Parental-rights extremists argue that parental rights receive strict-scrutiny analysis primarily because of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—in both of these decisions, the Court used the word "fundamental" to describe parental rights. In modern jurisprudence, calling a right "fundamental" would trigger strict scrutiny almost as a matter of course, but this wasn't the meaning of the term in the 1920s. *Meyer* and *Pierce* are *Lochner*-era cases, and the three-tiers of scrutiny we know today would not be adopted by the Court until later. If you look at the analysis actually applied by the *Meyer* and *Pierce* Courts, they used the *Lochner*-era analysis of determining whether the statute was "arbitrary," "unreasonable," and bearing "no reasonable relation to some purpose within the competency of the state." *Pierce*, 268 U.S. at 535-36; *see also Meyer*, 262 U.S. at 400 (condemning "legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"). This is not comparable to the strict scrutiny standard that requires the governmental interest to be "compelling" and its means "narrowly tailored." If anything, it is likely most akin to the modern intermediate standard of review. And importantly, both *Meyer* and *Pierce* have powerful language affirming the state's power to regulate education and otherwise ensure children's wellbeing.

The state's power to protect children was reiterated later in *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court upheld child labor laws even though the plaintiff claimed the laws violated both her parental rights and her religious exercise rights. In reaching that decision, the Court explained that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id*. at 166-67. The dissent in that case, far from saying that the Court had trampled on the plaintiff's parental rights or that parental rights received heightened scrutiny, took the majority to task for not giving greater protection to the *child's* religious exercise rights, which deserved the highest scrutiny then available. *Id*. at 174 (Murphy, J., dissenting) ("If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.").

The fact that the Court has declined to apply strict scrutiny to parental rights is most obvious in *Troxel v. Granville*, 530 U.S. 57 (2000). There, the Court struck down a Washington statute that authorized courts to grant third-party visitation with a child to any person, despite parental objections, provided the court found the visitation to be in the child's best interests. The plurality opinion held that the statute should give "special weight" to fit parents' decisions, but never named the standard of review to use—despite Justice Thomas chiding the plurality for this glaring omission in his concurrence. *See* 530 U.S. at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice KENNEDY, and Justice SOUTER recognize such a right [i.e. parental rights], but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.").

Consistent with these rulings, lower courts have been hesitant to ever apply strict scrutiny to parental rights. Typically, they state that parental rights are "fundamental" and then simply define "fundamental parental rights" so narrowly, that they determine that the governmental rule at issue simply does not violate parental rights at all. These cases are most often found in the public school context, where parents assert a parental right to control the public school's curriculum or other

actions, but certainly are found in other contexts well. (All cases cited, here or otherwise, are provided as examples and do not suggest endorsement of any parental or state actions discussed in the cases.) *See, e.g.*,

- *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (sex ed survey administered in public school did not violate parental rights because "there is no fundamental right of parents to be the *exclusive* provider of information regarding sexual matters to their children");
- *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.");
- *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) ("We do not read *Troxel* to create a fundamental right for parents to control the clothing their children wear to public schools and, thus, instead follow almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard.").
- *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1042 (9th Cir. 2000) (parental rights do not include the right to pick and choose services offered by the school district for their unenrolled child)

We are not aware of a case (outside of the recent gender-affirming care line of cases) in which a state-imposed restriction on a parent's right to make medical decisions for the child was struck down because the restriction was subject to strict scrutiny. *See, e.g.*, *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1369 (E.D. Cal. 2012) (in case involving state ban on state-licensed therapists providing "counseling" that purports to change minors' sexual orientation, holding that there is no fundamental parental right to subject children to mental health treatment that the state has deemed harmful to the children).

Multiple lower courts have declined to apply strict scrutiny to parental rights when forced to confront what level of scrutiny is appropriate. *See, e.g.*,

- *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) ("Despite the sweeping language used by the Supreme Court in describing the 'fundamental' constitutional liberty interest parents have 'in the care, custody, and control of their children,' ...the appropriate standard of review for claims alleging a violation of this interest is less than clear.... Thus, after *Troxel,* it is not entirely clear what level of scrutiny is to be applied in cases alleging a violation of the fundamental constitutional right to familial relations. What is evident, however, is that courts are to use some form of heightened scrutiny in analyzing these claims." (citations omitted))

- *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 178 (4th Cir. 1996) (explaining that *Meyer* and *Pierce* "all use the language of rational relationship review" but "were decided before the Court developed the current tiered framework" so "they provide no dispositive guidance on which standard applies" and ultimately applying rational basis review).

Parental-rights extremists know that their assertion that parental rights trigger strict scrutiny is on shaky ground, so they have responded in two ways:

- First, parental-rights extremists rely heavily on *Yoder v. Wisconsin*, 406 U.S. 205 (1972), where the Supreme Court applied strict scrutiny to hold that Wisconsin's mandatory attendance statute was unconstitutional when applied to members of the Amish faith, who had religious objections to school attendance after eighth grade. *Id*. at 215. *Yoder* does not compel a ruling

that parental rights get strict scrutiny today. *Yoder* was a Free Exercise case, and applied a standard that was later overturned in *Employment Division v. Smith*, 494 U.S. 872 (1990). And courts have consistently rejected expanding *Yoder* beyond its facts because the unique aspects of the Amish way of life were critical to the Court's decision. *See, e.g.*, *Leebaert*, 332 F.3d at 144-45. Further, advocates should hesitate to ever rely on *Yoder* because the majority opinion ignored the rights of the children in question—a fact that Justice Douglas eloquently recognized in his partial dissent, stating:

  - "The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.... If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. ... On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition." *Yoder*, 406 U.S. at 241-46 (Douglas, J., dissenting in part).

- Second, parental-rights extremists have responded by seeking to enact RFRAs for parental rights at both the federal level and in every state. These statutes would require, by statute, that parental rights get strict scrutiny analysis—in the very same way that the Religious Freedom Restoration Act imposes that analysis for religious-exercise rights. The same individuals behind the misuse of RFRA are also behind the parental-rights extremism movement, and they intend to use these parental-rights laws for similar ends.

  - Parental-rights extremists understand that these statutes are needed because they have not been winning the argument in the courts that parental rights trigger strict scrutiny. Of course, that could all change if litigators continue to pursue strategies in which they ask judges to rule that their clients' parental rights should receive strict scrutiny, as has already been seen in cases likes *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892-93 (E.D. Ark. 2021) (citing *Glucksberg* for proposition that parental rights receive strict scrutiny and holding for the first time that strict scrutiny is applied to parental medical decisions). Decisions like *Brandt* are a material change, and are particularly dangerous for LGBT children of non-affirming parents. Those children need to be able to access medical care or have their other needs met without having to justify their needs in the face of strict-scrutiny analysis.