Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Senate Judiciary Committee
Hearing on the Child Custody Protection Act
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The hearing today on the Child Custody Protection Act raises very challenging issues for us as lawmakers. The matters involved are deeply personal and strike at the heart of any parent. I unequivocally support the goal of fostering closer familial relationships and the value of encouraging parental involvement in a child's decision about how to respond to an unplanned pregnancy. I believe, however, that States should continue to maintain their historically dominant role in developing and implementing policies that affect family matters, such as marriage, divorce, child custody and policies on parental involvement in minors' abortion decisions. That is the nature of our federal system, in which the States may, within the common bounds of our Constitution, resolve issues consistent with the particular mores or practices of the individual State. We must honor and protect this system. Federal laws cannot and should not attempt to dictate the nature of family relationships.

In my view, this bill significantly undermines important federalism principles that we have respected, at least since the Civil War. In addition, while I know as a father that most parents hope their children would turn to them in times of crisis, no law will make that happen. No law will force a young pregnant woman to talk to her parents when she is too frightened or too embarrassed to do so. This bill will not encourage a young woman to involve her parents in a decision to have an abortion. It does not increase the perception of choices for such young women. Rather it is likely to drive young women who are afraid to seek help from their families away from their families and greatly increase the dangers they face from an unwanted pregnancy. For these reasons, I oppose this bill.

Only 25 States have adopted parental consent or notification laws that are currently enforced and meet the bill's definition of a "law requiring parental involvement in a minor's abortion decision." Thus, the remaining States either have opted for no such law, or are enforcing a law that allows for the involvement of adults other than a parent or guardian in the minor's abortion decision. The direct consequence of this bill would be to federalize the reach of the most strict parental involvement laws, overriding the policies in the remaining States in this country.

That the bill does not expressly establish a federal parental consent requirement is a mere fig leaf which cannot hide its anti-federalism effect. The bill would use the power and resources of the Federal Government to force select States' parental involvement laws into effect in all other States. Furthermore, it would create a federal crime as a mechanism for such federal intervention.

I can think of only one other instance in which the Federal Government applied its resources to

enforce one State's policy, absent a State judgment or charge, against the residents of that State even when the resident found refuge in another State. I refer to the fugitive slave laws before the Civil War. None of us -- and certainly not the sponsors of this legislation -- would ever condone slavery. Yet unfortunately, that is the only legislative precedent we have for a bill that would use federal law to enforce a particular State's laws against people wherever those people may travel.
The Thirteenth Amendment to the Constitution outlawed slavery and repealed article IV, section 2, paragraph 3 of the Constitution, which authorized return of runaway slaves to their owners. That authority and the implementing laws enacted by Congress, such as the Fugitive Slave Act of 1793, enabled slave owners to reclaim slaves who managed to escape to free States or territories. In fact, the notorious Dred Scott decision relied on this since-repealed constitutional provision to decide that slaves were not citizens of the United States entitled to the privileges and immunities granted to the white citizens of each State. This is why Dred Scott, born a slave, was deemed by the Supreme Court to continue to be a slave, even when he traveled to a "free" territory that prohibited slavery.
In 1858, Abraham Lincoln, who was at the time running for the U.S. Senate, criticized the Dred Scott decision, "because it tends to nationalize slavery." Indeed, the dissenting opinion in Dred Scott, made plain that "the principle laid down [in the opinion] will enable the people of a slave state to introduce slavery into a free State ... and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State."
And so too with S. 851, which tends to nationalize select State laws, even in those States that have declined to adopt such strict policies. Fugitive slave laws are no model to emulate with respect to our daughters and granddaughters.
Make no mistake: Despite the sponsors' contention that this bill does not attempt to regulate any purely intrastate activities related to the procurement of abortion services, the effect of this bill would be to impose the policies of certain States on the residents of the remaining ones.
Just because some in Congress may prefer the policies of certain States over those in the others does not mean we should give those policies federal enforcement authority across the nation. Doing so sets a dangerous precedent.
What about State laws governing the sale of fireworks? Vermont bars the sale of all kinds of consumer fireworks, including Roman candles and sky rockets. These fireworks are perfectly legal in other States, including next-door New Hampshire. What would we think about making it a federal crime for a Vermonter to go to New Hampshire to buy consumer fireworks because they are illegal in Vermont? I believe we would view such a law -- even if it were constitutional and even if it would promote the "safer" State fireworks law -- as overreaching in the exercise of our federal power.
Should residents of States that prohibit gambling not be able to travel to Las Vegas or Atlantic City or the many other places that now allow it?
It is the nature of our Federal system that when residents of a State travel to neighboring States or across the nation, they must conform their behavior to the laws of the States they visit. When residents of each State are forced to carry with them only the laws of their own State, they may be advantaged or disadvantaged but one thing is clear: We will have turned our federal system on its ear.
In this way, the bill imposes significant new burdens on a woman's right to choose and impinges on the right to travel and the privileges and immunities due under the Constitution to every citizen. Peter J. Rubin of Georgetown University Law Center, whose testimony I welcome today,

