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INTERNATIONAL OFFICE  
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Budapest, Hungary

September 23, 2011

The Honorable Jerry Brown, Governor  
State of California  
State Capitol, Suite 1173  
Sacramento, CA 95814

**Re: AB 499**

Dear Governor Brown:

California's AB 499 poses a significant threat to the constitutional right of parents to direct and control their children's upbringing. Indeed, by allowing young girls to consent to medical treatments related to the prevention of sexually transmitted diseases (STDs) as early as age 12 without their parents' knowledge or consent, AB 499 vests immature children with inappropriate levels of responsibility for critical decision-making, and undermines the fundamental parent-child relationship that has been the bedrock of society since the beginning of time. Believing AB 499 to be both constitutionally problematic and socially imprudent, we ask you to veto this bill.

## **Parental Rights**

For many decades now, the judiciary has recognized that our Bill of Rights protects the fundamental right of parents to direct and control their children's upbringing. In fact, the United States Supreme Court has noted that the interest of parents in "the care, custody, and control of their children" may be the oldest fundamental liberty interest recognized by the Court.<sup>1</sup> While this is a broad and general right, encompassing many facets of the child's life, courts have specifically applied it in the context of medical decision-making. As the U.S. Supreme Court has proclaimed:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.

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<sup>1</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.” Surely, this includes a “high duty” to recognize symptoms of illness and to seek and follow medical advice. The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>2</sup>

California’s AB 499 defies these venerable concepts of parental rights to direct their children’s upbringing. If parents’ rights to shape and influence their minor children’s course in life does not encompass the prerogative to control the administration of prophylactic medications by third-party strangers, then these rights are of no practical consequence.<sup>3</sup>

While it is our hope that you would not sign into law a measure that flagrantly transgresses some of the most sacred, fundamental rights of parents, please be aware that if you choose to do so, you invite a meritorious civil rights lawsuit that would be costly to your state.

### **Adolescent Children Are Ill-Equipped to Make Serious Medical Decisions**

AB 499 flies in the face of the well-established legal principles concerning informed consent in the healthcare context. Children are inherently impulsive, immature, and lacking in the sort of long-term perspective that our society has considered necessary to make truly informed medical decisions. They lack the capacity to comprehend the gravity of healthcare decisions and to carefully weigh costs and benefits of medical treatment options, including the costs and benefits of choosing to forego a given treatment altogether.

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<sup>2</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)) (internal citations omitted).

<sup>3</sup> See *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 1999) (“the right of family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state.”) (citing *Parham*, 442 U.S. at 602); *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (neither state nor private actors can “willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children.”).

In fact, neurological research reveals that an individual's dorsolateral prefrontal cortex is not fully developed until the early 20s.<sup>4,5</sup> This portion of the brain is responsible for performing many of the brain's "executive functions," including anticipating and weighing possible consequences of behavior, organizing thoughts and problem solving, impulse control, delaying gratification, and modulation of intense emotions.<sup>6</sup> Accordingly, children simply do not have the cognitive maturity at the age of twelve to make their own informed medical decisions.

The United States Supreme Court has recognized: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."<sup>7</sup> These are the reasons why, in general, medical professionals must obtain informed consent *from the parent or guardian* of a minor prior to administering medical treatments.<sup>8</sup>

The treatments encompassed by AB 499 actually intrude upon the bodily integrity of the child. For instance, Gardasil, a vaccination against Human Papillomavirus (HPV), is administered via injection by piercing the skin with a needle three times over a six-month period. It is injected intramuscularly into the upper arm or thigh. The second dose is administered two months after the first and the third dose is administered four months later.<sup>9</sup> Thus, the impact upon children, parents, and families is qualitatively different from even the provision of contraceptives to students, in that what the law allows is the performance of a medical *procedure* on a child without his or her parents' knowledge or consent.

