No. 24-745

In The
Supreme Court of the United States

STATE OF MONTANA, ET AL., *Petitioners,*
v.
PLANNED PARENTHOOD OF MONTANA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Montana Supreme Court

Brief of Amicus Curiae Governor Gianforte Supporting Petitioners

Anita Y. Milanovich
General Counsel
Office of the Governor
1301 E. 6th Ave.
Helena, Montana 59601
Ph.: 406/444-5554
Email: anita.milanovich@mt.gov
Counsel of Record

March 31, 2025

QUESTION PRESENTED

Whether 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, including a minor's decision to seek an abortion.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of Interest 1

Summary of the Argument 3

Argument 4

I. The question of parental knowledge and consent for state-authorized medical care is of national importance..... 4

A. The right of parents to raise their children forms the fabric of this country's history and tradition..... 4

B. Judicial activism is eroding confidence in the judiciary, separation of powers, and the rule of law. 11

Conclusion..... 15

TABLE OF AUTHORITIES

Cases

Armstrong v. State, 989 P.2d 364 (Mont. 1999) 11
Employment Div. v. Smith, 494 U.S. 872 (1990) 12 n.19
Espinoza v. Mont. Dep't of Rev., 435 P.3d 603 (Mont. 2018) 13 n.20
Mahonoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021) 10, 10 n.17
Meyer v. Nebraska, 262 U.S. 390 (1923) 4
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 4, 5
Planned Parenthood v. State, DA 21-0521 (Mont. 2022) 11 n.18
Prince v. Massachusetts, 321 U.S. 158 (1944) 5
Roe v. Wade, 410 U.S. 113 (1973) 11
Stanley v. Ill., 405 U.S. 645 (1972) 9
Troxel v. Granville, 530 U.S. 57 (2000) 4, 9
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12 n.19
Western Tradition Partnership, 271 P.3d 1 (Mont. 2012) 13 n.20
Wis. v. Yoder, 406 U.S. 205 (1972) 5, 9

Constitutions, Statutes, and Rules

U.S. Const., Amend. XIV 4
Mont. Const., Art. III, Sec. 1 1
Mont. Const., Art. VI, Sec. 4 1
Mont. Code Ann. § 2-15-103 1
Mont. Senate Bill 21 (2025), https://bills.legmt.gov/#/laws/ bill/2/LC0618?open_tab=bill. 14 n.23

Mont. Senate Bill 239 (2025), https://bills.legmt.gov/#/laws/ bill/2/LC0019?open_tab=bill 14 n.23

Other Authorities

After Roe Fell: Abortion Laws by State: Montana, Center for Reproductive Rights, https://reproductiverights.org/ maps/state/montana/ (last visited Mar. 26, 2025) 11 n.19

Aristotle, *Nicomachean Ethics* Book 8, Chap. 12 (H. Rackham, ed.), https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0054:book=8:chapter=12. ..... 9 n.15

James Wilson, "Lectures on Law," *Collected Works of James Wilson* Vol. 2, Part 2, Chap. 2 (Liberty Fund 2007)..... 5 n.4, 9 n.14

John Locke: English Philosopher, Britannica, https://www.britannica.com/biography/John-Locke (last visited Mar. 30, 2025). 6 n.6

John Locke, *Of Paternal Power*, Second Treatise of Government, Chap. VI, Sec. 58, https://pressbooks.online.ucf.edu/..... 6 n.7

John Locke, *Some Thoughts Concerning Education*, Dedication, https://origin-rh.web.fordham.edu/Hallsall/mod/1692locke-education.asp#Dedication. 8 n.13

Katie McKellar, *'A broad attack': Utah's judiciary fight bills threatening its independence*, Utah News Dispatch (feb 26. 2025), https://utahnewsdispatch.com/2025/02/26/a-broad-attack-utahs-judiciary-fights-bills-threatening-its-independence/. 13 n.22

Legislative Assaults on State Courts—June 2022, Brennan Center for Justice (June 22, 2022), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-june-2022 ..... 13 n.21

