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Legal Sidebar

# Title X Parental Consent for Contraceptive Services Litigation: Overview and Initial Observations (Part 2 of 2)

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This two-part Sidebar series provides an overview of *Deanda v. Becerra*, a legal challenge concerning parental consent for contraceptives and other family planning services funded by the Title X Family Planning Program (Title X). Enacted in 1970, Title X is a federal program that provides grants to public and nonprofit agencies to deliver family planning and related preventive health services. With respect to adolescent services, the Program generally maintained a policy of protecting the confidentiality of the service recipients and prohibited Title X projects from requiring parental consent or notification. In 2021, the Department of Health and Human Services (HHS) promulgated regulations at 42 C.F.R. § 59.10(b) that formally adopted this policy. Before HHS issued this 2021 final rule, a parent, in *Deanda v. Becerra*, sued in the Northern District of Texas to challenge HHS's then-policy of prohibiting Title X projects from requiring parental consent and notification. In December 2022, the court ruled in the plaintiff's favor, holding that Title X's parental consent and notification prohibition infringes upon the plaintiff's constitutional right to direct the upbringing of his children.

Part 1 of this series provides an overview of the state, constitutional, and federal statutory laws that govern the right of parents to consent to their minor children's health care services. Part 1 also reviews the relevant Title X litigation history. This Part of the series provides a summary of the district court's order in *Deanda*, as well as certain preliminary observations for Congress's consideration.

## *Deanda v. Becerra* and the District Court Order

In *Deanda*, the plaintiff argued that Title X's prohibition on parental consent and notification infringed on a right provided by both Texas law and the U.S. Constitution. The plaintiff objected, on religious grounds, to access to prescription contraception and "other family planning services that facilitate sexual promiscuity and pre-marital sex" for his daughters. In Texas, where he resides, the plaintiff asserted that he has an enforceable statutory right under Texas Family Code § 151.001(a)(6) to consent to his daughters' "medical and dental care, and psychiatric, psychological, and surgical treatment." He further

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argued that his right to parental consent is part of his fundamental right under the Fourteenth Amendment's Due Process Clause to direct his children's upbringing.

The district court, in a December 2022 order, agreed with the plaintiff. As a threshold matter, the court concluded that the plaintiff had standing to sue, even though he had not alleged that his daughters sought or were imminently likely to seek Title X-funded services without his consent. In the court's view, the plaintiff suffered a sufficiently concrete injury in the loss of his statutory rights under state law, as well as in the form of an increased risk that his children might access contraception without his consent. The court also concluded that the claims were not barred by the relevant statute of limitations.

On the merits, the court—disagreeing with case law from other circuits described in Part 1—first concluded that Title X does not preempt state parental consent requirements. In the court's view, nothing in Title X's text overcomes the judicial presumption against preemption, which the court suggested must flow from the statutory text. Title X's statutory text at 42 U.S.C. § 300(a), the court observed, includes no express preemption provision. The court further stated that Section 300(a)'s scheme of federal regulation was not "so pervasive as to make reasonable the inference that Congress left no room for states to supplement it, thereby creating field preemption." Nor does § 300(a), in the court's view, implicate implied conflict preemption.

The court observed that under the relevant conflict preemption principles, a state law is preempted only when "compliance with both state and federal law is impossible" or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The court found that Texas's parental consent requirement implicates neither basis for conflict preemption because it was not impossible for a Title X project to comply with state law and Title X. In the court's view, the state requirement to obtain consent is consistent with § 300(a)'s statutory directive to "encourage family participation" because such directive does not unambiguously prohibit a Title X entity from obtaining parental consent, but instead merely establishes a federal floor for parental involvement.

Additionally, the court concluded that the state consent requirement "does not stand as an obstacle to the accomplishment of Section 300(a)'s aims" because a law that stands as such an obstacle would be one that "*discourage[s]* or *prohibit[s]* parental involvement." Because the relevant state law instead *requires* parental involvement—which the court considered consistent with encouraging such involvement—the state law does not stand as an obstacle to Title X. To the extent other courts reached contrary conclusions, the district court critiqued those decisions as not adequately acknowledging the presumption against preemption and over-relying on legislative materials to discern congressional intent.

