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The Abortion Issue in November's Election: Prop 85's Defeat in California Means *AAP v. Lungren* Remains Law

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The November 2006 election included significant victories for abortion rights across the United States. Restrictions on the right to choose were defeated in South Dakota, Oregon, and California. In South Dakota, voters rejected the most restrictive ban on termination to be proposed in the U.S.¹ This law would have banned all abortions for adults and adolescents, except those necessary to preserve the life of the mother. Intended as a vehicle to directly challenge *Roe v. Wade*,² the law's defeat via ballot initiative has national significance.³

In Oregon and California, voters faced ballot measures that would have restricted minors' rights to choose by requiring notice to a minor's parent before the teen could obtain an abortion. Voters in Oregon rejected the parental notification ballot measure by 55 percent to 45 percent.⁴ In California, parental notification was defeated for the second year in a row, by 54.3 percent to 45.7 percent,⁵ thus preserving rights established in *American Academy of Pediatrics v. Lungren*.⁶

AAP v. Lungren and its Impact

The 2005 and 2006 California parental notification propositions (Propositions

73 and 85, respectively) were each attempts to amend the California Constitution. Supporters of the propositions took this approach because in 1997 the California Supreme Court held that an adolescent's right to choose is protected under the state constitution.

In *AAP v. Lungren*, the California Supreme Court invalidated a state law that would have required parental consent before minors could obtain abortions.⁷ The court determined that minors' privacy rights under the California Constitution are coextensive with those of adults and that the constitutional right to privacy includes the right to decide whether to continue or terminate a pregnancy.⁸ The court ultimately concluded that the notification statute unconstitutionally infringed on a minor's right to choose, as it is guaranteed under article one⁹ of the California Constitution.¹⁰

Once the California Supreme Court held that a minor's right to choose derives from her rights guaranteed under the state constitution, it became much more difficult to limit that right. For example, the legislature could no longer attempt to mandate parental consent or notification by simple statute. Parental consent or no-

tification could only be mandated if the state constitution were first amended to restrict the right to privacy guaranteed to citizens of California.

The state constitution can be amended in one of two ways: 1) by a proposal approved by a two-thirds vote of both houses of the state legislature and a majority of voters in the general election, or 2) by ballot initiative. In order to change the California Constitution by initiative, a petition proposing the amendment must first be signed by a prescribed number of registered voters. For constitutional amendments, this number is at least 8 percent of the total number of votes cast for Governor in the last gubernatorial election. According to the California Secretary of State, the number of signatures required for a constitutional amendment by ballot initiative in the November 7, 2006 general election was 598,105.¹¹

The 2005 and 2006 Ballot Initiatives

In 2005 and again in 2006, anti-choice advocates managed to get initiatives on the ballot that would have amended the right to privacy under the California Constitution to explicitly require

1 National Abortion Federation, *Election Results Signal Victory for Reproductive Freedom*, Nov. 9, 2006, at <http://www.prochoice.org/news/releases/20061109.html>.

2 *Roe v. Wade*, 410 U.S. 113 (1973).

3 Davey, Monica, *The 2006 Elections: Ballot Measures; South Dakotans reject Sweeping Abortion Ban*, N.Y. Times, Nov. 8, 2006 at <http://www.nytimes.com/>.

4 Bajaj, Vikas, *The 2006 Elections: State by State*; West, N.Y. Times, Nov. 9, 2006, at <http://www.nytimes.com/>.

5 NAF, *supra* note 1.

6 *American Academy of Pediatrics v. Lungren*, 66 Cal. Rptr. 2d 210 (1997).

7 *Id.* at 244.

8 *Id.* at 226-227.

9 Cal. Const. Art. I, §1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**." (emphasis added)).

10 *A.A.P. v. Lungren*, 66 Cal. Rptr. 2d at 244. (For further discussion of *AAP v. Lungren*, see sidebar).