Legislative Assaults on State Courts in 2024, Brennan Center for Justice (Jan. 28, 2025), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2024#:~:text=A%20Brennan%20Center%20review%20of,Courts'%20Gavel%20to%20Gavel%20database.. ..... 13 n.21

Sir William Blackstone: English jurist, Britannica, https://www.britannica.com/biography/William-Blackstone (last visited Mar. 30, 2025). 7 n.8

Sir William Blackstone, "Of Parent and Child," *Commentaries on the Laws of England (1765-1769)*, Book 1, Chap. 16, https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-116/#:~:text=Sir%20William%20Blackstone&text=THE%20next%2C%20and%20the%20most,and%20first%20of%20legitimate%20children 6 n.5, 7 n.9, n.10, n.11, 8 n.12, 9 n.16, 10 n.17

STATEMENT OF INTEREST[1]

Amicus the Honorable Greg Gianforte is the Governor of Montana. As Governor, he is "vested with [t]he executive power" and "shall see that the laws are faithfully executed." Mont. Const., Art. VI, Sec. 4(1). He is "the chief executive of the state," tasked with "formulat[ing] and administer[ing] the policies of the executive branch of state government." Mont. Code Ann. § 2-15-103.

As the Chief Executive Officer of the State of Montana, Governor Gianforte represents one co-equal branch of its government:

> The power of the government of this state is divided with three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Mont. Const., Art. III, Sec. 1. In this capacity, he has advanced pro-family and pro-children policies while respecting the long-recognized rights and duties of parents. It is this priority, along with his respect for the distinct branches of government, that motivates his participation in this matter.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission. The parties received timely notice of the filing of this brief.

For American governments to properly function, all branches must faithfully execute their respective purposes. When courts are dismissive of the federal constitution in favor of their own policy preferences and interpretations of state law, confidence in the judiciary wanes, the separation of powers is threatened, and the rule of law undermined.

For these reasons, the Governor respectfully urges the Court to grant Petitioners a writ of certiorari.

SUMMARY OF ARGUMENT

Western civilization has long recognized a legal duty of parents to maintain, protect, and educate their children. The Court has acknowledged this duty as a liberty interest under the Fourteenth Amendment, resulting in its protection under the Due Process Clause. In cases addressing this right, the Court has evaluated it in various contexts, including formal education in schools. But growing conflict has arisen around parental involvement in a minor's medical decisions, an important issue that is raised below. A grant of a writ of certiorari in this matter would allow the Court to clarify and further develop the proper limits of government in affecting that right.

By granting certiorari, the Court would also be using its appellate authority to mitigate judicial activism. The court below concluded that not even the federal constitution poses a restraint on its judicially created right to abortion under the Montana constitution. The effect of such activism, both in Montana and across the country, has been a reduced confidence in the judiciary and a legislative response that threatens the separation of powers and the rule of law. The Court should take this opportunity to, by example, restore the judiciary to its proper role.

ARGUMENT

I. The question of parental knowledge and consent for their children's state-authorized medical care is of national importance.

A. The right of parents to raise their children forms the fabric of this country's history and tradition.

"[T]he liberty interest … of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interest recognized by" the Court. *Troxel v. Granville,* 530 U.S. 57, 65 (2000). Since 1923, the Court has found this interest to be protected by the Due Process Clause,[3] including the right of parents to "establish a home and bring up children," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "to control the education of their own," *id.* at 401, and "to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925). *See also Troxel,* 530 U.S. at 66 (collecting post-1923 cases that recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children).

In acknowledging this right, the Court has stated that "the custody, care and nurture of the child reside first in the parents, whose primary function and

---

[3] Other provisions have been cited for support as well. *See, e.g., Troxel,* 530 U.S at 80 (Thomas, J., concurring) (suggesting that the Privileges and Immunities Clause of the Fourteenth Amendment might be a source for parental rights).

freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). These obligations "include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wis. v. Yoder*, 406 U.S 205, 233 (1972). So "if the State is empowered, as *parens patriae*, to 'save' a child from himself or his [ ] parents ..., the State will in large measure influence, if not determine, the [ ] future of the child." *Id.*at 232. But "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce,* 268 U.S. at 535.