Moreover, the treatments are certainly serious enough to warrant the informed consent of one who has full capacity to appreciate the associated risks and benefits. This is particularly so because some of these treatments are so new that even the medical community does not yet fully understand potential links with serious complications. For instance, while the known side effects of Gardasil are considered to be mild, a website for the Centers for Disease Control (CDC) states that some Gardasil patients have been

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<sup>4</sup> Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holmes and Arthur W. Toga, "In Vivo Evidence For Post-Adolescent Brain Maturation in Frontal and Striatal Regions," *Nature Neuroscience* 2.10 (1999).

<sup>5</sup> Jay Giedd, "Structural Magnetic Resonance Imaging of Adolescent Brain," *Annals of the New York Academy of Sciences* 1021 (2004).

<sup>6</sup> Office of Population Affairs, U.S. Department of Health and Human Services, "Maturation of the Prefrontal Cortex," online at [http://www.hhs.gov/opa/familylife/tech\\_assistance/etraining/adolescent\\_brain/Development/prefrontal\\_cortex/index.html#fn1/](http://www.hhs.gov/opa/familylife/tech_assistance/etraining/adolescent_brain/Development/prefrontal_cortex/index.html#fn1/).

<sup>7</sup> *Parham, supra*, at 603.

<sup>8</sup> See David Vukadinovich, "Minors' Rights to Consent to Treatment: Navigating the Complexity of State Laws," American Health Lawyers Association, *Journal of Health Law*, Vol. 37, No. 4, p. 667 (Fall, 2004).

<sup>9</sup> U.S. Food and Drug Administration, "How is Gardasil Administered?" online at <http://www.hhs.gov/fda/faq/vaccines/1840.html/>.

diagnosed with a rare neurological disorder, Guillain-Barre syndrome, after being vaccinated with the drug.<sup>10</sup>

Dr. Diane Harper, a researcher who helped develop the drug, has publically questioned whether the benefits outweigh Gardasil's risks. A study in the *Journal of the American Medical Association* has reported that blood clots occur with greater than normal frequency after Gardasil usage. The drug's manufacturer, Merck, is currently investigating whether there may be a relationship between Gardasil and ALS, or Lou Gehrig's Disease.<sup>11</sup> Since June 22, 2011, there have been 68 reported deaths of individuals who received Gardasil, but it is not clear whether any of these deaths can be attributed to the vaccine.

While we are aware that some state laws have carved out exceptions to the general parental consent requirement for the medical treatment of minors where the type of treatment sought concerns "sensitive" areas such as those involving the child's sexual activity, we submit that, at least with regard to AB 499, such exceptions may be dangerously short-sighted.

First, although these kinds of exceptions may seem expedient from a public health point of view, one cannot escape the logical inconsistency inherent in them. If a child is legally considered—by virtue of his or her youth, inexperience and ignorance—to lack capacity to provide informed consent for medical treatment generally, where "non-sensitive" medical issues are involved, he or she surely cannot simultaneously possess capacity to consent to "sensitive" medical procedures. In fact, these treatments and procedures would logically demand a higher, rather than lower, level of capacity.

Second, and in part because of the logical speciousness of these exceptions, laws such as AB 499 risk the erosion of the general rule recognizing that children lack the capacity to make certain important decisions for themselves, including those involving medical treatments. Our nation's children are obviously endangered by public policies that would treat children—who are yet prohibited from holding a job, driving a car, and voting—on par with mature adults in terms of their ability to make critical, life-changing decisions such as the choice to receive medical treatments that enhance their freedom to become sexually active.

Finally, while we appreciate the concerns of those who cite the frequency of poor parenting as a justification for eliminating traditional parental consent requirements, those concerns are properly addressed by creating the possibility for an alternative, trustworthy adult, such as a magistrate, to provide the required consent. Moreover, as we

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<sup>10</sup> Ibid.

