national RIGHT TO LIFE committee, inc.

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November 15, 2011 (202) 626-8820

RE: Parental Rights Amendment

Dear Member of Congress:

The National Right to Life Committee (NRLC), the nationwide federation of state and local pro-life organizations, respectfully urges you to refrain from cosponsoring or otherwise endorsing a proposed amendment to the U.S. Constitution, known as the "Parental Rights Amendment" (PRA). In recent communications, at least one organization has urged House Members to sign on as original cosponsors of this measure, preparatory to its reintroduction in the House of Representatives.

We understand that the language currently planned for reintroduction is the same as that previously proposed, most recently as H. J. Res. 3. NRLC is opposed to that language, because it is flawed and could pose a serious threat to pro-life interests in several areas of the law. In this letter, we offer only a brief summary of our objections. Until and unless the issues that we have raised are truly resolved by acceptable revision to the text of the PRA, we ask that you not embrace this measure.

The PRA would amend the U.S. Constitution to declare that "the liberty of parents to direct the upbringing and education of their children" is a "fundamental right." (The proponents of the PRA have explicitly argued that "direct the upbringing" must be very broadly construed, and would include, among many other things, "health care" decisions.) The amendment goes on to say that no level of government may "infringe upon this right" except by "demonstrating that its governmental interest . . . is of the highest order and not otherwise served."

We have no doubt that proponents of the PRA are well intentioned. Moreover, they are animated by substantial concerns regarding troubling trends in some areas of the law, including treaty-based law, that may run contrary to pro-life interests. We do not quarrel with a desire to reinforce a legal presumption that responsibility for the protecting and nurturing of a child rests primarily with the parents. Yet, NRLC believes that each child has an independent, intrinsic right to life, and in cases in which a parent or parents disregard that right, by choice or by neglect, the parent's right to decide must be overridden and the child's right to life protected by others – most often, by government actors, such as courts and law enforcement personnel.

Cases in which parents disregard the right to life of their own child, while not the norm, regrettably are far from rare. Indeed, abortion itself, in most cases, may be regarded as a circumstance in which one or both parents initiate, or at least consent to, the violation of the right to life of an unborn child.

Because of decrees of the U.S. Supreme Court (including *Roe v. Wade* and *Casey v. Planned Parenthood*), elected lawmakers are currently severely restricted from protecting unborn children from abortion, in cases in which the mother consents to an abortion. It is our hope and expectation that these cases will eventually be overturned, and certainly this possibility should not be disregarded in evaluating the potential effects of a proposed constitutional amendment. Beyond this, even under current constitutional case law, there are other types of cases in which government actors – for example, state courts and law enforcement officers – may and do intervene to protect the right to life of children, in ways that contravene the wishes of parents. We are troubled by the possible adverse effects which the PRA could have with respect to the outcome in such cases.

Consider, for example, the case in which an unmarried, unemancipated pregnant minor wishes to give birth, but one or both parents are determined that she should procure an abortion. Sadly, such cases are not at all uncommon. According to a 2006 *New York Times* article, "providers interviewed in 10 states with parental involvement laws all said that of the minors who came into their clinics, parents were more often the ones pushing for an abortion, even against the wishes of their daughters."

Currently, in such cases, a minor girl or her advocates can seek recourse to government interveners, including state courts, which invariably rule that the minor girl has a right to refuse the abortion – chiefly because of the autonomy conferred by the judge-made doctrine of *Roe v. Wade* and its progeny. Advocates for the PRA have cited these precedents in attempts to dismiss concerns regarding how the PRA could enhance the rights of parents who wish to prevent their minor daughters from giving birth. We believe this reliance is evasive, or at least misplaced. *The PRA proponents are proposing to insert a new textual "fundamental right" into the U.S. Constitution.* Where this new black-letter fundamental right comes into conflict with an unenumerated, judge-made "right," it is the new constitutional text that is likely to prevail. Even if this were not so, certainly it would be remarkable for pro-life lawmakers or advocates to rest their analysis on the premise that *Roe v. Wade* and its progeny will retain their full vitality indefinitely.

If the PRA were part of the Constitution, the coercive parents would have a new and very powerful legal weapon to wield against anyone who seeks to interfere with the abortion. Conscientious judges would be compelled to look first to the new constitutional text, which says that no level of government (no state judge, for example) may interfere with

the "fundamental right" of the parents to decide the outcome. The government can step in only if it can bring to bear a "governmental interest of the highest order." PRA advocates have offered no coherent or convincing explanation of where the minor girl, or her advocates, would find a "governmental interest of the highest order," rooted in the Constitution, that would allow government actors to override her parents' wishes in such cases.

Similar concerns arise with respect to so-called "Baby Doe" cases, referring to babies who are born alive with serious disabilities or acute medical needs. Some of these live births result from attempted abortions; certainly, no presumption that the parent is looking out for the child is warranted in such a circumstance. NRLC has advocated for laws that allow state and federal officials to step in to protect the intrinsic right to life of abortion survivors and other vulnerable newborns. Here too, the PRA could tip the scales too far towards parental autonomy, at the expense of protecting the child's intrinsic right to life.

In particular, ratification of the PRA in its current form could result in a constitutional challenge to the federal Child Abuse Amendments of 1984, which require states that receive federal funding for their child abuse and neglect programs to intervene to prevent parents from successfully directing or consenting to the "withholding of medically indicated treatment from infants with disabilities who have life-threatening conditions," 42 U.S.C. § 5106a(b)(2)(C) -- a term which, to ensure adequate protection, is defined with considerable specificity in the statute, 42 U.S.C. §5106g(5).

The PRA could also have problematic effects with respect to the status of human embryos who live in laboratories rather than in the womb. NRLC has advocated for laws that recognize such human embryos as members of the human family. Louisiana, for example, has enacted legislation which declares every such human embryo to be a "juridical person," and asserts an independent state interest in protecting them from exploitation. Under the PRA, however, the ability of a state to enforce such a policy could be severely compromised. There is nothing in the PRA to *contradict* Louisiana's assertion that the human embryo is a "juridical person" for state law purposes – but the PRA arguably could turn this virtue into a liability by giving the parents a "fundamental right" to determine what happens to "their" embryos. If the parents decide to exercise that right by donating their children for medical research, for example, Louisiana would find it difficult to convince a federal judge that there is a "governmental interest of the highest order" that would trump the parental right-to-decide – a right that the PRA would have raised to the highest level.

Amending the Constitution is a serious matter. It changes things. It is mere evasion, or at best wishful thinking, to recite old case law as if it would constrain the judicial

applications of a sweeping new constitutional imperative – and especially inadvisable to rely on court rulings which themselves lack any real basis in the text of the Constitution.

Therefore, NRLC believes that the PRA should be revised to explicitly affirm that government can step in when necessary to prevent violations of a child's intrinsic right to life, and also to preserve the right of a minor to protect the unborn child who she carries in her womb. To be effective, such language must be broad enough to allow for government actors to intervene to protect children even when they fall into categories that many people, including many judges, might wish to regard as less than human – for example, live-born abortion survivors, disabled Baby Does, embryos in laboratories, and human children in the womb.

So long as the PRA does not contain explicit language to ensure protection of a child's independent right to life, in the face of parental wishes adverse to that right, NRLC respectfully urges that you withhold your support. Thank you for your consideration of NRLC's objections to the PRA as currently drafted.

Respectfully submitted,

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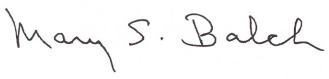

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