Although the right of parents to raise their children was first judicially recognized in the 1920s, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Yoder,* 406 U.S at 232. While "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," *id.* at 232, it predates and formed the framework of American law.

Family forms "the true origin of society,"[4] with the relationship between parent and child the "most universal relation in nature."[5] From that relationship

---

[4] James Wilson, "Lectures on Law," *Collected Works of James Wilson* Vol. 2, Part 2, Chap. 2 (Liberty Fund 2007).

[5] Sir William Blackstone, "Of Parent and Child," *Commentaries on the Laws of England (1765-1769)*, Book 1, Chap. 16,

arises a parental duty to their children. As described by political philosopher John Locke,[6] raising children is the duty of parents:

> The power, then, that parents have over their children, arises from that duty which is incumbent on them, to take care of their off-spring, during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place, and ease them of that trouble, is what the children want, and the parents are bound to …. whilst he is in an estate, wherein he has not understanding of his own to direct his will, he is not to have any will of his own to follow: he that understands for him, must will for him too; he must prescribe to his will, and regulate his actions; but when he comes to the estate that made his father a freeman, the son is a freeman too.[7]

---

https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-116/#:~:text=Sir%20William%20Blackstone&text=THE%20next%2C%20and%20the%20most,and%20first%20of%20legitimate%20children.

[6] Many founding fathers were informed by Lockan philosophy, most especially Thomas Jefferson in crafting the Declaration of Independence and the United States Constitution. *See, e.g., John Locke: English Philosopher,* Britannica, https://www.britannica.com/biography/John-Locke (last visited Mar. 30, 2025).

[7] John Locke, *Of Paternal Power*, Second Treatise of Government, Chap. VI, Sec. 58, https://pressbooks.online.ucf.edu/ ancientpoliticalphilosophy/chapter/locke-second-treatise-on-government/.

Sir William Blackstone, in describing the common law of England,[8] identified the duty of parents to their children as threefold: that of maintenance, protection, and education.[9] As to maintenance, he stated that:

> [t]he duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, … laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[10]

As to protection, he observed that protection "is also a natural duty. ... A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children."[11] And as to education, he stated:

---

[8] Blackstone's Commentaries informed the legal landscape at the founding of the United States. *See, e.g., Sir William Blackstone: English jurist*, Britannica, https://www.britannica.com/biography/William-Blackstone (last visited Mar. 30, 2025).
[9] Blackstone, *supra* n. 5.
[10] *Id.*
[11] *Id.*

> The last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For … it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself.[12]

Locke similarly understood the high importance of parental control over education:

> The well educating of their children is so much the duty and concern of parents, and the welfare and prosperity of the nation so much depends on it, that I would have everyone lay it seriously to heart and […] set his helping hand to promote everywhere that way of training up youth […] which is the easiest, shortest, and likeliest to produce virtuous, useful, and able men in their distinct callings.[13]

The founding fathers echoed this, with James Wilson, for example, stating that "[i]t is the duty of parents to maintain their children decently, and according to their circumstances; to protect them according to the dictates of prudence; and to educate them according to the suggestions of a judicious and zealous regard for

---

[12] Blackstone, *supra* n. 5.

[13] John Locke, *Some Thoughts Concerning Education*, Dedication, https://origin-rh.web.fordham.edu/Halsall/mod/1692locke-education.asp#Dedication.

their usefulness, their respectability, and their happiness."[14]

That parents should be afforded this right to direct the care and control of their children makes sense: "parents love their children as part of themselves, … parents know their offspring with more certainty than children know their parentage … parents love their children as soon as they are born …"[15] So the law places consequential decisions "into the parent's hands … in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life."[16] For this reason, the law recognizes that parents act in the best interest of their children absent a showing of harm or potential harm. *Troxel,* 530 U.S. at 69.

