abuse. *Id.* at 18-126 (detailing every state law for the 50 states and the District of Columbia). Many states also require reporting of patients who are suspected to be involved with criminal activities. Oberman II, *supra*, at 740. Importantly, “*few* states allow mandated reporters to exercise discretion in deciding which cases to report.” Lewin Group, *supra*, at 13 (emphasis added).¹³

Kansas is not alone in maintaining that all sexual activity under a certain age—regardless of the age of a minor’s partner—is illegal.¹⁴ Almost half of the states hold that minors under a certain age cannot consent to certain sexual activity and/or that certain activity with a minor is illegal, *regardless of the defendant’s*

¹³ These states are listed as Florida, Tennessee, and Wisconsin. Lewin Group, *supra*, at 13.

¹⁴ See KAN. STAT. ANN. §§ 21-3502, 21-3504.

age.¹⁵ Thus, absent a regulation or court order to the contrary, such activities should be reported and minors can be prosecuted for such illegal, “consensual,” age-mate sexual activity.¹⁶ Four more states maintain similar provisions, but

¹⁵ Delaware (DEL. CODE ANN. tit. 11, § 770); Hawaii (HAW. REV. STAT. § 707-730); Idaho (IDAHO CODE § 18-6101); Illinois (720 ILL. COMP. STAT. 5/12-16); Indiana (IND. CODE § 35-42-4-3); Iowa (IOWA CODE § 709.4); Kansas (KAN. STAT. ANN. §§ 21-3502, 21-3504); Kentucky (KY. REV. STAT. ANN. §§ 510.020, 510.140); Maine (ME. REV. STAT. ANN. tit. 17-A, § 253); Massachusetts (MASS. GEN. LAWS ch. 265, § 23); Michigan (MICH. COMP. LAWS § 750.520d); Missouri (MO. REV. STAT. §§ 566.032, 566.068); Montana (MONT. CODE ANN. §§ 45-5-501, 45-5-503); New Hampshire (N.H. REV. STAT. ANN. § 632-A:3); New York (N.Y. PENAL LAW §§ 130.05, 130.20); North Dakota (N.D. CENT. CODE § 12.1-20-03); Oklahoma (OKLA. STAT. tit. 21, § 1111); Rhode Island (R.I. GEN. LAWS §§ 11-37-8.1, 11-37-8.3); South Carolina (S.C. CODE ANN. § 16-3-655); Texas (TEX. PENAL CODE ANN. § 22.021); Utah (UTAH CODE ANN. §§ 76-5-401, 76-5-402.1); Virginia (VA. CODE ANN. § 18.2-63); *see also* Lewin Group, *supra*, at 33, 41, 43, 45, 48, 50, 52, 54, 59, 64, 65, 71, 73, 79, 85, 90, 94, 101, 103, 110, 112, 117. The age under which sexual activity is prohibited with a minor ranges from state to state. For example, children under 14 years of age cannot consent to sexual activities under any circumstances in Hawaii, while in Idaho intercourse with a female under 18 years of age is considered rape, regardless of the age of the defendant. *See* HAW. REV. STAT. § 707-730; IDAHO CODE § 18-6101.

¹⁶ Interestingly, there is a gap in some states between illegal activity and reporting requirements. For example, in California, all sexual activity involving minors is illegal, regardless of the age of the defendant. Lewin Group, *supra*, at 11. However, the reporting requirements only apply when there is a large difference in age between the two parties. *Id.* Thus, there is a discrepancy between illegal activity and reported activity. In Connecticut, “sexual contact” with someone less than 15 years of age is illegal, regardless of the age of the defendant, but the attorney general has concluded that reporters are not required to make a report if no other evidence of abuse exists. *Id.* at 31-32. Contrary to these states, there is no discrepancy in the Attorney General’s interpretation of Kansas law. In Kansas, the law dictates that minors’ sexual activity is illegal regardless of the age of the defendant. *See id.* at 6 (Table 1). The law and the interpretation are cohesive and complimentary.

provide some reporting exceptions.¹⁷ In addition, South Dakota specifically prohibits a minor under the age of 16 from engaging in sexual contact with another minor under the age of 16, making it a misdemeanor. S.D. CODIFIED LAWS § 22-22-7.3.¹⁸

