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 Supreme Court of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Montana Supreme Court, applying state constitutional scrutiny, correctly treated the State's asserted and uncontested interest in parental rights as compelling.

PARTIES TO THE PROCEEDING

The caption of the petition correctly lists the parties to the proceeding.

RULE 29.6 STATEMENT

Petitioners do not have any parent or publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The Petition asks the Court to decide a federal constitutional question that was neither presented nor passed on below.

In defending the Parental Consent for Abortion Act of 2013 ("Consent Act") before the trial court and the Montana Supreme Court, Petitioners invoked "family integrity" or parental rights as the last of four compelling governmental interests that they argued justified the Act. Petitioners then asked the state courts, as a matter of *state* constitutional law, to balance those four governmental interests against the rights of minors protected by Montana's expansive Right to Privacy and Rights of Persons Not Adults—both expressly enshrined in the Montana Constitution. The courts below concluded that strict scrutiny must govern any infringement on these rights (again, as a matter of *state* constitutional law) and that the Consent Act was not narrowly tailored to the four interests Petitioners identified.

Petitioners have now entirely changed course before this Court. Gone are the various state interests Petitioners identified and Petitioners' request for balancing. Instead, Petitioners ask this Court to decide whether parents have a fundamental right enshrined in the U.S. Constitution "to know and participate in decisions concerning their minor child's medical care, including a minor's decision to seek an abortion," and they contend that the answer will resolve this case. Pet. i. But that has never been the question presented by this case or its parties—to the contrary, all parties (and both state courts below) *assumed* the existence of fundamental parental rights under the Montana and/or U.S. Constitutions. The

parties litigated how and to what extent those rights should be weighed considering the constitutional rights that minors also enjoy under the Montana Constitution—whether by applying strict scrutiny (as Respondents argued) or under a less rigorous balancing test (as Petitioners argued).

Both state courts below agreed with Respondents, applied strict scrutiny, and held that the Consent Act was not narrowly tailored to serve the compelling interests that Petitioners had identified—including parental rights. The petition challenges neither the strict-scrutiny standard that the Montana Supreme Court applied, nor how the court applied that standard to the Consent Act. Accordingly, answering the question presented (*whether* the U.S. Constitution vests parents with the rights Petitioners suggest) will in no way resolve this case, because this case has never turned on whether those rights exist. No court in this case has ever been asked to pass upon that question until the petition filed before this Court.

At times, Petitioners seem to suggest that the *existence* of parental rights is the beginning and end of the inquiry—that so long as there *is* a federal due process right of parents to participate in decisions concerning their minor child's medical care, there is no need to consider what other rights might be in play or what level of scrutiny should apply to review the Consent Act. But Petitioners never even hinted at this absolutist position below, despite litigating the issue for over a decade. The Montana Supreme Court was never asked to consider, and therefore never addressed, that extreme argument. *See Troxel v. Granville*, 530 U.S. 57, 92-93 (2000) (Scalia, J., dissenting) ("no one believes … parental rights are to

be absolute"). This case is therefore an extraordinarily poor vehicle for deciding it. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.").

The question presented is also not certworthy. The cases Petitioners identify as supporting their position in the purported circuit "split" concern alleged coercive interference with the parent-child relationship caused by *an affirmative act by the state*, which is not the case here. Moreover, the decisions in the purported "split" are so factually distinct that they can hardly be said to be answering the same question presented.

This case is, and has always been, a case about state constitutional law: Montana's Right to Privacy and Montana's Rights of Persons Not Adults, both unique provisions that are expressly enshrined in the Montana Constitution. From the outset, Petitioners framed their challenge as whether the compelling state interests they identified (only one of which even involved parental rights) outweighed minors' rights under these two state provisions. This Court should reject Petitioners' eleventh-hour attempt to spin that framing into a newly presented question of federal constitutional law.

The petition should be denied.

