

**Prepared Testimony of Distinguished Professor Emeritus William Wagner
Before the New Hampshire Senate Committee on the Judiciary
April 2, 2024**

Distinguished Chair and Distinguished Members of the Committee: Thank you for the opportunity to provide this written testimony on Senate Bill 459-FN.

Introduction

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. Most relevant though, I also serve as a Member of the Board of Directors of the Parental Rights Foundation (PRF). PRF is a non-profit research and educational institution dedicated to the promotion and preservation of parental rights and the protection of children.

Currently Senate Bill 459-FN provides in pertinent part:

"Neglected child" means a child:

Who is without proper parental care or ~~{control}~~**attention**, ... as required by law, or other care or ~~{control}~~**attention** necessary for the child's ... mental, **psychological**, or emotional ~~{health}~~**wellbeing**, when it is established that the child's ~~{health}~~ ... **emotional, or psychological wellbeing** has suffered or is likely to suffer serious impairment; ~~{and the deprivation is not due primarily to the lack of financial means of the parents, guardian, or custodian}~~ **although financially able to do so, or able to do so with assistance...**

The 14th Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const. Amend. 14*. This provision of the United States Constitution guarantees individuals the right to prior notice of what constitutes prohibited conduct. If a law is vague, ambiguous, or indefinite so that it, as here, is impossible to determine what it requires or to determine the legislative intent, the courts will hold the law unconstitutionally void for vagueness,

and therefore unenforceable. The meaning of a law must be clear enough so that ordinary persons who are subject to its provisions can determine what acts will violate it and so they do not need to guess at its meaning.

An unambiguously drafted law affords prior notice to the citizenry of conduct proscribed. In this way the rule of law provides predictability for individuals in their personal behavior. A fundamental principle of due process, embodied in the right to prior notice, is that a law is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly. The proposed statutory language is so unconstitutionally vague as to violate the due process protected under the U.S. Constitution.

Assume that parents, while controlling and directing the upbringing of their child, act in what they see as the best interest of their child, but in ways that do not agree with so-called State ideas of "gender affirming care." Is it the intent of the legislature that the provision at issue would apply to this set of facts so that the State here could charge the parent with child neglect for not providing proper "attention necessary for the child's... mental, psychological, or emotional well being"? If not, then the legislature should specifically say so in the statutory language. If so, then we have another constitutional problem.

If it is the express intent of the legislature here for the State to enforce so-called "gender-affirming care" on children via child neglect charges against their parents, then the law violates the constitutional right of parents to direct and control the upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of The Sisters of The Holy Names of Jesus And Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Troxel v. Granville*, 530 U.S. 57 (2000).

In any case, this legislation needs significant rewriting to avoid otherwise inevitable federal lawsuits challenging the current language as unconstitutional. Challenges that in my view will be successful at great cost to the State.