There are two primary objectives in enforcing statutory rape laws: 1) ensuring the health, safety, and well-being of the minor in question and taking the necessary steps to prevent further harm, and 2) conducting an investigation to determine if the reported abuse constitutes a criminal act and prosecuting offenders. Lewin Group, *supra*, at 14. Yet both of these objectives are thwarted by granting an informational right of privacy in illegal, “consensual,” age-mate sexual activity.¹⁹ Such a right removes the teeth from statutory rape laws, making

¹⁷ California (CA. PENAL CODE § 261.5; *but see People ex rel. Eichenberger v. Stockton Pregnancy Control Med. Clinic, Inc.*, 249 Cal. Rptr. 762 (Cal. Ct. App. 1988)); Connecticut (CONN. GEN STAT. § 53a-73a; *but see Lewin Group, supra*, at 32); Florida (FLA. STAT. § 800.04; *but see id.* at § 39.201); Wisconsin (WIS. STAT. ANN. § 948.02; *but see id.* at § 48.981); *see also Lewin Group, supra*, at 26-27, 31-32, 38-39, 123-24.

¹⁸ The definition of statutory rape used by the federal government also includes minor perpetrators. *See* U.S. Dep’t of Justice, *Statutory Rape Known to Law Enforcement*, JUVENILE JUSTICE BULLETIN 1 (Aug. 2005) (“Statutory rape is a general term used to describe an offense that takes place when an individual (*regardless of age*) has consensual sexual relations with an individual not old enough to legally consent to the behavior.”) (emphasis added).

¹⁹ In a study questioning 77 local Kansas family planning program managers, 77 percent supported aggressive enforcement, and 43 percent thought enforcement

them unenforceable for all intents and purposes. Without evidence and proper investigation, the state simply cannot prosecute sexual predators—regardless of their age. Thus, granting an informational privacy right in illegal, “consensual,” age-mate sexual activity will hamper proper investigation and therefore undermine statutory rape laws nationwide.²⁰

In light of the estimate that *at least* 7.5 million incidents of statutory rape occur per year, drastically hampered investigation leaves minors unprotected and endangered. Oberman II, *supra*, at 704; *see also* U.S. Dep’t of Justice, *supra*, at 1 (stating that three out of every five rape victims is 14 or 15 years of age).

Moreover, statutory rape laws are currently enforced “at the margins,” meaning only in those cases where drastic coercion and age differences exist. Oberman II, *supra*, at 751. Yet this practice “turns a blind eye to the coercion and abuse that may infect sexual encounters among peers,” and “undermine[s] the intentions of

would reduce pregnancy rates. C. Miller et al., *Issues in Balancing Teenage Client’s Confidentiality and Reporting Rape Among Kansas Title X Clinic Staff*, 16[5] PUB. HEALTH NURSING 329 (Oct. 1999).

²⁰ “[T]he problem with statutory rape laws has never been too much enforcement, but too little....” Oberman III, *supra*, at 826. “Since the early 1970s ... society has displaced 700 years of law premised upon girls’ inability to give legally valid consent to sex.” Oberman I, *supra*, at 114 (citing Eidson, *supra*, at 762 n.35). Indeed, statutory rape laws are “notorious” for being an area of law where “the law on the books ... differs markedly from the law in action.” *Id.* at 132 (citing M. Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 778 (1988)).

legislatures to treat girls differently from adult women for purposes of consenting to sexual activity.”²¹ *Id.* at 751-52; *see also* S. Lamb, *The Secret Lives of Girls: What Good Girls Really Do – Sex Play, Aggression, and Their Guilt* 116-33 (2001). The Attorney General, however, is attempting to protect those minors at the heart of statutory rape protection.

B. Such a broad informational privacy right undermines Tenth Circuit precedent denying a privacy right in criminal activity.

It is undisputed that sexual activity with a minor is illegal in Kansas, as well as in all 49 other states and the District of Columbia. It is also clear that there is no privacy right in illegal activity. *See Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) (“Criminal activity is thus not protected by the right to privacy.”); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (“Accurate information concerning such unlawful activity is not encompassed by any right of confidentiality....”). *See also Aid for Women*, 411 F.3d at 1117-18.