The district court further concluded that Title X's prohibition on parental consent and notification violates the constitutional right of parents to direct their children's upbringing. The court asserted that under the applicable substantive due process jurisprudence, where a fundamental right is implicated, courts must apply strict scrutiny—meaning that a government action can only survive if it is narrowly tailored to further a compelling government interest. Applying this judicial review standard, the court first concluded that parents' fundamental right in the care, custody, and control of their children encompasses the right to direct a child's medical care, which, in turn, includes the right to consent to the child's use of contraceptives. Title X's prohibition on parental consent and notification, the court continued, infringed upon this fundamental right without advancing a compelling governmental interest. Instead, the court concluded that the government identified only a legitimate and substantial interest in promoting minors' reproductive health.

Based on these conclusions, the court issued a final judgment that declared HHS's administration of Title X to violate plaintiff's rights under Texas Family Code § 151.001(a)(6) and under the Due Process Clause, and set aside the relevant portion of 42 C.F.R. § 59.10(b) that prohibited parental consent and notification for services rendered to minors. As of the date of this Sidebar's publication, the government has not yet filed a notice of appeal, but the timeline to do so has not expired.

# Initial Observations

The district court's decision in *Deanda* is significant because the court based its holding on constitutional grounds, which has potentially broad implications. As discussed in Part I, Title X's prohibition on parental consent and notification is not the only existing law that limits parental consent for health services rendered to minors. To varying degrees, many existing state laws also restrict parents' ability to consent on behalf of their minors in certain circumstances. Because the Constitution defines the outer bounds of governmental actions at both the federal and state levels, the court's reasoning—if adopted by other courts in a relevant challenge—could also cast doubt on existing state laws that permit unilateral minor consent. To the extent *Deanda* proceeds through appellate proceedings, some of the legal issues that higher court(s) may consider include the following:

**Whether and how to resolve the constitutional question.** One principle that a court may consider in deciding whether and how to resolve the constitutional question presented by *Deanda*—i.e., whether a law prohibiting parental consent and notification for contraceptive services rendered to minors violates parents' right in the care, custody, and control of their children—is the doctrine of constitutional avoidance. This doctrine generally cautions federal courts to interpret the Constitution only when it is strictly necessary and under sufficiently concrete factual circumstances. The reasons for this restraint involve several considerations, including the broad implications of constitutional rulings, as well as the inherent tensions that result within our democratic system when an unelected judicial body invalidates the actions of elected governmental entities. The scope of parental consent in relation to minors' health services—as an issue long addressed by legislative and/or executive bodies at both the state and federal level in different contexts—implicates both considerations.

To the extent a court determines that these considerations are relevant, it could implement the doctrine through several different approaches. For example, a court could emphasize threshold inquiries like standing to determine whether the allegations in the case present a sufficiently concrete injury that warrants resolution at this time. To the extent a court decides the case should be decided on the merits, a court may invoke the constitutional avoidance doctrine by deciding the case more narrowly, including by refining existing standards that have been applied by other courts and issuing rulings specific to the facts at issue. One reason a court may opt to approach the constitutional question at issue narrowly, without pronouncing a standard of review that applies generally to this parental right, is that this is a question the Supreme Court has long left unresolved. As discussed in Part 1, although the Supreme Court has recognized parents' right in the care, custody, and control of their children as a fundamental right for nearly a hundred years, it has never adopted a standard of review in analyzing claims asserting a violation of such a right. As at least one commentator has observed, this century-long lack of consensus—including at the lower-court level where courts applied different approaches in different contexts—perhaps reflects the difficulty of applying a single standard that encapsulates the broad range of parental decisions made in the course of parenthood. Some of these decisions may implicate complex questions involving various competing interests, including that of the minor in question, of other minors, and the government. Given this longstanding uncertainty and the broad implications of adopting a uniform standard that applies to claims involving this parental constitutional right, a court may instead, for instance, elect to apply the balancing test that other courts have previously used in similar circumstances, and refine the test to take into account the specific interests at issue in this case.

**How to resolve the preemption question.** Still another approach to implement the constitutional avoidance doctrine is to resolve the case, if possible, on statutory grounds. Under the aspect of the doctrine sometimes known as the "last resort rule," a court should avoid ruling on constitutional issues and resolve the case before it on other grounds. To the extent a court elects to focus on this approach, there are at least two separate sets of questions at issue.

The first question, as noted by the *Deanda* district court, is whether the Title X's statute itself preempts Texas Family Code § 151.001(a)(6)'s parental consent requirement. In concluding that it does not, the district court appeared to attribute the divergence between its analysis and prior case law, summarized in Part 1, at least in part to two intervening legal developments: the Supreme Court's refinement of conflict preemption jurisprudence and changes in the modes of statutory interpretation that now focus primarily on discerning congressional intent through statutory text as opposed to legislative history. The district court appeared to suggest that prior precedent relied upon outdated modes of interpretation that are inconsistent with current doctrines, including by inadequately applying a presumption against preemption and failing to recognize the textual consistency between a state requirement on parental consent and the federal directive to "encourage" family participation.

