No. 24-745

In the Supreme Court of the United States

STATE OF MONTANA,

Petitioner,

v.

PLANNED PARENTHOOD OF MONTANA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF OF FLORIDA AND 16 OTHER STATES AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION

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INTEREST OF AMICI CURIAE*

The State of Florida along with Alabama, Arkansas, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and the Arizona Legislature respectfully submit this brief as *amici curiae* in support of petitioner, the State of Montana.

Like Montana, *amici* States have an interest in promoting and enforcing the right of parents to learn of and participate in the major medical decisions of their children. *Amici* States represent a significant portion of American parents who must make decisions every day about the welfare of their children. Clarification from this Court as to the constitutional scope of parents' decision-making power is imperative so that they can properly fulfill their duty to the maintenance of their children.

Through its interpretation of the federal Constitution, the Montana Supreme Court has shrunken the scope of parental rights for Montanan parents. Like in many other States, Montana's positive law—here, the Consent Act—grants protections to parents that extend even beyond those constitutional rights that this

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* Counsel of Record for both parties were notified of Florida's intent to file this amicus curiae brief on March 25. Though notice was given less than 10 days before the filing of this brief, *see* Sup. Ct. R. 37.2, no party has opposed Florida's filing. Specifically, Petitioner has consented to the filing, and Respondents have taken no position. Nor will any delay in notifying the parties prejudice Respondents, as their deadline to file a response is still a month away on April 30, 2025.

Court to date has acknowledged. In failing to appreciate the States' compelling interest in safeguarding parental rights, the Montana Supreme Court flouted history, tradition, and precedent. If more widely adopted, that court's narrow view of the States' compelling interest would threaten parents nationally who seek judicial enforcement of their decision-making rights.

SUMMARY OF ARGUMENT

The Montana Supreme Court held that because the "fundamental right to parent" does not include the right to know about and participate in a child's medical decisions, the Consent Act could not withstand strict scrutiny under the federal and state constitutions. Pet. App. 37a–38a. As that court saw it, a State's interest in safeguarding parental rights extends merely to the promotion of healthy families, not to furthering "the care, custody, and control of their children" in the context of abortion. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.). That holding contorts federal law all the way down.

Montana has asked the Court to grant certiorari to decide the scope of "a parent's fundamental right to direct the care and custody of his or her children," Pet. i, a right that sounds in this Court's substantive due process jurisprudence. That is a pressing question. But equally important, and supplying an additional basis for review, is the Montana Supreme Court's skewed approach to the federal Equal Protection Clause. By recognizing only the State's compelling interest in promoting a narrow concept of family unity, the Montana Supreme Court overlooked that States have historically preserved the rights of parents to

oversee the upbringing of their children for the very reason that minors lack the reason and judgment necessary to make pivotal life decisions. That understanding dates to Blackstone and beyond, and represents "an enduring American tradition." *Troxel*, 530 U.S. at 66 (plurality op.). Parents' involvement is especially critical when it comes to major medical treatments, and even more so when the treatment is abortion—a procedure that both ends the life of a preborn person and is linked to increased risks of depression, suicide, and anxiety among formerly pregnant girls and young women.

The Montana Supreme Court's myopic view of the State's compelling interest infected its analysis of both the state and federal issues litigated below. The Court should decide the question presented in Montana's petition, but it should further hold that States have a compelling interest in ensuring that parents are notified of, and participate in, a child's decision to undergo an abortion, and remand to the state court to determine how that federal-law holding alters its view of the state constitutional issues.

ARGUMENT

I. States have a compelling interest in ensuring that parents learn of and participate in their children's major medical decisions.

After determining that the Consent Act implicated both the privacy clause of Montana's Constitution and the Equal Protection Clauses of the Fourteenth Amendment and Montana Constitution, the Montana Supreme Court held that the Act failed strict scrutiny

because the law was not narrowly tailored to a compelling interest. Pet. App. 3a, 18a–19a, 35a–36a. Though the court paid lip service to a parent's "fundamental right to parent," it assumed that Montana had a "compelling state interest" in protecting those values only if doing so would "promot[e]," in the court's view, "healthy families." *Id.* at 30a–32a. That cramped reading of the State's interest affected the court's understanding of how the scrutiny analysis should shake out here, both as a matter of state *and* federal law.