The Court has addressed parental rights in numerous circumstances, including formal educational settings. *See, e.g., Stanley v. Ill.,* 405 U.S. 645 (1972) (addressing parentage in the context of neglect); *Yoder,* 406 U.S. 205 (discussing parental rights in the context of education); *Troxel,* 530 U.S. 57 (addressing grandparent visitation rights without parental consent). However, as Petitioners show, less clarity in the law exists around medical decisions for minors. For example, the case law in the education context frees schools

---

[14] Wilson, *supra* n. 4.

[15] Aristotle, *Nicomachean Ethics* Book 8, Chap. 12 (H. Rackham, ed.), https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0054:book=8:chapter=12.

[16] Blackstone, supra n. 5.

"from the constraints the Fourteenth Amendment placed on other government actors" because "the Fourteenth Amendment was ratified against the background legal principle that publicly funded schools operated not as ordinary state actors, but as delegated substitutes of parents," *Mahonoy Area Sch. Dist. v. B.L.,* 594 U.S. 180 (2021) (Thomas, J., dissenting). So presumably, if the Court recognizes the rights of parents over the formal education of their children, then surely those rights extend even more so to parents' rights to know and be involved in the medical decisions of their children. [17] But courts are conflicted about that analysis. The Court should resolve the legal conflict among courts on this issue by providing clarity for this important question.

B. Judicial activism is eroding confidence in the judiciary, the separation of powers, and the rule of law.

While Petitioners rightly state the issue before this Court as a broader conflict of and confusion in the law about parental involvement in their children's medical

---

[17] Indeed, in the public school context, Blackstone observes that the common law allowed a parent "to delegate part of his parental authority ... to the tutor or schoolmaster of his child; who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, that of restraint and correction, as may be necessary to answer the purposes for which he is employed," Blackstone, *supra* n.5. But "parents do not implicitly relinquish all that authority when they send their children to a public school." *Mahonoy,* 594 U.S. at 202 (Alito, J., concurring).

decisions, the context of this petition underscore a secondary, latent threat that is facing this nation.

In 1999, by judicial decision, the Montana Supreme Court determined that the Montana Constitution protects a right to an abortion. *Armstrong v. State,* 989 P.2d 364 (Mont. 1999).[18] Since that decision, every piece of legislation touching abortion—whether health and safety standards governing the who and how of abortion, viability definitions, late term abortion restrictions, even taxpayer funding—have been enjoined as violating this right.[19] While it is possible the

---

[18] *Armstrong* relied on *Roe v. Wade,* 410 U.S. 113 (1973), decided after Montana's 1972 Constitution was debated and adopted, to reject clear intent in the Constitutional Convention record to reserve the abortion issue to the legislature. An honest reconsideration of the impacts of the reversal of *Roe* on that founding decision has never been undertaken. *See Planned Parenthood v. State,* DA 21-0521, *Order* (Aug. 9, 2022) (rejecting Governor Gianforte's proposed amicus brief and denying supplemental briefing because reconsideration of *Armstrong* was not appropriate at the preliminary injunction stage even though *Armstrong* itself was a preliminary injunction decision); *see also id.,Brief of Amicus Governor Gianforte Supporting Defendant-Appellant State of Montana* (Aug. 2, 2022), https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/2/403/url/DA+21-0521+Amicus+-+Leave+to+Participate+--+Motion+-+Opposed.pdf (discussing the history of the Montana Constitution and the effect of *Roe*'s repeal on *Armstrong*).

[19] *See After Roe Fell: Abortion Laws by State: Montana,* Center for Reproductive Rights, https://reproductiverights.org/maps/state/montana/ (last visited Mar. 26, 2025) (documenting numerous cases striking down every Montana law relating to abortion). Indeed, by all accounts, Montana's 26 year-old judicially-created right to abortion is the most sacrosanct

Montana legislature is simply unable to properly craft a lawful statute, the simplest—and more rational—conclusion for such a complete correlation is that the Montana Supreme Court is substituting its own policy preferences for that of the legislature. This is the very definition of judicial activism.