11 California Secretary of State, "How to Qualify an Initiative," at http://www.ss.ca.gov/elections/elections_h.htm. For a full description of the initiative process, see the California Secretary of State's website at http://www.ss.ca.gov/elections/initiative_guide.htm.

minors to notify their parents before terminating a pregnancy. Both ballot initiatives (Proposition 73 and Proposition 85) were funded by the same two individuals: Jim Holman, a publisher of Catholic weeklies, and former Assemblyman Don Sebastiani, a Sonoma winemaker.¹²

Proposition 73 would have amended the state constitution to require parental notification of abortion.¹³ It also would have made other changes to the constitution. It would have inserted language into the constitution that defined abortion as a procedure that “cause[s] the death of the unborn child, a child conceived but not yet born.”¹⁴ In addition, it would have inserted into the constitution a requirement that courts report the number of judicial bypass requests each judge granted and denied each year under the judicial bypass provision of the proposition (*See sidebar*).¹⁵ Supporters promoted Proposition 73 by arguing the proposition would facilitate family communication.¹⁶ Opponents countered that family communication cannot be mandated. They pointed out that while most teens do speak with a parent or guardian about pregnancy and termination, mandating parental notification could endanger certain teenagers – teens who, for example, might be kicked out of their homes or threatened with violence if their parents were notified of the situation.¹⁷ Proposition 73 was defeated by a margin of 52.8 percent to 47.2 percent.¹⁸

12 Gordon, Rachel, “Parental Notification for Abortion Back on Ballot,” S.F. Chronicle, Oct. 9, 2006, at <http://www.sfgate.com/>.

13 For complete text of Proposition 73, see http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/text73.pdf.

14 “Text of Proposed Law, Proposition 73,” California 2005 Official General Election Voter Information Guide, at http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire73.pdf.

15 *Id.*; see also Egelko, Bob, *Abortion Issue’s Opponents Wary of Fine Print*, S.F. Chronicle, Oct. 26, 2005 at <http://www.sfgate.com/>.

16 “Argument in Favor of Proposition 73,” California 2005 Official General Election Voter Information Guide, *supra* note 12.

17 “Argument Against Proposition 73,” California 2005 Official General Election Voter Information Guide, *supra* note 12; see also Gordon, Rachel, *Parental Notification for Abortion Back on Ballot*, S.F. Chronicle, Oct. 9, 2006, at <http://www.sfgate.com/>.

American Academy of Pediatrics v. Lungren¹

The California legislature first authorized minors to consent to pregnancy related care, including abortion, in 1953. In 1987, the legislature passed a law that would have limited this right and required a minor to get consent from a parent or guardian before terminating a pregnancy, absent a medical emergency.² The law provided for judicial bypass, an alternative whereby minors could petition the juvenile court to determine whether the minor was mature enough to consent to an abortion, or, alternatively, that the abortion was in the minor’s best interest.

Shortly before the parental consent statute was to be implemented, several provider groups challenged the law in court, represented by the National Center for Youth Law, ACLU-NC, and the law firm of Morrison & Foerster.³ The plaintiffs in the case, *American Academy of Pediatrics v. Lungren*, argued that the law violated the girls’ right to privacy under the California Constitution. The California Supreme Court agreed.⁴ The court made several important findings in reaching this conclusion. The court first held that minors’ privacy rights under the California Constitution are coextensive with those of adults and that the right to privacy includes the right to decide whether to continue or terminate a pregnancy.⁵

The court then looked at whether the state’s intrusion on the

minors’ privacy rights was justified. Because the law affected a constitutional right, the intrusion would be lawful only if it served important government interests. Because of the nature of the right involved, the government had to establish that the law would serve “compelling” interests – the highest standard the government can be asked to meet.⁶ The state argued that the law served to promote two compelling state interests: protecting the physical, emotional and psychological health of minors, and promoting the parent-child relationship. The court agreed that these were compelling state interests, but, importantly, rejected the argument that mandating parental consent would further those interests. In fact, the California Supreme Court stated that “[t]he evidence [is] nothing less than overwhelming that the legislation would not protect these interests, and would in fact *injure* the asserted interests of the health of minors and the parent-child relationship.”⁷ The court thus concluded that Health and Safety Code section 25958 (renumbered as section 123450 in 1995), mandating parental consent for adolescent abortion, violated a minor’s right to privacy under the California Constitution.⁸