The Court should correct that misconstruction of the State's compelling interest. States have a compelling interest in ensuring that parents learn of and participate in a child's major medical care, full stop. The Consent Act equips parents with the knowledge that their children seek to undergo an abortion, a major medical procedure, and grants them a say in that decision. That in turn aids parents in constructing healthy family dynamics and safeguarding their children from psychological harm. And that interest accords with the American common-law tradition of respecting parental rights. In overlooking these principles, the Montana Supreme Court erred as a matter of federal law.

A. There are compelling policy reasons for ensuring that parents can learn of and participate in a child's major medical decisions.

A State's interest in promoting the parental right to know about and participate in their child's medical decisions is compelling. Beyond doubt, States have a compelling interest in "safeguarding the physical and

psychological wellbeing of a minor." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). This interest can play out in different ways. Sometimes it entails direct regulation of the sorts of medical procedures a child can undergo. *See United States v. Skrmetti*, No. 23-477. Such regulations are justifiable because the State may sometimes conclude, as a broad policy matter, that certain types of procedures are unsuitable for a minor. Other times, like here, the State's interest in protecting children instead means empowering *parents* to participate in the major medical decisions of their children. Indeed, a State may reasonably conclude that the government is ill-equipped to make decisions at the family level, and so state laws have historically recognized the broad right and duty of parents to handle familial decision making.

This Court has repeatedly acknowledged the important role of parents in this regard. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (citing "a tonsillectomy, appendectomy, or other medical procedure" as examples). While a "child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery," a parent typically will know better and should have the "authority to decide what is best for the child." *Id.* at 604. "Parents," this Court has said, "can and must make those judgments." *Id.* at 603; *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (extolling the "natural duty" of parents to provide "children education suitable to their station in life"); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–

35 (1925) (explaining that parents must "direct the upbringing" of "children under their control").

Children, in other words, are not "mere creature[s] of the state." *Pierce*, 268 U.S. at 535. Rather, the State relies principally on parents to "prepar[e]" children for the "obligations" of adulthood. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality op.).

Medical and social-science literature supports this view. Research shows that children are not able to "deliberate maturely" towards their own best interests. Ferdinand Schoeman, *Parental Discretion and Children's Rights: Background and Implications for Medical-Decision-Making*, 10 J. Med. & Phil. 45, 46 (1985). Because a child's prefrontal cortex is undeveloped and because children lack life experience, they cannot fully appreciate the implications of their decisions. Adele Diamond, *Normal Development of Prefrontal Cortex from Birth to Young Adulthood: Cognitive Functions, Anatomy, and Biochemistry*, *in* D. Stuss & R. Knight, eds., *Principles of Frontal Lobe Function* 466 (2002) (noting that the prefrontal cortex takes over two decades to reach full maturity), https://tinyurl.com/4j5xvbpa. All parents intrinsically know this. And so, it is up to them to teach children basic lessons like the benefits of eating vegetables or doing their homework. Applied to a major medical decision, children are woefully unprepared to reliably exercise mature judgment.

The risks to children of making their own major medical judgments are particularly acute in the context of abortion—a decision that even adults struggle with. Parental involvement in abortion decisions is

critical because of the psychological trauma associated with abortion. Maureen Curley, *An Explanatory Model to Guide Assessment, Risk and Diagnosis of Psychological Distress*, 4 Open J. of Obstetrics & Gynecology 944, 945 (2014). Patients who have had an abortion often report sadness, grief, and feelings of loss, *id.*; David C. Reardon, *The Abortion and Mental Health Controversy: A Comprehensive Literature Review of Common Ground Agreements, Disagreements, Actionable Recommendations, and Research Opportunities*, 6 SAGE Open Med. 1, 2 (2018), https://tinyurl.com/2cwwy7wc, potentially leading to depression, suicide, and anxiety, *see* Curley, *supra*, at 945. These adverse psychological effects are attributable to the stress of the abortion itself, aggravation of prior existing mental health issues, and conflicting thoughts about having the abortion at all. *Id.*

Sadly, the "highest rates" of abortion-related post-traumatic stress disorder are "observed in women aged 15–24 years." Huiling Liu et al., *Impact of the Intensive Psychological Intervention Care on Post-Traumatic Stress Disorder and Negative Emotions of Teenage Female Patients Seeking an Induced Abortion*, 14 Frontiers in Psychiatry 1, 5 (2023), https://tinyurl.com/3n976wrj. And studies report that "young women who had abortions appeared to be at moderately increased risk of both concurrent and subsequent mental health problems." David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47:1 J. Child Psych. & Psychiatry 16, 23 (2005). Given the risk of post-abortion trauma, and since children have a lowered ability to make sound judgments, parents have an increased interest in participating in the decision.

