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BILL ANALYSIS | Center for Litigation

PARENTAL RIGHTS ARE CONSTITUTIONALLY ESTABLISHED AND DEEPLY ROOTED IN THE SUPREME LAW OF THE LAND

By Patricia Nation

It has been said, "as the family goes, so goes the nation and so goes the whole world in which we live." Sadly, as a lawyer and mother, I am concerned about the safety and well-being of our most precious commodities - our children. These concerns are not isolated.

The U.S. House of Representatives along with at least 30 states have proposed legislation, known as Parents' Bill of Rights, which seeks to protect the fundamental rights of parents to direct the upbringing, medical care, and education of their children.[1] Opponents and critics, however, have maligned these efforts with impunity.[2] Unsurprisingly, their criticisms and mischaracterizations are untrue. Indeed, they have missed the point altogether. At its core, this legislation is based on one of our nation's oldest and most cherished liberties: parental rights. Every parent in the U.S. who desires to determine the upbringing and education of

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[1] *See* H.R. 5, 118th Cong. (2023-2024). The bill requires schools to notify parents about certain facets of their children's education, including but not limited to "know[ing] if their child's school operates, sponsors, or facilitates athletic programs or activities that permit an individual whose biological sex is male to participate in an athletic program or activity that is designed for individuals whose biological sex is female[;] and "know[ing] if their child's school allows an individual whose biological sex is male to use restrooms or changing rooms designated for individuals whose biological sex is female"[.] *Id.*, available at https://www.congress.gov/bill/118th-congress/house-bill/5?q=%7B%22search%22%3A%22hr5%22%7D&s=1&r=1; *see also*, NCSL-RR_ParentBillofRights.pdf (northcarolinahealthnews.org).

[2] Teachers Say a New Parents' Bill of Rights Doesn't Solve Schools' Problems (edweek.org); https://coloradonewsline.com/briefs/proposed-parents-bill-of-rights-constitutional-amendment-dies-in-colorado-legislature/; https://ohiocapitaljournal.com/2023/06/12/house-bill-8-would-force-schools-to-notify-parents-before-teaching-sexuality-content/.

their child should support these proposed laws. They are not only sound policy, but they are also consistent with longstanding United States Supreme Court precedent.

The Fourteenth Amendment Protects Fundamental Parent Rights

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Within this framework, the Supreme Court has firmly upheld "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxell v. Granville*, 530 U.S. 57, 67 (2000). The Court also recognized nearly a century ago, that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 535 (1925). And in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court declared that "it is cardinal with us that 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." And more recently, the Supreme Court left no doubt that parents are normally the best decision makers regarding the rearing of their children when the Court observed:

> So long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's child.

Troxell, 530 U.S. at 68. (cleaned up).

The Fourteenth Amendment Protects Parent Rights to Make Medical Decisions on Behalf of Their Children

The Fourteenth Amendment protects the right of parents to make medical treatment decisions on behalf of their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . Surely this included a 'high duty' to recognize symptoms of illness and to seek and follow medical advice").

Besides, there's a reason the federal government's HHS and NIH informed consent regulations and medical best practices require parental consent for all medical procedures, treatment, or research involving pediatric patients. Principally, "[t]he 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

difficult decisions." *Id.* It comes as no surprise then that the Court in *Parham* concluded that parents **can and must** make judgments about children's need for medical care and treatment. *Id*. at 603. (emphasis added).

Parental consent is also important because it is designed to help parents understand the risks, the follow-up care that will be needed, symptoms to look for, and when to call the doctor if something doesn't seem right.

Fourteenth and First Amendments Provide Protections to Parents to Guide the Religious and Educational Training of Their Children

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), three Amish families were sued for violating the compulsory education laws of Wisconsin by pulling their children out of school after eighth grade, a decision that aligned with their religious beliefs but violated state law. The Court recognized the vocational training that the Amish students received and its relationship to their way of life and found in favor of the parents, holding that the State cannot violate a sincerely-held religious belief by claiming an interest in compulsory education. Importantly, the Court declared that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

Notably, in 2005, the United States House of Representatives quoted *Yoder* and *Troxel* in House Resolution 547 in response to a public school district's subjection of children to inappropriate and sexually explicit content. H.R. 547, 109th Cong. (2005-2006). The House affirmed that "the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions." *Id.*

First Amendment Protected Speech

The First Amendment protects speech between parents and their children.[3] Whether speaking about religious values regarding sexuality or other matters, the First Amendment guarantees religious freedom and protects against government intrusion upon religious practices. As such, these bills, generally, will stop government entities from silencing a parental viewpoint that they disagree with on religious, political, or social grounds.

[3] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance. U.S. CONST. AMEND. 1.

Legal Standard Governing Constitutionally Protected Liberty Interests

The Supreme Court has not set forth a standard of review that state and federal courts must follow in determining the constitutionality of infringements upon fundamental liberty interests, such as parental rights. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993). However, the high court explained that the Due Process Clause includes a "substantive component, which forbids the government from infringing on certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* (emphasis in original; cleaned up). When it comes to narrowly tailored laws, the courts are clear: the means must justify the ends. Moreover, courts rarely impose their own judgments in lieu of a fit parent's decision about what is in the best interest of their child because it is presumed by judges that "fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. at 68.

Conclusion

In recognizing that the relationship between a parent and child is constitutionally protected, perhaps Justice Thurgood Marshall said it best in *Quillion vs. Walcott*, 434 U.S. 246 (1978). Marshall stated that "we have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest."

For the above-stated reasons, I support these bills and their immediate passage.

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