STATEMENT

I. Montana's Legal Regime

A. The Montana Constitution

"Montana's Constitution affords significantly broader protections than the federal constitution." Pet. App. 15a. "Unlike the federal constitution, Montana's Constitution explicitly grants to all Montana citizens the right to individual privacy." *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997). Article II, Section 10 of the Montana Constitution provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Because "the right to privacy is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis." *Gryczan*, 942 P.2d at 122.

The Montana Constitution also expressly recognizes the Rights of Persons Not Adults (the "Minors' Rights Clause"). *See* Mont. Const. art. II, § 15. As with the Right to Privacy clause, this provision provides express protection for minors that extends beyond the scope of federal constitutional law. Under the U.S. Constitution, it is of course true that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). But the Montana Constitution goes further by declaring that minors possess the *same* constitutional rights as adults—namely, the "rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless

specifically precluded by laws which enhance the protection of such persons." *See In re J.W.*, 498 P.3d 211, 231 (Mont. 2021) ("Montana youths are constitutionally guaranteed the same fundamental rights as adults."); *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997) (recognizing that minors "enjoy all the fundamental rights of an adult under Article II").

Because this provision is contained within Montana's Declaration of Rights (Article II), it creates a right that is recognized "as being 'fundamental,'" referring to rights that "are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts." *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003). This provision reflects an "intent to extend fundamental rights to children and to afford constitutional protection to those rights with …one exception"—namely, laws that enhance the protection of minors. *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984). To rely on this exception, the Legislature must provide a "clear showing" that a law is "designed and operat[es] "to enhance the protection of such persons." *Id.*

Finally, the Montana Constitution likewise has a state-specific Equal Protection Clause. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of a law must receive like treatment." *Goble v. Mont. State Fund*, 325 P.3d 1211, 1218-19 (2014). "When analyzing an equal protection claim, the Court follows a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the

appropriate level of scrutiny to the challenged statute." *Id.* Much like the Right to Privacy and the Minors' Rights provisions, "this section of the Montana Constitution is broader than the Equal Protection Clause of its federal counterpart." *State v. Miller*, 510 P.3d 17, 51 (2022).

B. Montana's Statutory Scheme

Two Montana statutes address parental involvement in a minor's decision to seek abortion care. The first is the Parental Notice of Abortion Act of 2011 (the Notice Act), which became law in January 2013 after it was approved in a voter referendum. Pet. App. 3a. The Notice Act requires physicians to notify a parent or guardian or to seek a waiver from a court before performing an abortion on a minor under the age of 16. Mont. Code Ann. §§ 50-20-221 *et seq*. Specifically, a physician "may not perform an abortion upon a minor unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor of the physician's intention to perform the abortion." *Id.* § 50-20-224.

Shortly after the Notice Act's enactment, the Montana Legislature overrode the Notice Act by enacting the Parental Consent for Abortion Act of 2013 (the Consent Act). *Id.* §§ 50-20-501 *et seq*.; Pet. App. 3a. The Consent Act requires parental consent for minors up to 18 years of age. Under the Consent Act, a physician may not provide an abortion to a minor without the notarized written consent of a parent or legal guardian. Mont. Code Ann. § 50-20-504(1). Consent is valid only if provided on a mandated form that discloses what the statute deems "the risks and hazards related to the procedures planned for the minor," among them "the potential for

infection, blood clots in veins and lungs, hemorrhage, and allergic reactions," sterility, "uterine perforation or other damage to the uterus," and "a potential hysterectomy caused by a complication or injury during the procedure." *Id.* § 50-20-505. To sign the consent form, the parent or guardian must provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor." *Id.* § 50-20-506. A minor who is unable to obtain consent can access abortion care only through a court order, commonly known as a judicial bypass. *Id.* § 50-20-509.