In short, States have an overwhelming interest in ensuring that parents are both armed with the information necessary to guide their children in making major medical decisions like abortion, and empowering parents to ultimately decide.

B. That compelling interest accords with America's common-law tradition of respecting parental rights.

From the above, the State's compelling interest in parental notification and consent is clear enough. But history, tradition, and precedent only underscore the importance of parental rights in our society.

Because of the vulnerabilities inherent in youth, parents have long enjoyed broad rights to direct the upbringing of their children. As seventeenth-century commentators recognized, children do not understand "how to govern themselves." 2 Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature* 202 (1735). Their innate naivete, as Blackstone said, leaves them prone to "injur[y]." 1 William Blackstone, *Commentaries on the Laws of England* 447 (1753). Their "wants and weaknesses" thus "render it necessary that some person maintain them" until adulthood. 2 James Kent, *Commentaries on American Law* 190 (1873); *see also* Blackstone, *Commentaries* at 447; Pufendorf, *Whole Duty of Man* at 202; *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 828–29 (2011) (Thomas, J., dissenting).

Parents have traditionally been understood as "the most fit and proper person[s]" for that task. Kent, *American Law* at 190. The common law therefore im-

posed a "duty o[n] parents" to "maintain[] and educat[e]" their children "during the season of infancy and youth." *Id.* By "bringing [children] into the world," parents assumed a "duty . . . to provide for the[ir] maintenance." Blackstone, *Commentaries* at 447. Parents were expected, as "natural guardians," to "mak[e] reasonable provision for their [children's] future usefulness and happiness in life." *Id.* So serious was the task that early municipal law held parents liable for shirking their duties. *Id.*; Kent, *American Law* at 190–91.

To help parents carry the weighty burdens placed on them, the common law equipped parents with equally robust parental rights. "[H]ousehold heads" were empowered to "speak for their dependents in dealings with the larger world," Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750–1820*, 47 Wm. & Mary Q. 235, 236 (1990), and parents enjoyed the "right . . . to govern their children's growth," *Brown*, 564 U.S. at 828 (Thomas, J., dissenting). As a consequence, minors remained subject to their parents' "power" until they reached the age of majority. Blackstone, *Commentaries* at 452–53. During that period, parents could "order[] the Actions of their Children for their Good," even over the child's objection. Pufendorf, *The Whole Duty of Man* at 202. Children largely could not "participate in public life" without their parents' approval, Ditz, *Ownership and Obligation* at 237—from enlisting in the military, *see* Act of Mar. 16, 1802, 2 Stat. 132, 135, to participating in a lawsuit, *see* Blackstone, *Commentaries* at 464, to accessing information, like books, *see Brown*, 564 U.S. at 831–32 (Thomas, J., dissenting). And at all times, children

"were expected to be dutiful and obedient" to their parents, *id.* at 830 (Thomas, J., dissenting), "subject [always] to the authority of household heads," Ditz, *Ownership and Obligation* at 237.

Precedents of this Court reflect that historical respect for parental rights. Those rights, the Court has said, are "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65 (plurality op.). Because children are "not able to make sound judgments concerning many decisions," the Court has understood our Constitution to incorporate "Western civilization concepts of . . . broad parental authority over minor children." *Parham*, 442 U.S. at 602–03. Expounding on that authority, it has acknowledged a parent's right to direct children's education, *see Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 534–535; their religious upbringing, *see Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); and their relationship with their parent, *see Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Most relevant here, it has long heralded a parent's right "to make decisions concerning the care, custody, and control of their children," *Troxel*, 530 U.S. at 65–66 (plurality op.)—"including their need for medical care or treatment," *Parham*, 442 U.S. at 603. And the Court has gone so far as to pronounce that a State's "strong and legitimate interest in the welfare of its young citizens" is enough to justify "state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation." *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990) (plurality op.).[1]

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[1] To be sure, in the era when this Court had located a right to abortion in substantive due process, *see Roe v. Wade*, 410 U.S.

To date, the Court has situated its recognition of parental rights in the doctrine of substantive due process, *Troxel*, 530 U.S. at 65, reflecting the verdict that those rights are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

In sum, our historical and legal traditions make clear that the State has a compelling interest in ensuring parents' involvement in their children's medical care.