While the district court below²² attempted to distinguish the foregoing Tenth Circuit case law by pointing out that there was a clearly identified “perpetrator” in

²¹ Such a privacy right also runs contrary to the strong public outcry and growing demand for stronger enforcement against child predators. “Unfortunately, the law in practice has yet to take this obligation [of protecting minor girls from coercion and exploitation] seriously, and girls remain largely unprotected from nonvoluntary sexual interactions.” *Oberman II*, *supra*, at 757.

²² *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1115 (D. Kan. 2006).

those cases, that is a difference that makes no difference. As evidenced above, the very foundation of statutory rape laws is that sexual conduct is *illegal* under a certain age, and that such conduct inherently involves a *victim*.

Moreover, the grounds given by the lower court were the very same as those outlined by the dissent in the previous Tenth Circuit opinion—grounds upon which the majority opinion stated the Tenth Circuit cases did not rely. *See id.* at 1118 (“[W]e feel that the dissent’s grounds for distinguishing the cases are grounds on which those cases did not rely.”).

Allowing a privacy right for minors in *illegal* activity directly undermines this general rule as well as the states’ “strong interest ... in the enforcement of its criminal laws.” *Id.* at 1119. Criminal laws in every area of law would be affected.

C. Such a broad informational privacy right undermines other areas of law where minors remain protected as a vulnerable population group.

The Supreme Court has held that minors are impaired in their decision-making ability by their “immaturity, inexperience, and lack of judgment.” *Hodgson v. Minn.*, 497 U.S. 417, 444 (1990). *See also* Part II.A. This impaired decision-making ability is the focus of numerous areas of law focused on protecting minors from others and from themselves. In fact, this impaired decision-making ability calls into question any claims that minors can consent to sexual activity.

Allowing an informational privacy right in illegal, “consensual,” age-mate sexual activity inhibits enforcement of laws protecting minors—not only laws aimed at sexual abuse, but also those laws aimed at protecting minors against erroneous decision-making in other areas of life—because such a right elevates a minor’s decision-making capacity to that of an adult’s, contrary to long-standing jurisprudence.

For example, the common law rules governing contracts protect minors by not allowing them to enter into contracts and by allowing them to void or disaffirm contracts. Due to their decisional immaturity, minors are considered “incapacitated” under the law. *Oberman III*, *supra*, at 801; *see also* *Oberman I*, *supra*, at 141 (“[T]he common law conception that a minor does not possess the discretion and experience of adults and therefore must be protected from his own contractual follies generally holds sway today.”). Similarly, the “general principal” in tort law is “that the law limits the autonomy of young people, barring them from making medical decisions without adult guidance.”²³ *Oberman III*, *supra*, at 802.

It lacks reason to allow minors an informational privacy right in concededly illegal activity while simultaneously holding that minors lack the decision-making

²³ The very *narrow* exception to this rule is that minors may seek care for pregnancy, mental health, or sexually transmitted diseases in a number of states.

capacity to participate in that illegal sexual activity. If a minor is free to hide *illegal* sexual activity behind a privacy curtain, then there is no reason to prohibit minors from engaging in other life-affecting decisions.

II. FINDING AN INFORMATIONAL RIGHT TO PRIVACY IN THE ILLEGAL, “CONSENSUAL,” AGE-MATE SEXUAL ACTIVITY OF MINORS WILL LEAD TO SOCIAL RAMIFICATIONS DEVASTATING TO THE ADVANCEMENT OF THE STATE’S COMPELLING INTERESTS

A. Such a broad informational privacy right encourages continued exploitation and coercion of a vulnerable population group.

Finding an informational privacy right in illegal, “consensual,” age-mate sexual activity ignores the fact that even “consensual” sexual activity between young peers is subject to high levels of coercion and is not truly consensual.²⁴ In