and Laurence H. Tribe of Harvard Law School, have argued that the bill violates both "the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States ... to travel to and from any state of the Union for lawful purposes, a right strongly reaffirmed by the Supreme Court." These leading constitutional scholars contend that the bill as drafted is unconstitutional.

Given Tuesday's ruling by a Federal judge that the partial birth abortion ban is an unconstitutional burden on a woman's right to seek an abortion do we really want the Congress to pass another bill of suspect constitutional validity? And, given the highly intrusive practices of the Department of Justice in seeking to obtain women's private medical records in litigating the challenges to the partial birth law, do we want to encourage the Federal prosecutors to investigate decisions made by young women with the counsel of friends, relatives, and clergy?

This bill would sweep into its criminal and civil liability reach extended family members, including grandparents or aunts and uncles, who respond to a cry for help from a young relative by helping her travel across State lines to obtain an abortion, without telling her parents as required by the laws of her home State. In addition to close family members, any other person to whom a young pregnant woman may turn for help, including health care providers and religious counselors, could be dragged into court on criminal charges or in a civil suit. Rev. Doctor Katherine Hancock Ragsdale, who is with us today, once helped a stranger, a 15-year-old girl seeking an abortion in Massachusetts. The girl feared for her safety if her father learned of her pregnancy and had no relative to turn to for help. She was alone and desperate. Should such conduct have subjected Rev. Ragsdale to federal prosecution?

The purported goal of this bill, to foster closer familial relationships, will not be served by threatening to throw into jail any grandmother or aunt or sibling who helps a young relative travel out of State to obtain an abortion without telling her parents, as required by her home State law. The result of this bill will be to discourage young women from turning to a trusted adult for advice and assistance. Instead, these young women may be forced then into the hands of strangers or into isolation.

Keep in mind what this bill does not do. It does not prohibit pregnant minors from traveling across State lines to have an abortion, even if their purpose is to avoid telling their parents as required by their home State law. Thus, this bill will urge more young women to travel alone to obtain abortions or to seek illegal "back alley" abortions locally. How can anyone view these outcomes as desirable? Young pregnant women who seek the counsel and involvement of close family members when they cannot confide in their parents -- for example, where a parent has committed incest or there is a history of child abuse -- would subject those same close relatives to the risk of criminal prosecution and civil suit, if the young woman subsequently travels across State lines for an abortion.

No law will force a young pregnant woman to involve her parents in her abortion decision if she is determined to keep that fact secret from her parents. Indeed, according to the American Academy of Pediatrics, the percentages of minors who inform parents about their intent to have abortions are essentially the same in States with and without notification laws. Yet while doing nothing to achieve the goal of protecting parental rights to be involved in the actions of their minor children, S.851 would isolate young pregnant women, forcing them to run away from home or pushing them to seek protection from strangers at a time of crisis. And while doing nothing to foster familial relationships, this bill would do serious damage to important federalism and constitutional principles.

I thank the witnesses for appearing today, and ask unanimous consent to insert into the hearing

record a letter from a number of groups that are opposed to S.851, and written submissions from the Center for Reproductive Rights and the American Civil Liberties Union.