I. DAYTIME/NIGHTTIME CURFEWS CAN VIOLATE THE FUNDAMENTAL RIGHTS OF MINORS

The Supreme Court of the United States has affirmatively decided that a minor has constitutional rights. *In re Gault*, 387 U.S. 1 (1967); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). In the case of *Planned Parenthood* v. *Danforth*, the Supreme Court stated, ñConstitutional rights do not mature and come into being magically, only when one attains the state defined age of majority.ò 428 U.S. 52, 74 (1976).

The Supreme Court expressly recognized the fundamental importance of a citizenôs right to move about at will, stating that such activities as ñnight walking,ò ñloafing,ò and ñstrolling,ò while ñnot mentioned in the constitution or the Bill of Rights are historically part of the amenities of life as we have known them.ò *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972). ñThe right to walk the streets, or to meet publicly with oneôs friends for a noble purpose or no purpose at all, and to do so when ever one pleases - is an integral component of life in a free and ordered society.ò *Id.*

In 1997, in a federal case addressing the issue of curfews, *Nunez v. San Diego*, 114 F.3d 935, 949 (9th Cir. 1997), the Court of Appeals ruled that a juvenile curfew ordinance violated the fundamental right of minors to move about freely. The court acknowledged the governmentôs compelling interest in reducing juvenile crime and victimization, but was not persuaded that the ordinance was narrowly tailored to meet that interest. *Id.* ñThe curfewôs blanket coverage restricts participation in, and travel to or from, many legitimate recreational activities, even those that may not expose their special vulnerability. *Id.* at 2227. The court held that San Diegoôs failure to provide adequate exceptions excessively burdened the minorsô fundamental right to free movement:

> We therefore conclude that the City has not shown that the curfew is a close fit to the problem of juvenile crime and victimization because the curfew sweeps broadly, with few exceptions for otherwise legitimate activity . . . . The Court recognizes that, in the eyes of many, the crippling effects of crime demand stern responses. With the Act, however, the District has chosen to address the problem through means that are stern to the point of unconstitutionality. Rather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this cityôs innocent juveniles prisoners at night in their homes.

Id. The proposed ordinance is similarly stern in its approach to truancy and daytime juvenile crime. Given the great variance of school hours among private schools and students being educated at home, this ordinance would work to restrain the otherwise lawful and harmless conduct of many New Mexico youths.

Courts upholding curfew ordinances have only done so after determining that the municipality has a compelling interest in restricting the juvenile activity for only a narrow period of the day, and that the ordinance is drawn as narrowly as practicable. *City of Milwaukee* v. *K.F.*, 145 Wis. 2d 24, 426 N.W.2d 329 (1988). Even if the city has a compelling interest in

school attendance, reduction of unsafe activities in residential neighborhoods and prevention of criminal activity, the city must show that it has statistics over a significant period of time to justify the restriction of fundamental freedoms of minors. This point is also stressed in the *Nunez* case above.

New Mexico communities will have similar difficulty establishing a connection between the daytime curfew ordinance and reduced juvenile crime. There exists no evidence of which we are aware that daytime curfews significantly reduce juvenile crime during the curfew hours. Statistics demonstrate that there is little juvenile crime during these hours even in the absence of a daytime curfew. Statistics regarding truancy are equally difficult to connect to a daytime curfew. When so small a percentage of the student population falls into this category, any decrease in truancy can only affect an even smaller percentage of students. And there will always be other factors to account for a decrease in unexcused absences, whether it is parental counseling, or a more active attendance supervisor.

The Center on Juvenile and Criminal Justice recently conducted a detailed statistical study of juvenile curfews in California, and concluded that ñ[s]tatistical analysis does not support the claim that curfew and other status enforcement reduces any type of juvenile crime, either on an absolute (raw) basis or relative to adult crime rates.ò Macallair & Males, Justice Policy Institute of the Center on Juvenile and Criminal Justice, *The Impact of Juvenile Curfew Laws in California*, at p. 11 (June, 1998). It appears that New Mexico is hastily following other jurisdictions that have attempted to enact similar ordinances without the requisite statistical support.

The proposed ordinance unconstitutionally infringes the fundamental right of minors to travel and move about freely without the interference of the government as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

II. THE ORDINANCE VIOLATES THE FOURTH AMENDMENT

Daytime curfews violate the Fourth Amendment standard for stopping and detaining minors. The Fourth Amendment forbids officials from stopping or detaining minors simply because they are not in school during school hours. In determining the range and depth of the Fourth Amendment guarantees, courts must be aware that ñin the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.ò *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959).

> ñAmong deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.ò

Brinegar v. *U.S.*, 338 U.S. 160, 180-181 (1949). The proposed ordinance empowers police officers to detain minors simply because they are not in school during school hours. Thus, the proposed ordinance should be void as violative of the Fourth Amendment prohibition against detentions without reasonable suspicion.

III. THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THE UPBRINGING OF THEIR CHILDREN

The United States Supreme Court has repeatedly recognized that the right of parents to direct the upbringing of their children is among those higher-tiered constitutional rights that have been declared to be ñfundamental.ò This right is grounded on the Fourteenth Amendmentôs protection of liberty in the Due Process Clause. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In the early parentsôrights cases, the Court had not yet developed the specific ñfundamental rightsò doctrine, together with its required compelling interest/least restrictive means analysis. Nonetheless, the Court used powerful language to express its view that parentsô rights are to be zealously protected against government encroachment.

> The fundamental theory of liberty upon which all governments in this Union repose exclude any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 525. See also, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The leading parentsôrights case of the modern era is undoubtedly *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Court clearly declared parentsôrights to be of a fundamental nature and, importantly, imposed the strictest constitutional balancing test upon the interest of the government.

