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PLEASE DO NOT CONCEDE THAT PARENTAL RIGHTS IN TENNESSEE ARE **SUBJECT TO THE POWER OF CONGRESS** UNDER THE 14TH AMENDMENT **TO OVERRIDE STATE LAW**

On March 5, the attorney for Alliance Defending Freedom testified in the Children and Family Affairs subcommittee in support of House Bill 2936 relative to parental rights:

1. The rights being codified were those "existing at common law."

But common law is common law of the states and there is no "general federal common law." *Wheaton and Donaldson v. Peters and Grigg*, 33 U.S. 591, 658 (1834); *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) ("no clause in the Constitution purports to confer . . . on federal courts" the "power to declare substantive rules of common law applicable in a State").

So, why does the state want to say in the Bill that there are parental rights under the U.S. Constitution. Ask yourself, where is the "parent clause" or "parent-child relationship" clause in Constitution? No where?

That means those rights must somehow be in the Due Process Clause of the Fourteenth Amendment in order for the U.S. Constitution to apply to the states. And that is why the lawyer referred to U.S. Supreme Court decisions, which are construing the Fourteenth Amendment.

The problem with the state agreeing by statute to throw parental rights under the Fourteenth Amendment is that **a unanimous U.S. Supreme Court held this week that section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation" the provisions of the Fourteenth Amendment.** (More under No. 2)

I do not support Tennessee's legislature voluntarily conceding that Congress can veto something the state approves if it can get the U.S. Supreme Court to agree. Family law is a state issue.

2. During the Senate Judiciary Committee last week, this exchange took place between Senator Roberts and the ADF lawyer over parental rights being subject to the federal government.

> Senator Roberts: So, is it possible that if this bill would pass and ultimately be signed in law is it possible that we could inadvertently and unintentionally turn over parental rights to the federal government?
>
> Lawyer: In my opinion no. . . . we learned a lot of lessons from the episode involving RFRA at the federal government. RFRA was passed by the by the Congress signed into law and purported to enforce against the states under the 14th amendment, under section 5 of the 14th amendment and there was a supreme court case that said you can't do that. **That's outside the bounds of the U.S. Congress**

That U.S. Supreme Court case involved the Religious Freedom Restoration Act (RFRA), and this is the last paragraph of its opinion, and this week it was cited twice by the majority and twice by

Justices Sotomayor, Kagan, and Jackson in the case Trump v. Colorado, a 9 to 0 decision resting on Section 5 of the Fourteenth Amendment:

> It is **for Congress in the first instance to "determin[e]** whether and **what legislation is needed** to secure the guarantees of the **Fourteenth Amendment**," **and its conclusions are entitled to much deference.** *Katzenbach* v. *Morgan*, 384 U. S., at 651. Congress' discretion is not unlimited, however, and **the courts retain the power,** as they have since *Marbury* v. *Madison*, **to determine if Congress has exceeded its authority under the Constitution**."

City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (emphasis added).

3. The ADF lawyer also referred Rep. Bricken to the parental rights law in Arizona in response to his question about how long these kinds of bill have been in place. The law is at AZ Revised Statutes., Title 1, Chapter 6, Article 1-602.

Note the absence of any reference to the U.S. Constitution in 1-602(D):

"Unless those rights have been legally waived or legally terminated, parents have inalienable rights that are more comprehensive than those listed in this section. This chapter does not prescribe all rights of parents or preempt or foreclose claims or remedies in support of parental rights that are available **under the constitution, statutes or common law of this state**. Unless otherwise required by law, the rights of parents of minor children shall not be limited or denied.

The Arizona law does not throw parental rights under the federal constitution and its Fourteenth Amendment.

4. Citing to old U.S. Supreme Court decisions is of no help since we no longer live in that world, but under a new one in which the Fourteenth Amendment was used to repudiate the millennia told understanding of the family for purpose of state marriage licensing laws. Who know what we will get now? See Douglas NaJaime, "Marriage Equality and the New Parenthood," 129 Harvard Law Review 1185 (2016):

> "[Marriage equality . . . both seized on and extended the very model of parenthood forged by LGBT advocates in earlier work on behalf of *unmarried* parents. That model of parenthood is premised on *intentional* and *functional*, rather than biological and gendered, concepts of parentage. In this way, rather than affirming traditional norms governing the family, marriage equality and **the model of parenthood it signals are transforming parenthood, marriage, and the relationship between them — for *all* families."** (bold emphasis supplied; italics in original)