²⁴ See, e.g., J.L. Stock et al., *Adolescent Pregnancy and Sexual Risk-Taking Among Sexually Abused Girls*, 29[5] FAM. PLAN. PERSP. 200, 203 (Sept./Oct. 1997) (stating that sexual abuse is perpetrated by peers as well as older men); G. Murphy, *Beyond Surviving: Toward a Movement to Prevent Child Sexual Abuse* 11 (2002), available at: <http://www.darkness2light.org> (last visited Nov. 12, 2006) (“[Child sexual abuse] also occurs among children of the same age and gender—with some children holding more power according to the ‘group’ with whom they associate. For example, the star athlete holds power over the quiet smart kid. This kind of power can be abused.”); *id.* at 12 (stating that abuse of children by other children is under-reported); Oberman II, *supra*, at 716 (stating that a considerable proportion of adolescents experience sexual intercourse “under conditions that are less than mutually desired and pleasurable”); *id.* at 769 (“There is a shocking level of violence, coercion, and harassment among students.... [I]t seems all the more important to permit the law to accommodate those cases in which peers actually do behave in a sexually exploitative manner.”); *id.* at 769 n.211 (noting that 85 percent of girls report being sexually harassed by peers at school); Oberman I, *supra*, at 162 (stating that as many as one-third of all high school and college-age girls are involved in violence in an intimate or dating relationship); Darkness to

fact, the younger a female is when she has sex for the first time, the more likely it is to have been unwanted. National Campaign to Prevent Teen Pregnancy [NCPTP], *14 and Younger: The Sexual Behavior of Young Adolescents* 1 (Summary 2003). The Supreme Court took note of this unique vulnerability of minors when it enunciated these three differences between minors and adults:

- Minors possess a lack of maturity and an underdeveloped sense of responsibility, which result in impetuous and ill-considered actions and decisions;
- Minors are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and
- The character of a minor is not as well formed as that of an adult, with the personality traits of minors being more transitory and less fixed.

Roper v. Simmons, 543 U.S. 551, 569-70 (2005).

Evidence suggests there is widespread confusion and ignorance among young girls about their sexual encounters and that a “considerable proportion” of minors experience their first sexual intercourse under coercive conditions.

Oberman II, *supra*, at 708; Oberman III, *supra*, at 820 (citing J. Abma et al., *Young Women’s Degree of Control Over First Intercourse: An Exploratory Analysis*, 30[1] FAM. PLAN. PERSP. 12, 12-18 (Jan./Feb. 1998)). In one study, 60 percent of

Light, *Statistics Surrounding Child Sexual Abuse* (2005), available at: <http://www.darkness2light.org> (last visited Nov. 14, 2006) (reporting that 60 percent of first teen pregnancies are preceded by experiences of molestation, rape, or attempted rape).

women who had sexual intercourse before the age of 15 reported having had a forced sexual experience. Lewin Group, *supra*, at 1 (citing Alan Guttmacher Institute, *Sex and America's Teenagers* (1994)); *see also* Oberman II, *supra*, at 717; Patricia Donovan, *Can Statutory Rape Laws be Effective in Preventing Adolescent Pregnancy?*, 29[1] FAM. PLAN. PERSP. 30 (Jan./Feb. 1997). Of those with a first sexual experience before the age of 14, 74 percent reported a forced sexual experience. Oberman II, *supra*, at 717; Donovan, *supra*, at 30.

A study conducted by the Department of Justice Bureau of Justice Statistics found that 23 percent of sexual offenders were under the age of 18. H.N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 8 (U.S. Dep't of Justice 2000). The single age category with the greatest number of offenders was age 14. *Id.* Another source reports that juvenile predators comprise as many as one-third of sexual offenders. Darkness to Light, *Child Sexual Abuse* (1997).²⁵ The United States Justice Department has found that the younger a victim is, the more likely the offender is a juvenile. U.S. Dep't of Justice, *supra*, at 3.

²⁵ Available at: <http://www.darkness2light.org> (last visited Nov. 14, 2006).

Moreover, there is “ample evidence” of the “bad bargains”²⁶ female minors make in “consenting” to sexual activity. Oberman II, *supra*, at 717. A number of factors other than sexual desire and love lead teenagers to consent to sex, including immaturity, sexual naiveté, vulnerability to coercion, fear, confusion, peer pressure, and a desire for male attention. *Id.* at 709. Girls tend to negotiate access to fulfillment of emotional needs by way of sex. Oberman I, *supra*, at 164. “The majority of stories [of teen sexual encounters] fall short of ... ideal, and instead reflect the narrator’s sense of disappointment, if not betrayal, and a lack of control over the timing and circumstances of sex.” Oberman II, *supra*, at 709 (citing S. Thompson, *Going All the Way: Teenage Girls’ Tales of Sex, Romance, and Pregnancy* 29 (1995)).²⁷