The Consent Act also imposes significant obligations on the physician or physician assistant providing the abortion. The physician or physician assistant must themselves execute an affidavit stating that they "certify that according to my best information and belief, a reasonable person under similar circumstances would rely on the information presented by both the minor and the minor's parent or legal guardian as sufficient evidence of identity and relationship." *Id.* § 50-20-506(3). Any person who performs an abortion without having received notarized parental consent that complies with the disclosure requirements in the Consent Act "shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both." *Id.* § 50-20-510(1). "On a second or subsequent conviction, the person shall be fined an amount not less than $500 or more than $50,000 and be imprisoned in the state prison for a term of not less than 10 days or more than 5 years, or both." *Id.* A violation of the provision is also "prima facie evidence

in an appropriate civil action for a violation of a professional obligation." *Id.* § 50-20-510(2).

II. Procedural History

1. Respondents filed this action challenging the constitutionality of both the Consent Act and the Notice Act before the Consent Act's July 1, 2013 effective date. The Attorney General consented to a preliminary injunction enjoining the Consent Act; as a result, it has never gone into effect. Pet. App. 3a. The Consent Act's repeal of the Notice Act is therefore not operative, and the Notice Act remains in effect. *Id.*

2. In the district court, the parties cross-moved for summary judgment on the constitutionality of both the Consent Act and the Notice Act. *Id.* at 56a. Respondents argued that the statutes violated three independent constitutional guarantees under the Montana Constitution: the Right to Privacy, Minors' Rights, and Equal Protection. Supp. App. 154a. The district court granted Respondents' motion with respect to the Consent Act and concluded that the law violated the Montana Constitution. As relevant here, it largely denied the parties' cross-motions with respect to the Notice Act. Pet. App. 57a.

On the Consent Act, the district court first explained that the Montana Constitution "unambiguously establishes a person's fundamental right to autonomy over their own body, including a woman's right to decide whether to keep or terminate a pregnancy." *See id.* at 73a (discussing *Armstrong v. State*, 989 P.2d 364 (Mont. 1999)). "Infringement on that right is justified, if at all, only upon demonstration by the State that the infringement is 'narrowly tailored to serve a compelling government

interest and only that interest.'" *Id.* at 77a (quoting *Stand Up Mont. v. Missoula Cnty. Pub. Schs.*, 514 P.3d 1062, 1067 (2022)) (further noting that the "Montana Supreme Court has expressly rejected the less-stringent 'undue burden' standard" for evaluating the right to abortion care).

In so holding, the district court rejected Respondents' argument that, in the context of minors, "the Court should not apply strict scrutiny to the Consent Act, but the Court should rather engage in a balancing of the State's interest in the protection of the minor with the minor's interest in personal autonomy." *Id.* at 84a. The district court refused to apply this "proposed balancing test," concluding that it could not "be a correct statement of the law." *Id.* at 90a. Rather, the district court determined that the Consent Act could "only be justified, if at all, if it withstands strict scrutiny." *Id.* at 92a.

The district court then considered whether the Consent Act was narrowly tailored to serve the four interests identified by the State: "(1) protecting minors from sex crimes and sex trafficking; (2) ensuring that, if a minor decides to have an abortion, someone is there to monitor for post-abortion complications and especially mental health trauma; (3) ensuring immature minors make fully informed decisions; and (4) promoting family integrity." *Id.* (internal quotations omitted). The district court examined each state interest in turn and concluded that, while all four were compelling, Petitioners had failed to show that the Consent Act was "necessary to promote" the interests at hand. *Id.* at 93a (quoting *Driscoll v. Stapleton*, 473 P.3d 386, 393 (2020)).

With respect to "family integrity" in particular, the district court explained that the "promotion of healthy families is undoubtedly a compelling state interest." *Id.* at 104a. But, it continued, the "consent requirement itself only has operative effect where the wishes of parent and child are in tension." *Id.* In other words, "the consent requirement empowers the parent to take the decision about whether to keep or terminate a pregnancy from the minor," and therefore "goes beyond merely facilitating parental involvement and guidance." *Id.* The district court also noted that the Consent Act was overinclusive because the State failed to show that the Consent Act was narrowly tailored when it asserted that the Notice Act served the same compelling interests. *Id.*

Because the district court concluded that the Consent Act violated the state right to privacy, it did not address Respondents' separate equal protection argument.