C. The Montana Supreme Court misapprehended these principles.

The Montana Supreme Court acknowledged that "[p]arents do have a fundamental right to parent," Pet. App. 37a (citing *Troxel*, 530 U.S. 57), and that "the promotion of healthy families is undoubtedly a compelling state interest," *id.* But it misconstrued the principles discussed above and how they apply here. In evaluating Montana's claims of a compelling state interest, for example, the court reasoned that "any parental right that exists within this framework is a right to parent *free from state interference*, not a right to enlist the state's powers to gain greater control over a child or to make it more difficult for a minor to exercise their fundamental rights." Pet. App. 38a (emphasis added). And as to the State's asserted interest in maintaining healthy families, the Montana Supreme Court thought that giving a "veto power" to parents

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113 (1973), it struck down parental-consent laws in the abortion context. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–75 (1976). But *Danforth* was based on *Roe*, *id.* at 74, 75, which this Court has now repudiated. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

over their children's medical decisions would result in a family that "*fundamentally* is in conflict." *Id.*

That was wrongheaded in three ways. First, though a parent's constitutional rights, enshrined in substantive-due-process holdings like *Troxel*, *Meyer*, and *Pierce*, have thus far been understood to operate against the government, not private actors, *see* U.S. Const. amend. XIV, § 1 ("[N]or shall *any State* deprive any person of life, liberty, or property, without due process of law." (emphasis added)), a State's compelling interest is in no way limited to vindicating the *constitutional* rights of parents. Far from it, a State is entitled to conclude, as Montana has through the Consent Act, that its positive law should extend additional protections to parents—protections that operate against even private action. Put differently, a State can decide that medical providers should be required to consult a parent before offering life-altering services, even if the Constitution itself might not require that doctors do so.

Such was Justice Scalia's view in *Troxel*. "[A] right of parents to direct the upbringing of their children," Justice Scalia wrote, "is among the 'unalienable Rights'" described in the Declaration of Independence and "retained by the people." *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting) (quoting U.S. amend. IX) (cleaned up). Justice Scalia did not think that parental rights, as "unenumerated right[s]," were enforceable by judges; he thought it "entirely compatible with the commitment to representative democracy" that the scope of parental rights would be sketched out in "legislative chambers" and "electoral campaigns." *Id.* at 91–92. Montana has done that here, entrenching in

its positive law certain natural rights that make up "an enduring American tradition." *Id.* at 66 (plurality op.) (cleaned up).

Second, the Montana Supreme Court missed the mark with its concern that giving parents a "veto power" over the medical decisions of their children would result only in the further "fractur[ing]" of the family unit. Pet. App. 37a–38a. When a parent and child disagree—or *would* disagree if only the parents were aware—over the proper medical course, they are already in a sense "fractured," as the Montana Supreme Court acknowledged. Pet. App. 38a. Montana's law, then, addresses who in that circumstance has the final say in deciding whether to undergo the medical procedure. It stands to reason that parents, as the mature party, should sign off on critical medical decisions. And to the extent that the child can make a showing of "physical abuse, sexual abuse, or emotional abuse" by a parent, or that parental consent "is not in the best interests of the minor," the child can obtain a judicial waiver of the law's parental-consent requirement. Mont. Code Ann. § 50-20-509(5)(a)–(b).

Third, and even spotting the Montana Supreme Court its views on "fractured" families, the court seriously overvalued the importance of family unity relative to the importance of empowering parents to supervise their children's medical treatment. Parents and children disagree all the time. *Cf. Parham*, 442 U.S. at 603 (noting that a child "may balk" at a parent's decisions for the child). Such disagreement inheres in the parent/child relationship. But parents, by virtue of their age and experience, are better positioned to make reasoned judgments, and thus "can

and must make those judgments." *Id.* And historically, the common law has entrusted parents to make difficult decisions for their children, even when those children disagree. *Supra* Section I.B.

In concluding otherwise, the Montana Supreme Court wrongly discounted the State's compelling interest in promoting a parent's authority to oversee major medical decisions for his or her child.

II. The Montana Supreme Court's misapprehension of the State's compelling interest infected all facets of its decision below.