1 This is a summary and update of the July-August 1997 Youth Law News article entitled “California High Court Rejects Parental Consent for Abortion Law” by Marcia Henry.

2 Cal. Health & Safety Code § 25958, renumbered in 1995 as Cal. Health & Safety Code § 123450.

3 The plaintiffs included the American Academy of Pediatrics, (California District IX), the California Medical Association, the American College of Obstetricians and Gynecologists (District IX), Planned Parenthood Golden Gate, and Dr. Philip Darney.

4 *A.A.P. v. Lungren*, 66 Cal. Rptr. 2d 210 (1997).

5 *Id.* at 226-227.

6 *Id.* at 232.

7 *Id.* at 241 (quoting *A.A.P. v. Lungren*, 32 Cal. Rptr. 2d 546, 550 (C.A. Dist. 1 1994)).

8 *Id.* at 244.

In 2006, Proposition 73's sponsors tried again with Proposition 85. The language of the proposition was substantially similar to that of 73, though the drafters removed some of the more controversial provisions.¹⁹ But while the language of the proposition was almost identical to that of 73, the campaign to sell the Proposition was quite different. Proponents all but abandoned their family communication argument; instead, they argued that parental notification is necessary to protect young girls from adult men who rape and abuse them and attempt to conceal their crimes by pressuring the girls who get pregnant to abort.²⁰ Proponents claimed that notification is necessary because health care providers fail to report these rapes and child abuse as required by law, which allows teens to be victimized again and again. The opponents of Proposition 85 showed these allegations to be completely false, citing an Inspector General investigation which found no evidence of such reporting violations.²¹ In their own campaign, opponents again emphasized their concern that parental notification would endanger the most vulnerable teens.²² In spite of – or possibly because of – proponents' new inflammatory

strategy, Proposition 85 was defeated by an even wider margin of 54.3 percent to 45.7 percent²³.

2007 and Beyond

To date, the court and voters of California have acted to support a minor's constitutional right to choose. Nevertheless, we may expect continued attempts to limit the rights established in *AAP v. Lungren*. Indeed, the supporters of the parental notification propositions have indicated a determination to put yet another such proposition on the ballot in the future. Shortly after the election, Albin Rhomberg, a spokesman for Proposition 85 supporters, said: "We think this is a very good common sense piece of legislation."²⁴ Given proponents' commitment to the issue, Californians may well be voting on the issue yet again in 2007.

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18 California Secretary of State, 2005 Special Statewide Election Returns, at <http://vote2005.ss.ca.gov>Returns/prop/00.htm>.

19 For complete text of Proposition 85, see http://www.voterguide.ss.ca.gov/pdf/prop85_text.pdf.

20 "Argument in Favor of Proposition 85," California 2006 General Election Official Voter Information Guide, at <http://www.voterguide.ss.ca.gov/props/prop85/prop85.html>.

21 "Rebuttal to Argument in Favor of Proposition 85," California 2006 General Election Official Voter Information Guide, *supra* n. 18.

22 "Argument Against Proposition 85," California 2006 General Election Official Voter Guide, *supra* n. 18.

23 California Secretary of State, 2006 General Election Results, at <http://vote.ss.ca.gov>Returns/prop/00.htm>.

24 Gordon, Rachel, *Abortion: Early Returns Reject Prop. 85, Which Requires Doctors to Notify Unwed Teen's Parents*, S.F. Chronicle, Nov. 8, 2006, at <http://www.sfgate.com/>.