

J. MICHAEL SMITH, ESQ.
PRESIDENT (CA, DC, VA)

CHRISTOPHER J. KLICKA, ESQ.
SENIOR COUNSEL (VA)

DEWITT T. BLACK, III, ESQ.
SENIOR COUNSEL (AR, SC, DC)

THOMAS J. SCHMIDT, ESQ.
ATTORNEY (CA)

MICHAEL P. DONNELLY, ESQ.
ATTORNEY (MA, NH)

HOME SCHOOL
LEGAL DEFENSE
ASSOCIATION

Advocates for Family & Freedom

MICHAEL P. FARRIS, ESQ.
CHAIRMAN & GENERAL COUNSEL (DC, WA)

JAMES R. MASON, III, ESQ.
DEPUTY GENERAL COUNSEL (OR)

SCOTT A. WOODRUFF, ESQ.
ATTORNEY (VA, MO)

DARREN A. JONES, ESQ.
ATTORNEY (CA)

SCOTT W. SOMERVILLE, ESQ.
OF COUNSEL (VA, MD)

August 18, 2008

**MEMORANDUM IN OPPOSITION TO PROPOSED
ROCK SPRINGS, WYOMING, ORDINANCE
ESTABLISHING A TRUANCY CURFEW**

By way of introduction, Home School Legal Defense Association is a national organization which has as its primary purpose the protection of the right of parents to educate their children at home. We presently have more than 85,000 member families in all 50 states, with nearly 400 member families in the state of Wyoming.

We have been asked by member families in Rock Springs to evaluate the above-referenced ordinance. The truancy curfew ordinance (the "ordinance") is constitutionally defective as applied to minors and their parents for the following reasons:

1. The ordinance violates minors' fundamental right to travel and move about freely.
2. The ordinance violates the search and seizure protections of the Fourth Amendment to the U.S. Constitution.
3. The ordinance is unconstitutionally vague.
4. The ordinance violates the fundamental right of parents to direct the upbringing of their children.

We will support these contentions with case law in an attempt to persuade the Rock Springs City Council not to pass this ordinance. The following represents a legal analysis pointing out the constitutional problems with the ordinance.

I. THE ORDINANCE VIOLATES 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, “Constitutional rights do not mature and come into being magically, only when one attains the state defined age of majority.” 428 U.S. 52, 74 (1976).

The Supreme Court expressly recognized the fundamental importance of a citizen’s right to move about at will, stating that such activities as “night walking,” “loafing,” and “strolling,” while “not mentioned in the constitution or the Bill of Rights are historically part of the amenities of life as we have known them.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972). “The right to walk the streets, or to meet publicly with one’s 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.” *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 government’s compelling interest in reducing juvenile crime and victimization, but was not persuaded that the ordinance was narrowly tailored to meet that interest. *Id.* “The curfew’s 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 Diego’s failure to provide adequate exceptions excessively burdened the minors’ 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 city’s 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 Rock Springs 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.

Rock Springs 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 “[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.” 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 Rock Springs 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 “in 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.” *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

“Among 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.”

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 IS UNCONSTITUTIONALLY VAGUE

If the terms of the ordinance are so ambiguous or uncertain that it cannot be understood by persons of ordinary intelligence as to the act it forbids or requires, then it denies due process and will be found to be unconstitutionally vague. Similarly, if the wording of the ordinance is such that the police officers lack certain “minimal guidelines” by which to enforce it, the likelihood of “arbitrary and discriminatory enforcement” increases. *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

In 1999, the Supreme Court of the United States reiterated the standard for determining whether a law is unconstitutionally vague.

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

* * * * *

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits

City of Chicago v. Morales, 119 S.Ct. 1849, 1859 (1999). The proposed ordinance fails the first of these criteria, because it criminalizes the innocent behavior of children who are not required to be in school.

In the *Morales* case, the Supreme Court struck down a presence prohibition similar to the one in the proposed Rock Springs ordinance. A Chicago ordinance authorized police to disperse and remove a loitering criminal street gang member and his cohorts from any public place. “Loiter” was defined in the ordinance as “to remain in any one place with no apparent purpose.” *Id.* at 1856, n.14. The Court, however, pointed out that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 1857. The Court held that a prohibition of this type “fail[s] to distinguish between innocent conduct and conduct threatening harm.” *Id.* at 1859. In the same way, the proposed Rock Springs ordinance punishes mere presence in public, in spite of the fact that there may be no indication of criminal conduct. Courts have consistently struck down such presence prohibitions as unconstitutionally vague.