Montana has asked this Court to decide "[w]hether a parent's fundamental right to direct the care and custody of his or her children includes a right to know and participate in decisions concerning their minor child's medical care." Pet. i. That is a pressing question. Yet this case also presents the matter of whether, aside from any constitutional right of parents, the State has a compelling state interest in promoting, as sound policy, parental rights within its borders. That issue has relevance any time a court is called upon to assess whether the State's infringement of a constitutional right is justified. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (applying strict scrutiny in the free-speech context); *Students for Fair Admissions v. Pres. & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023) (equal protection); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (free exercise). An opinion by this Court reversing the state court's analysis of the equal-protection question would provide Montana effective relief on the Fourteenth Amendment issue while also

requiring the state court to reconsider its assessment of even the state constitutional questions.

Below, the Montana Supreme Court concluded that the Consent Act violated both the privacy clause of the state constitution and the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 19a, 22a–23a, 42a–43a. By two separate routes, the Montana Supreme Court arrived at the conclusion that strict scrutiny applied. The court first found that the Consent Act implicated Montana's privacy clause. Pet. App. 21a–22a (calling the state "right of privacy" a "fundamental right" that "must be reviewed under a strict scrutiny analysis"). It then found that the Act implicated the federal and state Equal Protection Clauses. Pet. App. 22a–25a (invoking "the Fourteenth Amendment" and "Article II, Section 4, of the Montana Constitution" and holding that the "the classification discriminates against minors who choose a particular type of medical care—an abortion"—and therefore requiring the court to "apply a strict scrutiny analysis"). Either theory, the court thought, required it to apply strict scrutiny. But when the court turned to scrutiny, it did not distinguish between strict scrutiny's application to the state rights, on the one hand, and the federal right, on the other. It instead held—in a single section of its opinion collectively addressing the "Application of Strict Scrutiny to a Minor's Rights of Privacy and Equal Protection," Pet. App. 25a—that the State had failed to show that the Consent Act was "narrowly tailored to further [] a compelling state interest," Pet. App. 38a–39a.

As a result, the Montana Supreme Court's analysis of the State's compelling interest for the two claims

was inextricably intertwined. Accordingly, any decision from this Court confirming that States have a compelling interest in promoting parental rights to their full extent would necessarily impact both the lower court's equal-protection analyses and its analysis of the state right to privacy. Put another way, this Court's conclusion that Montana has a compelling interest in not only facilitating healthy family dynamics but also entrusting to parents the responsibility to oversee their children's medical decisions will require reconsideration below of both the federal *and* state law determinations.

For those reasons, the state court's privacy-clause holding does not constitute an adequate and independent state ground that might otherwise deprive this Court of jurisdiction. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1038–42 (1983). Because the state court knotted the federal and state claims together when conducting scrutiny, its assessment of the state-law question is "interwoven with the federal law" such that this Court has jurisdiction to consider the federal claim. *Id.* at 1040; *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (noting that the "independent and adequate state ground doctrine is jurisdictional"). At a minimum, it certainly is not "clear from the face of the opinion" that the Montana Supreme Court viewed strict scrutiny as operating differently in the privacy-clause setting as contrasted with the federal equal-protection setting. *Long*, 463 U.S. at 1040–41.[2]

[2] Moreover, though at times the Montana Supreme Court's equal-protection inquiry appeared to revolve around state law, Pet. App. 14a–15a, 42a–43a (finding, for instance, that "the Con-

The Court should take this opportunity to address the Montana Supreme Court's erroneous understanding of the State's compelling interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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sent Act violates the Constitution of the State of Montana"), elsewhere the court clarified that it was considering an equal-protection theory under *both* "the Fourteenth Amendment to the United States Constitution[] and Article II, Section 4 of the Montana Constitution," *id.* at 22a. And the Montana precedents the court cited for the equal-protection framework it applied below themselves turned on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 23a (citing *Goble v. Mont. State Fund*, 325 P.3d 1211 (Mont. 2014); *In re C.H.*, 683 P.2d 931 (Mont. 1984)). Indeed, the Montana Supreme Court has previously described the Fourteenth Amendment and Article II, Section 4 of the Montana Constitution as "similar and provid[ing] generally equivalent but independent protections." *C.H.*, 683 P.2d at 938. And while the court here remarked that "Montana's Constitution affords significantly broader protections than the federal constitution," it identified the source of those broader protections as being "the minors' rights provisions and the right of privacy" in the Montana Constitution, not the state equal protection clause. Pet. App. 15a.

Respectfully submitted,

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