With respect to the Notice Act, the district court denied the parties' cross-motions, explaining that there were genuine disputes of material fact that precluded summary judgment. *Id.* at 57a. Litigation on the Notice Act is ongoing before the district court. The district court certified its decision on the Consent Act to the Montana Supreme Court.

3. The Montana Supreme Court affirmed, concluding that the Consent Act violated the rights to privacy and equal protection under the Montana Constitution. Starting with the right to privacy, the court concluded that, under the Montana Constitution, "minors, like adults, have a fundamental right to privacy, which includes procreative autonomy and making medical decisions

affecting his or her bodily integrity and health in partnership with a chosen health care provider free from governmental interference." *Id.* at 21a. The court continued: Because "the right of privacy is explicit in the [Montana] Declaration of Rights, it is a fundamental right," and "legislation infringing the exercise of the right of privacy must be reviewed under a strict scrutiny analysis." *Id.* at 22a.

The Montana Supreme Court accepted that Petitioners' four asserted interests were properly understood as compelling for purposes of strict scrutiny. But the court concluded that, while the state had identified compelling state interests, the Consent Act was not narrowly tailored to those interests. *Id.* at 43a.

When evaluating the asserted compelling interest of parental rights, the Montana Supreme Court recognized that parents "have a fundamental right to parent," and that "promotion of healthy families is undoubtedly a compelling state interest." *Id.* at 37a. But, the court explained, the "State's parental rights argument [was] unpersuasive given the minor's own fundamental right of privacy and because the minors' rights provision expressly affirms the rights of minors except when necessary to enhance a minor's *own* protection—not the protection of a parent." *Id.* at 38a.

On equal protection, the Montana Supreme Court began by observing that, "[w]hen analyzing an equal protection claim, the Court follows a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Id.* at 23a.

Conducting that analysis here, the court determined that "the Consent Act creates a class of pregnant minors who want to obtain an abortion and a class of pregnant minors who do not want to obtain an abortion." *Id.* at 24a. Because "the classification discriminates against minors who choose to have an abortion," and because Article II, Section 15 affords minors "full recognition under the equal protection clause," the court explained that strict scrutiny likewise applied to Respondents' equal protection challenge. *Id.* at 25a. The court therefore conducted the same strict scrutiny analysis for both the right to privacy and the right to equal protection. *See* p. 11, *supra*.

REASONS FOR DENYING THE PETITION

The petition commits every cardinal sin of certworthiness.

This case has never been a vehicle for considering the question presented. In fact, up until now, Petitioners have never "presented" it at all. Petitioners never asked the Montana courts to decide whether the federal Constitution confers a "right to know about and participate in decisions concerning their child's medical care." Rather, everyone—Petitioners, Respondents, the courts—addressed the State's asserted interest as stated, with every court acknowledging it as "compelling" for purposes of the state constitution's standards of scrutiny.

What makes this case an even worse vehicle is the fact that resolving the question presented entirely in Petitioners' favor would not disturb the Montana Supreme Court's judgment. To do that, Petitioners would at a minimum have had to seek review of the

Montana Supreme Court's choice of framework (strict scrutiny versus Petitioners' balancing test), or the amount of weight given to Petitioners' stated interest in vindicating parental rights. But the question presented is about the scope of parental rights, not the weight accorded to them. And it is certainly not about the framework that the Montana Supreme Court used to evaluate the infringement on a minor's state-constitutional rights under Montana's Right to Privacy and Minors' Rights Clause. Compounding these issues, Petitioners all but ignore the Montana Supreme Court's equal protection analysis, which independently supports the ruling below.