Terms in nighttime curfew ordinances that describe the behavior prohibited have been the subject of litigation. “Remaining” or “loitering” in public places have sometimes been held unconstitutionally vague because the terms do not provide adequate guidelines for determining what is unlawful. *Portland v. James*, 251 Or. 8, 444 P.2d 554 (1968); *In re Doe*, 54 Hawaii 647, 513 P.2d 1385 (1973). The court in *Seattle v. Pullman*, 82 Wash. 2d 794, 514 P.2d 1059 (1973)

held a city curfew ordinance unconstitutionally vague where it made it unlawful for any minor to “loiter, idle, wander, or play” in public places. The court reasoned that the activities proscribed could not reasonably connote unlawful activity and did not provide an ascertainable standard for determining the line between innocent and unlawful behavior. Likewise, the activities proscribed by the proposed Rock Springs ordinance could not reasonably connote unlawful activities.

A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. *Grayned v. City of Rock Springs*, 408 U.S. 104, 92 S. Ct. 2294 (1972). “No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal codes. All are entitled to be informed as to what the state commands or forbids.” *Lonzetta v. New Jersey*, 306 U.S. 451 (1939). Because the proposed Rock Springs ordinance impermissibly delegates policy decisions to law enforcement, it is unconstitutionally vague.

IV. 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 “fundamental.” This right is grounded on the Fourteenth Amendment’s protection of liberty in the Due Process Clause. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In the early parents’ rights cases, the Court had not yet developed the specific “fundamental rights” doctrine, together with its required compelling interest/least restrictive means analysis. Nonetheless, the Court used powerful language to express its view that parents’ 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 parents’ rights case of the modern era is undoubtedly *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Court clearly declared parents’ rights 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 “deprive any person of life, liberty, or property, without due process of law.” We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process.” *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Id.*, at 720; see also *Reno v. Flores*, 507 U.S. 292, 301—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 home schooling. *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 O’Connor and joined by the Chief Justice, Justice Ginsburg, and Justice Breyer, stated:

The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — 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 “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 534-535 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”

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, parents’ rights have

been recognized as fundamental in the context of both truancy and curfew laws. If the proposed Rock Springs ordinance 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 government's 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 "broad exemptions written into the curfew ordinance."

In *Nunez*, the district court had found that the burden imposed upon parental liberties was only minimal. San Diego defended this contention on appeal "on the grounds that it is a minimal burden to prevent parents only from allowing unsupervised children in public places at night." 114 F.3d at 952. The Ninth Circuit rejected this contention: "The broad sweep of the ordinance, and the paucity of exceptions to allow unsupervised nocturnal activity, burden the parents just as they do the minors." *Id.*

The exceptions found in the San Diego ordinance were even broader than the exceptions in the proposed Rock Springs ordinance. 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 parent's right to direct the upbringing of his child. The Rock Springs ordinance's exceptions are far less. Since the *Nunez* court struck down the San Diego ordinance despite its exceptions, the proposed Rock Springs ordinance could be struck down as well.

Private schools and home schools 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 Rock Springs ordinance is quite similar to the situation found to be unconstitutional in *Nunez*. "The ordinance does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor." 114 F.3d at 952. In Rock Springs, if a home schooling parent sends his older child to the library or piano lessons during the curfew hours, the child can 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. "Negroes were forbidden, upon pain of arrest by a vigilant patrol, to be abroad after the ringing of the curfew at nine o'clock, without written permission from their

employers.” Woodrow Wilson, *History of the American People*, vol. 5, p. 20-21. Before Rock Springs shrugs off this insult to liberty as only a “minimal intrusion” they should look at the situation for just a moment from the perspective of the person subject to this restraint. In Frederick Douglas’s *The Narrative of a Slave*, p. 106-107, he moans under the brutality of slavery (“You are loosed from your moorings, and are free; I am fast in my chains, and am a slave!”) and yearns for the freedom of Pennsylvania. “When I get there, I shall not be required to have a pass; I can travel without being disturbed.”

Unlike a nighttime curfew, a daytime curfew affects minors unequally. Rock Springs’s proposed daytime curfew 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, Rock Springs’s proposed ordinance 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.

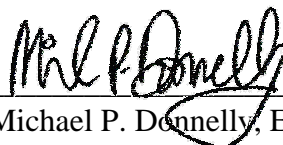
CONCLUSION

The above clearly demonstrates that there are distinct problems with the proposed ordinance. The ordinance imposes an unconstitutional curfew on minors. This daytime curfew ordinance will not pass constitutional muster because it violates minors’ fundamental rights as guaranteed by the U.S. Constitution; and the ordinance violates the fundamental right of parents to direct the upbringing of their children. As such, it could potentially involve the County in costly litigation.

As a practical matter, history has shown that curfews have little effect in deterring crime, but are tremendously effective at restricting the freedoms of law-abiding citizens. Certainly, after giving further thought, this would not be the intended desire of the County Council in passing this ordinance.

For all of these reasons, we would respectfully request that the Council vote against the proposed truancy ordinance.

Respectfully submitted,



Michael P. Donnelly, Esq.
Home School Legal Defense Association
P.O. Box 3000
Purcellville, VA 20134
540-338-5600