While it is not, as a general matter, this Court's role to rein in state court judicial activism in interpreting state law, the judicial activism of the court below is now so complete that it has asserted that Montana's abortion right is inoculated even from federal constitutional restraints. Addressing the federal right of parental consent in three paragraphs with one solitary federal citation, the court below asserts that the inevitable conflict that will result when a minor and her parents disagree is grounds to reject parental involvement: "It is difficult to conclude that providing a parent with unilateral, veto power over a minor's exercise of a [state] fundamental right, made in conjunction with the minor's care provider, will strengthen the family unit." App. 31a. It then concludes that the state fundamental right cannot be affected by the federal constitutional right: "The State's parental rights argument is unpersuasive given the minor's own [state]

---

constitutional right afforded to any person under any constitution anywhere in the United States, eclipsing centuries-old express rights of free speech (which can be abridged in time, place, and manner contexts or where strict scrutiny is satisfied, *see, e.g., Ward v. Rock Against Racism,* 491 U.S. 781 (1989)) and the free exercise of religion (which can be abridged by generally applicable laws, *see, e.g., Employment Div. v. Smith,* 494 U.S. 872 (1990)).

fundamental right of privacy and because [of] the [state] minors' rights provision ...." *Id.*[20] With the decision below, the activism of the Montana Supreme Court has now arrived at this Court's doorstep, undermining the supremacy of the U.S. Constitution and thereby the rule of law.

Concerns of judicial activism are not unique to Montana as is evidenced by the sweep of legislative efforts to reform state judiciaries occurring throughout the United States in recent years. With public confidence in the judiciary undermined by the overreach of the courts, legislatures across the country have responded with efforts to cabin and rein in their state judiciaries.[21] And while legislative reforms can legitimately imbue transparency and accountability in the courts,[22]

---

[20] This is not the first time the Montana Supreme Court has neglected to conduct proper federal constitutional analysis or has excepted Montana from that analysis. *See Espinoza v. Mont. Dep't of Rev.,* 435 P.3d 603 (Mont. 2018) (summarily addressing federal religion clause analysis in a paragraph before upholding a state regulation under Montana's Blaine Amendment), *rev'd* 591 U.S. 464 (2020); *Western Tradition Partnership,* 271 P.3d 1 (Mont. 2012) (excepting Montana from the application of *Citizens United*), *summarily rev'd,* 567 U.S. 516 (2012).

[21] *Legislative Assaults on State Courts—June 2022,* Brennan Center for Justice (June 22, 2022), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-june-2022; *Legislative Assaults on State Courts in 2024,* Brennan Center for Justice (Jan. 28, 2025), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2024#:~:text=A%20Brennan%20Center%20review%20of,Courts'%20Gavel%20to%20Gavel%20database..

[22] *See, e.g.,* Katie McKellar, *'A broad attack': Utah's judiciary fight bills threatening its independence*, Utah News Dispatch

the temptation of these efforts to undercut the judiciary itself as an institution or make another branch the final arbiter of the law threatens the separation of powers contemplated in state constitutions: the legislature is no more tasked with being the final arbiter on the meaning of the law than the judiciary is tasked with legislating it.[23]

This Court has the opportunity through appellate review to correct the judicial activism of the court below and demonstrate to the nation through example as well as law the appropriate application of the federal constitution to the important issue of parental involvement in the medical decision making of their minor children. Governor Gianforte respectfully urges the Court to grant a writ of certiorari in this case.

(feb 26. 2025), https://utahnewsdispatch.com/2025/02/26/a-broad-attack-utahs-judiciary-fights-bills-threatening-its-independence/.

[23] *See, e.g.,* Mont. Senate Bill 21 (2025), https://bills.legmt.gov/#/laws/bill/2/LC0618?open_tab=bill (allowing legislative and executive leadership to vacate a writ of mandate); Mont. Senate Bill 239 (2025), https://bills.legmt.gov/#/laws/bill/2/LC0019?open_tab=bill (requiring courts to invite amicus briefs and allowing amicus to become intervenors post judgment for purposes of an appeal).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

Anita Y. Milanovich
General Counsel
Office of the Governor
1301 E. 6th Ave.
Helena, Montana 59601
Ph.: 406/444-5554
Email:
anita.milanovich@mt.gov
Counsel of Record