Worse still, there is no split, let alone one that addresses the issue decided below. Petitioners argue that there is a deep divide on whether the federal Constitution recognizes a parent's right to "know about their child's major medical decisions." Pet. 16. That description obscures the irrelevance of the conflict: all of the cases in the purported "split" concern alleged coercive action affirmatively *taken by the state* that interferes with the parent-child relationship. None of the cases discussed in Petitioners' purported split concern a state's invocation of parental rights to intrude on a minor's fundamental right to privacy in medical decisionmaking. Even within this discrete category of cases concerning coercive state action, there is no split given the factual differences among the cited cases. Petitioners cannot seriously compare cases involving invasive medical examinations of children without the parents' notice or consent to cases where schools provided access to contraceptives for students.

In any event, Petitioners' theory of parental rights finds no support in this Court's precedents. While Petitioners claim that the Montana Supreme Court gave short shrift to their asserted interest in protecting parental rights, their real grievance seems to be that the court applied strict scrutiny and concluded that the Consent Act was not narrowly tailored to serve the identified state interests. *Id.* at 27-28. Petitioners intimate that, after *Dobbs*, there is no need to engage in *any* review (whether strict scrutiny or something less stringent), the implication being that the federal parental right will categorically supersede the state right of privacy for minors. The Montana Supreme Court correctly recognized that, for over a century, the U.S. Constitution has afforded parents a shield against government compulsion and intrusion into the parent-child relationship. Substantive due process is not a tool that empowers parents to impose their will on their children, even in the absence of state action or coercion.

I. This case is not, and has never been, a vehicle for addressing the question presented.

A. The question presented was never addressed below.

In the 12-year history of this case, the courts below were never asked to decide whether parents have a fundamental "right to know about, and participate in, their child's medical decisions," much less an *absolute* right to that effect. *See* Pet. 26. To the contrary, the parties and state courts assumed that fundamental parental rights exist under the state and/or federal constitution and can be a compelling state interest. What the parties disputed (and asked the state courts

to resolve) were (i) *how* to evaluate the Consent Act's intrusion on minors' fundamental rights in light of the asserted state interests—whether under strict scrutiny or a more general balancing test as a matter of state constitutional law—and (ii) whether the Consent Act passed muster under the appropriate state constitutional framework. That is how this case has always been litigated, and those questions are nowhere to be found in the petition.

The point bears repeating: the parental right, as described by Petitioners here, was never a controverted issue (and so the state courts had no need to resolve it). And Petitioners never suggested below, as they do now, that parents' federal due process rights are the beginning and end of the analysis (and so the state courts had no opportunity to decide that issue either). This Court should not resolve issues that were never raised below.

1. Start with the district court. Petitioners proposed balancing the State's interests against a minor's fundamental rights under Article II, § 15 of the Montana Constitution. Petitioners maintained that, under that provision, "the States' interest in protecting children may conflict with their fundamental rights." Supp. App. 281a (quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984)). To determine when the State's interest may properly override a minor's fundamental rights, Petitioners argued that the "minor's liberty interest 'must be balanced against her right to be supervised … and cared for.'" *Id.* (quoting *In re C.H.*, 683 P.2d at 941). In other words, "[r]ights that are subject to rigorous strict scrutiny in the context of adults, are subject to a balancing test when it comes to minors." *Id.* at 198a. Petitioners

further specified, however, that even if Respondents' right to privacy and equal protection claims were "viewed under standard strict scrutiny, the State should still win because its interests in protecting minors is compelling and the law is carefully tailored to advance those interests." *Id.* at 199a.