On the other hand, a court may conclude that it is possible to reconcile the prior cases with current doctrines. For example, while prior Title X decisions relied on relevant legislative history, a court may find that their principal holdings also rest on a textual basis that overcomes the presumption against preemption. A court could, for instance, construe the prior cases as concluding that the plain meaning of the statutory directive under 42 U.S.C. § 300(a) to "encourage" family participation "to the extent practical" necessarily means that in *some* circumstances, family participation is *not* practical and should be excluded. A court could conclude that under the relevant conflict preemption principles, to the extent a state law uniformly *mandates* family participation in the form of parental consent for *all* adolescent services, such a law creates a conflict that both makes it "impossible" for a Title X project to comply with both state and federal law, and "stands as an obstacle" to the objectives of Title X to provide services in those situations.

To the extent a court concludes, as the *Deanda* district court did, that the Title X statute does not preempt the state consent requirements, there remains at least one additional question following the promulgation of 42 C.F.R. § 59.10(b). Under settled law, "[f]ederal regulations have no less pre-emptive effect than federal statutes" so long as the regulations fall within the scope of the agency's statutory authority. Here, because HHS promulgated § 59.10(b) as a regulation through rulemaking proceedings, giving it the force of law, its express prohibition on parental consent and notification requirements would seem to preempt contrary state law as long it was within HHS's statutory authority to issue this regulation.

Therefore, a second question in the preemption analysis is whether Title X grants HHS the statutory authority to issue § 59.10(b). On the one hand, a court could find that Congress granted HHS general authority to issue rules governing Title X, providing that Title X grants and contracts "shall be made in accordance with such regulations as the Secretary may promulgate." Moreover, a court may further find that Title X's statutory directive to encourage family participation "to the extent practical" also explicitly leaves undefined the precise parameter of the relevant circumstances. Under *Chevron v. Natural Resources Defense Council, Inc.*, which set forth the administrative law doctrine commonly known as *Chevron* deference, this ambiguity leaves room for the agency to reasonably clarify such circumstances. Thus, a court could conclude that § 59.10(b)—in precluding parental notification and consent for adolescent services—reasonably defined one such circumstance in order to increase access to service to this population.

On the other hand, a court could also invoke certain canons of statutory construction that demand more explicit statutory language to preempt state laws that require parental consent. Given that parental consent requirements and their exceptions are historically defined at the state level, a court could, for instance, invoke the federalism canon, which generally requires a clear statement before finding that a federal statute alters the federal-state balance. A court could apply the canon to conclude that Title X cannot reasonably be interpreted to preempt state parental consent laws absent clearer statutory text. A court may also consider the major questions doctrine, a canon that requires clear congressional authorization when agencies address issues of "vast economic and political significance," though it is unclear if a court would

find that the subset of Title X services at issue implicate sufficient economic significance to trigger the application of this canon.

**The appropriate remedy.** Depending on a court's analysis on the merits, there may also be additional considerations related to the appropriate remedy. The *Deanda* district court, for instance, vacated the relevant portion of § 59.10(b) that prohibited parental consent and notification for all services provided to minors. The court's constitutional analysis, however, focused on contraceptive services and the absence of a compelling government interest in imposing this prohibition on those particular services. Assuming this heightened standard of review applies, different analyses may apply to other Title X services. For example, the diagnosis and treatment of sexually transmitted infections potentially implicates a compelling government interest. It is also notable that the *Deanda* plaintiff does not specify what Title X services—beyond contraceptive services—form the basis of his claims, alleging only that he objects to "other family planning services that facilitate sexual promiscuity and pre-marital sex." To the extent a court concludes that limitation on parental consent and notification cannot be imposed for only a subset of Title X services, whether on constitutional or statutory grounds, a court may have the option to remand the rule to HHS to promulgate revised regulations consistent with the court's order.

To the extent *Deanda* proceeds through appellate proceedings and a higher court ultimately elects not to resolve the case on constitutional grounds as to the merits, Congress, if it deems appropriate, could clarify via statutory amendments the circumstances under which parental consent or notification is required or prohibited for Title X services furnished to minors. Congress could also specify the extent to which such requirements or prohibitions preempt conflicting state laws.

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