<sup>11</sup> Sharyl Attkisson, "Gardasil Researcher Speaks Out," *CBS News*, Aug. 29, 2009, online at [http://www.cbsnews.com/stories/2009/08/19/cbsnews\\_investigates/main5253431.shtml/](http://www.cbsnews.com/stories/2009/08/19/cbsnews_investigates/main5253431.shtml/).

will explain next, poor parenting is perpetuated by policies such as this that go so far as to make active parenting legally impossible.

**Dispensing With Traditional Parental Consent Requirements Undermines the Foundational Parent-Child Relationship**

Adolescents are inherently eager to escape the protective boundaries imposed by their parents. Any state-sanctioned program that enhances children's ability to indulge this natural desire will inevitably act to the detriment of the family, and to the particular detriment of the child who would otherwise be protected by his or her parent's natural, instinctive concern for the child's well-being.<sup>12</sup>

As it stands already, the government has an incredible amount of influence over the nation's children through the public education system. Modern public school curriculum encompasses far more than reading, writing and arithmetic, including such subjects as family life, sex education, and even character development. To the extent that the state's foray into the inculcation of morality in the nation's youth renders the parent's own instruction on these issues marginal, the Institute submits that it weakens the American family.

The central issue behind this law is not whether or not the treatments to be offered to adolescents at their own choosing are beneficial. The more fundamental issue here is whether the State should be permitted to provide the treatment to children based on its *own* judgment that the treatment will be beneficial to any child who chooses it. This judgment necessarily excludes sensitive, individualized considerations of moral, ethical and religious issues that many American parents believe to be critical to this particular decision. Indeed, one must presume that it is the desire to see that these sensitive, individualized considerations are excluded from the decision-making process that has instigated this bill's passage. Having made a morality-based judgment that every child will benefit medically from certain treatments related to sexually transmitted diseases, the majority of California's legislature has evidenced a desire to see that no other considerations impede children's access to them. Thus, the wisdom and experience of concerned parents has been surgically extracted from the universe of effective influences on the child's sex-related choices. This law would allow the State to assume this aspect of parental decision-making for itself.

In addition to these concerns, a greater long-term danger is presented by this bill, in particular, and the State's usurpation of parental prerogatives, in general. As our

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<sup>12</sup> See, e.g., *Parham, supra*, 442 U.S. at 602 ("historically [the law's concept of the family] has recognized that natural bonds of affection lead parents to act in the best interests of their children.") (citing 1 W. Blackstone, Commentaries \*447; 2 J. Kent, Commentaries on American Law \*190).

nation's parents are increasingly led to rely upon judgment-based decisions that the state makes for their children, parents are likely to become inoculated to their children's desperate need for good, old-fashioned, personal parenting. This bill and others like it tend to lull even well-meaning parents into a false sense of security—into believing that all important aspects of parental decision-making have been evaluated by an all-wise state. This bill would offer parents one more excuse to disengage and one less reason to discuss critically important issues with their kids. We submit that what America's children need is not a *state* that parents, but *parents* who parent.

Rather than usurp the traditional role of parents by using the force of law to determine that any willing child should receive sex-related medical treatments, it would be far more constructive for the state to educate parents about the scientific, medical risks and benefits of these treatments, in particular, and the decision to become sexually active, in general. In this way, the state might truly empower parents with information that can be included in the mix of other crucial considerations that inform parents' decisions about what is best for their own children. The necessity for the *parent* to make a decision on this issue will foster meaningful familial conversations through which children may be led into choices that enhance the health of the total child rather than those that focus solely on the health of reproductive organs.

### Conclusion

For the aforementioned reasons, The Rutherford Institute hereby formally requests that you refuse to sign AB 499 into law. We ask, instead, that you reaffirm that it is the responsibility and authority of parents—not the state—to make wise medical decisions for their children. As the United States Supreme Court has eloquently expressed: "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>13</sup>

Sincerely yours,



John W. Whitehead  
President

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<sup>13</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).