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

406 U.S. at 232.

In the more recent case of *Troxel v. Granville*, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the Supreme Court confirmed that the right of parents to the care, custody, and control of a child is a fundamental right.

> The Fourteenth Amendment provides that no State shall ñdeprive any person of life, liberty, or property, without due process of law.ò We have long recognized that the Amendmentôs Due Process Clause, like its Fifth Amendment counterpart, ñguarantees more than fair process.ò *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Clause also includes a substantive component that ñprovides

> heightened protection against government interference with certain fundamental rights and liberty interests.ò Id., at 720; see also *Reno v. Flores*, 507 U.S. 292, 301ð 302 (1993).

Troxel, 120 S.Ct. at 2059.

The Court goes on to list eight different Supreme Court cases that have upheld the constitutional right of parents to direct the education and upbringing of their children, a right which encompasses the right to choose private or homeschooling. *Troxel* is simply the latest and clearest articulation of the constitutional principle. Any regulation of that fundamental right is subject to the strict scrutiny test. The plurality opinion written by Justice OôConnor and joined by the Chief Justice, Justice Ginsburg, and Justice Breyer, stated:

> The liberty interest at issue in this case ð the interest of parents in the care, custody, and control of their children ð is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the ñlibertyò protected by the Due Process Clause includes the right of parents to ñestablish a home and bring up childrenò and ñto control the education of their own.ò Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 534-535 (1925), we again held that the ñliberty of parents and guardiansò includes the right ñto direct the upbringing and education of children under their control.ò

Troxel, 120 S.Ct. at 2060.

In addition to the recognition by the Supreme Court of the United States of the fundamental right of parents to direct the education of their children, a number of other relatively recent decisions have included parental rights in various lists and descriptions of those constitutional rights that the Court deems to be fundamental. Importantly, parentsô rights have been recognized as fundamental in the context of both truancy and curfew laws. If the proposed New Mexico curfew bill is considered to be one outlawing truancy, then *Yoder* and *Troxel* are controlling authority which teach that parental rights are fundamental and may override the governmentôs interest in compulsory education. Two recent federal cases have held that curfews, such as the daytime ordinance imposed by the proposed ordinance, must be measured against the strict standards that flow from recognizing that the right of parents to direct the upbringing of their children is a fundamental right. *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997). *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1995), also recognized that parental rights are fundamental in a curfew case, although the court held that the particular ordinance in question was written in such a way as to only minimally burden parental rights because of ñbroad exemptions written into the curfew ordinance.ò

In *Nunez*, the district court had found that the burden imposed upon parental liberties was only minimal. San Diego defended this contention on appeal ñon the grounds that it is a minimal burden to prevent parents only from allowing unsupervised children in public places at night.ò 114 F.3d at 952. The Ninth Circuit rejected this contention: ñThe broad sweep of the ordinance,

and the paucity of exceptions to allow unsupervised nocturnal activity, burden the parents just as they do the minors.ò *Id.*

The exceptions found in the San Diego ordinance were even broader than the exceptions in the proposed New Mexico bill authorizing local ordinances. The San Diego ordinance made provision for such things as going to and from work, going to and from a legitimate activity, an emergency errand at the direction of a parent, or when the minor is lawfully engaging in work. These exceptions, however, were not enough to remove the severe burden upon a parentôs right to direct the upbringing of his child. The New Mexico bill exceptions are far less. Since the *Nunez* court struck down the San Diego ordinance despite its exceptions, any enacted ordinances authorized under the New Mexico bill could be struck down as well.

Private schools and homeschools do not have to march to the beat of the public school schedule. But the demonstrated consequence of marching to a different beat is that privately educated children are subject to repeated police stops and interrogation. Children will be forced to repeatedly explain themselves to the police just because their parents have exercised their constitutional liberty to choose private education.

The central burden on parental rights imposed by the New Mexico bill authorizing curfew ordinances is quite similar to the situation found to be unconstitutional in *Nunez*. ñThe ordinance does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor.ò 114 F.3d at 952. In New Mexico, if a homeschooling parent sends his older child to the library or piano lessons during the curfew hours, the child could be detained under the ordinance.

Free people generally do not have to explain themselves to the police or carry passes. Passes and curfews imposed on those of a different race were a part of the regime of shame known as slavery. ñNegroes were forbidden, upon pain of arrest by a vigilant patrol, to be abroad after the ringing of the curfew at nine oôclock, without written permission from their employers.ò Woodrow Wilson, *History of the American People,* vol. 5, p. 20-21. Before New Mexico shrugs off this insult to liberty as only a ñminimal intrusionò they should look at the situation for just a moment from the perspective of the person subject to this restraint. In Frederick Douglasôs *The Narrative of a Slave,* p. 106-107, he moans under the brutality of slavery (ñYou are loosed from your moorings, and are free; I am fast in my chains, and am a slave!ò) and yearns for the freedom of Pennsylvania. ñWhen I get there, I shall not be required to have a pass; I can travel without being disturbed.ò

Unlike a nighttime curfew, a daytime curfew affects minors unequally. New Mexicoôs proposed daytime curfew bill will have a disparate affect on the minority of its residents who have chosen private education because private school students are often legitimately on the street at times the public schools are in session. All curfews employ a tool of repression used by slave-holding states. But because of its disparate application upon the private school minority, New Mexicoôs proposed curfew bill has both the form and the feel of this ancient law designed to keep minorities in their place. Such a status offense is impermissible and should be rejected.