²⁶ “[T]he sexual bargains struck by girls often are so painfully one-sided that it is difficult for adults to understand what prompted the girl to consent. In this sense, the sexual bargains girls make are more like the commercial bargains they might make, were they permitted to act in the marketplace. The combination of girls’ age-appropriate naiveté and insecurity and the norms of male sexual initiative make bad bargains inevitable.” Oberman II, *supra*, at 714. Moreover, the fact that some girls “consent” to such exploitative sex is evidence of their immaturity and vulnerability to exploitation and that girls lack the capacity for meaningful consent to sex. Oberman I, *supra*, at 113, 167. In addition is the fact that girls are less likely to take an active role in rejecting sex. Oberman II, *supra*, at 767.

²⁷ As many as 90 percent of sexual assaults during adolescence are committed by a date or acquaintance. C.E. Irwin, *Editorial: Coercive Sexual Experiences During Adolescence and Young Adulthood: A Public Health Problem*, 36 J. ADOLES. HEALTH 359, 360 (2005); *see also* U.S. Dep’t of Justice, *supra*, at 1 (finding that out of every ten offenders, three were boyfriends and six were acquaintances).

Disturbingly, “this coercion may be so commonplace, and so deeply scripted into contemporary norms of sexual interaction, that it is all but invisible.”

Oberman III, *supra*, at 813 (citing *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), as demonstration of this proposition). The growing body of evidence on female adolescence calls into question the presumption that minors are capable of protecting themselves. Oberman I, *supra*, at 116, 167. Even between age-mates, the power may be so greatly imbalanced that verbal or non-verbal consent does not reveal the true nature of a sexual encounter.²⁸ *Id.* at 168. In one study, 34 percent of boys thought it would be okay for a boy to pressure a girl to have sex if they had had sex before. NCPTP, *supra*, at 13.

Simply put, because of their inexperience and the sexual culture surrounding them, minors are inherently vulnerable to exploitation and coercion in their sexual interactions. Oberman II, *supra*, at 704-05, 709-10, 778 (citing numerous studies

²⁸ The fact that Plaintiffs are approached by girls with “unwanted pregnancies” points to the strong possibility that their partners are not taking into account the girls’ desire to avoid pregnancy. If their partners are ignoring their desire not to become pregnant, it is entirely possible that those partners are ignoring other desires—or lack of desire—as well. See E.M. Saewyc et al., *Teenage Pregnancy and Associated Risk Behaviors Among Sexually Abused Adolescents*, 36[3] PERSP. ON SEXUAL & REPROD. HEALTH 98 (May/June 2004) (stating that a sense of powerlessness in relationships may impair minors’ ability to negotiate use of contraception).

and resources).²⁹ Finding an informational privacy right in illegal, “consensual,” age-mate sexual activity will foster this coercion, as sexual abuse is “vastly underreported.” National Association of Children’s Hospitals and Related Institutions [NACHRI], *Child Sexual Abuse Fact Sheet* (2004);³⁰ Saewyc et al., *supra*, at 99. In fact, nearly 88 percent of sexual abuse is never reported—let alone prosecuted. Stop It Now, *Commonly Asked Questions: Answers to Commonly Asked Questions About Child Sexual Abuse* (2005) (citing R.F. Hanson et al., *Factors Related to the Reporting of Childhood Sexual Assault*, 23 CHILD ABUSE & NEGLECT 559, 559-69 (1999)).³¹ Many experts refer to sexual violence and date/acquaintance rape as a “hidden” or “silent” epidemic because of the high rates of occurrence and its infrequent disclosure. Irwin, *supra*, at 359; V.I. Rickert et al., *Disclosure of Date/Acquaintance Rape: Who Reports and When*, 18 J. PED. ADOLES. GYN. 17 (2005).

It has been documented that 42 percent of women and 33 percent of men who were sexually abused as minors never disclose their experiences to anyone. NACHRI, *supra*. Other evidence reveals that *less than one in ten* adults who were

²⁹ For more information on studies related to the inherent vulnerability of minor females, *see generally* Oberman III, *supra*; Oberman I, *supra*.

³⁰ Available at: <http://www.childrenshospitals.net> (last visited Nov. 12, 2006).

³¹ Available at: <http://www.stopitnow.com> (last visited Nov. 14, 2006).

sexually abused before turning 18 will tell of their experience. Darkness to Light, *Adults' Responsibility in the Prevention of Child Sexual Abuse* (2005).³²

Minors are simply “too vulnerable to coercion and abuse to be expected to protect themselves from predatory sexual advances.”³³ Oberman II, *supra*, at 733. A minor’s typical response is shame, self-doubt, and a reluctance to tell anyone.³⁴ Oberman I, *supra*, at 176. As such, it is unlikely that minors would have the self-confidence to inform authorities of abuse on their own.³⁵ *Id.* Furthermore, young victims may not even recognize their victimization as sexual abuse. Darkness to Light, *Statistics Surrounding Child Sexual Abuse, supra*. For each of these reasons, “placing the law’s enforcement on the girls’ shoulders makes little sense.” Oberman I, *supra*, at 176.

Not only do minors infrequently report sexual abuse, but the tendency of mandatory reporters is to under-report as well. As one physician wrote, information about sexual abuse is “well shielded by social taboos against seeking

³² Available at: <http://www.darkness2light.org> (last visited Nov. 14, 2006).

³³ In acknowledging a compelling interest in protecting abused children, the court in *Pesce* noted that minors may be unable to report abuse. *Pesce*, 830 F.2d at 798.

³⁴ In addition, when sexual abuse occurs within the family, there is strong familial pressure to keep silent and be loyal to the family.

³⁵ Adolescent victims are also prone to silence because the offender is typically a boyfriend or acquaintance. Rickert et al., *supra*, at 17.

or obtaining this information.” V.J. Felitti, *The Relationship of Adverse Childhood Experiences to Adult Health: Turning Gold Into Lead 2* (German Adverse Childhood Experiences [ACE] Study 2002).³⁶ In addition, the effects of abuse may be invisible to third parties. *See Pesce*, 830 F.2d at 798. There is a so-called “sleeper effect” among sexual abuse victims—20 percent of those who are asymptomatic early on will “deteriorate over time.” P.T. Clements et al., *Issues and Dynamics of Sexually Assaulted Adolescents and Their Families*, 13 J. MENTAL HEALTH NURSING 267, 271 (2004). While the American Academy of Pediatrics, American College of Obstetricians and Gynecologists, and American Medical Association endorse universal screening for intimate partner violence, fewer than half of health providers routinely perform such screening. Rickert et al., *supra*, at 17. Therefore, allowing discretion to mandatory reporters—such as the Plaintiffs—does not work in identifying instances of sexual abuse and prosecuting abusers. That discretion simply cannot be trusted.

Thus, finding an informational privacy right in illegal, “consensual,” age-mate sexual activity between minors will both perpetuate sexual coercion between peers by encouraging silence and decrease the likelihood of appropriate intervention to protect minors from sexual exploitation.

³⁶ Available at: <http://www.darkness2light.org> (last visited Nov. 14, 2006).

B. Such a broad informational privacy right fosters the harmful consequences of sexual abuse.

In addition to fostering the coercion of minors, the silence accompanying an informational privacy right in illegal sexual activity will also foster the devastating consequences of sexual abuse. And vast numbers of minors endure these consequences: studies have revealed that *at least* one in five girls and one in seven boys is sexually abused before the age of 18. NACHRI, *supra*. Some researchers estimate even higher numbers. Murphy, *supra*, at 3.

Numerous studies document the consequences of sexual abuse, ranging from psychological to physical to behavioral effects.³⁷ Psychologically, sexual assault leads to severe emotional and traumatic reactions. Clements et al., *supra*, at 273. Such effects include post-traumatic stress disorder; difficulty regulating reactions to disturbing events; a detrimental effect on “adolescent intrapsychic development and interpersonal relationships”; a poorly-developed sense of self; an inability to trust that directly impacts the potential for intimate relationships; eating and sleep disorders; intense, negative self-evaluations; depression; and increased incidences or attempts of suicide. *Id.* at 267, 271, 273; J.L. Stock et al., *supra*, at 201; Rickert et al., *supra*, at 23; Murphy, *supra*, at 3.

³⁷ As acknowledged by the Seventh Circuit in *Pesce*, sexual abuse can carry physical and emotional scars that last a lifetime. *Pesce*, 830 F.2d at 798.

From a physical standpoint, minors enduring sexual abuse have an increased incidence of soft tissue injury, pelvic pain syndromes, and gastrointestinal illness. Clements et al., *supra*, at 217. Some of the most drastic physical consequences occur as a result of the behavioral effects common in sexual abuse victims. Evidence demonstrates a strong correlation between sexual abuse and compulsive, addictive, high-risk behavior. J.L. Stock et al., *supra*, at 202; Oberman II, *supra*, at 729-30; Saewyc et al., *supra*, at 102.

For example, sexually abused minors are more likely not to use contraception and to have multiple partners. *See, e.g.*, Saewyc et al., *supra*, at 98; Clements et al., *supra*, at 271. One study found that minors who have been sexually abused are twice as likely not to use birth control and are more likely to have had more than one sexual partner. J.L. Stock et al., *supra*, at 202; *see also* Saewyc et al., *supra* (reporting that sexually abused adolescents are less likely than their non-abused peers to use condoms or other birth control methods). Another study found that previously abused minors were three times more likely to have had three or more partners in the last year, with currently abused minors seven times more likely than never-abused minors to have had three or more partners in the last year. T. Luster & S.A. Small, *Sexual Abuse History and Number of Sex Partners Among Female Adolescents*, 29[5] *FAM. PLAN. PERSP.* 204, 207 (Sept./Oct. 1997).

These actions bring higher rates of pregnancy and sexually transmitted diseases, as well as an increased risk of sexual violence in relationships. J.L. Stock et al., *supra*, at 202; NCPTP, *supra*, at 18; Clements et al., *supra*, at 267, 271; Saewyc et al., *supra*, at 98, 102. One study found that sexually abused teens are three times more likely to become pregnant before the age of 18. J.L. Stock et al., *supra*, at 200.

In addition, sexually abused minors have higher rates of substance abuse and addictions, including the use of alcohol, cigarettes, and illegal substances. NCPTP, *supra*, at 13; Clements et al., *supra*, at 267; K. Moore & J. Manlove, *A Demographic Portrait of Statutory Rape*, presentation to *Conference on Sexual Exploitation of Teens* (2005).³⁸ Often these substances are used as coping devices. See Saewyc et al., *supra*, at 98.

On an economic level, minors who are victimized before the age of 18 earn, on average, one dollar less per hour than adults who were not crime victims. R. MacMillan, *Adolescent Victimization and Income Deficits in Early Adulthood: Rethinking the Cost of Criminal Violence from a Life Course Perspective*, 31 *CRIMINOLOGY* 553-87 (2000).

Finally, revictimization is a major concern. Studies show a link between sexual abuse and the repetition of assaults and prostitution. Clements et al., *supra*,

³⁸ This presentation is *available at*: <http://www.childtrends.org>.

at 267, 271. In fact, one study claims that previous victimization is the “most highly correlated predictor of subsequent victimization.” *Id.* Forty-four percent of women who were sexually abused before the age of 18 are revictimized at least once later in life. Oberman II, *supra*, at 730. Between 38 and 48 percent of survivors later have physically abusive husbands. *Id.* at 729. One report documented that 65 percent of prostitutes were forced into sexual activity before the age of 16. *Id.* at 730. Another study revealed that more than 75 percent of teenage prostitutes had been sexually abused. Darkness to Light, *Statistics Surrounding Child Sex Abuse, supra.*

Allowing an informational right of privacy in the illegal, “consensual,” age-mate sexual activity of minors will decrease society’s ability to protect vulnerable minors from sexual abuse and perpetuate the devastating consequences of sexual abuse in generations to come.

CONCLUSION

The judgment of the lower court should be reversed.

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

Counsel for *Amici Curiae* hereby certifies that the foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,964 words, excluding the parts of the brief exempted by Fed. Rule App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in 14 point font, Times New Roman font style.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2006, I served two paper copies of the foregoing Brief of *Amici Curiae* to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid. I also served one electronic copy upon the parties listed below, in compliance with Tenth Circuit Rule 25.5.

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