Petitioners identified four interests to support the Consent Act in their motion for summary judgment: (1) "protecting minors from sex crimes and sex trafficking"; (2) "ensuring that, if a minor decides to have an abortion, someone is there to monitor for post-abortion complications and especially mental health trauma," (3) "ensuring immature minors make fully informed decisions," and (4) "promoting family integrity." *Id.* at 285a. Petitioners did not argue that the U.S. Constitution *compels* the recognition of these rights or ascribes particular weight to them in the state constitutional analysis. Instead, they argued that the state's interest in promoting family integrity—in conjunction with other state interests—justified the Consent Act's infringement on the rights of minors. *See id.* Of the 15 pages Petitioners devoted to discussing the State's interests, Petitioners spent just three sentences at the end discussing parents' constitutional rights. *Id.* at 301a. Even when they finally reached this issue, they did not argue that parents have an *absolute* federal right "to know about and participate in their minor child's decision … whether to get an abortion," irrespective of any other rights that might be at stake. Pet. 3. Rather, Petitioners suggested in passing that the Consent Act "promote[s] the integrity of the family and protect[s] the parental right to be involved in their minor child's decision making process." *Id.*

Petitioners took a similar approach in opposing Respondents' motion for summary judgment. Petitioners again did not argue that the Consent Act must be upheld as necessary to protect parents' rights under the Fourteenth Amendment. Instead, in addressing Respondents' evidence regarding the risk of abuse created by parental involvement laws, Petitioners complained about the "belitt[ling of] the rights of parents to be involved in their abortion decision." *Id.* at 214a. Notably, Petitioners did not explicitly ground these parental rights in the U.S. Constitution, describing them only as having "both constitutional and commonsense proportions." *Id.*

The district court rejected Petitioners' proposed balancing test and applied strict scrutiny to evaluate the Consent Act's infringement on a minor's fundamental right to privacy. Pet. App. 90a; *see also* pp. 8-10, *supra*. The court ultimately concluded that, while the State had identified compelling interests in support of the Consent Act, the Act was "not narrowly tailored to achieve" those interests. Pet. App. 105a; *see also* pp. 9-10, *supra*.

2. In the Montana Supreme Court, Petitioners' brief argued that the trial court employed the wrong legal standard by applying strict scrutiny rather than its proposed balancing test. Supp. App. 37a. Petitioners never argued—as they seem to suggest now—that no balancing was required because parents' federal due process rights always blot out any other constitutionally protected interests. Nor did Petitioners ask the Montana Supreme Court to "define the scope of parents' fundamental rights" guaranteed by the U.S. Constitution—a broad ask

more appropriate for a treatise than a cert petition. *See* Pet. 3.

Under *their* proposed balancing test, Petitioners maintained that the "Consent Act easily survives the appropriate rights-balancing standard." Pet. App. 38a. Petitioners presented a variation on the state interests they had identified in the district court: (1) protecting "minors from sexual violence," (2) protecting "the physical and psychological wellbeing of minors," (3) protecting minors by ensuring they engage in fully informed decision-making," and (4) "promot[ing] parents' fundamental rights." *Id.* at 39a-43a. In addressing parental rights, Petitioners argued that the "Consent Act ensures that parents can counsel their children through the uniquely consequential abortion decision," and therefore "furthers the goal at the very heart of Article II, Section 15"—*i.e.*, at the heart of the relevant *state* constitutional provision. *Id.* at 44a. While Petitioners criticized the district court's decision for failing to "account for parents' weighty fundamental rights," *id.* at 36a-37a, they did so while presenting parental rights as part of the balancing test under Article II, § 15, *id.* at 37a.

The Montana Supreme Court concluded that, "[s]ince the right of privacy is explicit in the [Montana] Declaration of Rights, it is a fundamental right." *Id.* at 22a. "For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict scrutiny analysis." *Id.*; *see also* pp. 10-12, *supra*. Applying strict scrutiny, the Montana Supreme Court concluded that, while the state had identified compelling state interests, the

Consent Act was not narrowly tailored to those interests. Pet. App. 39a.

3. The Montana Supreme Court's decision rested on a one-two conclusion: (1) the strict scrutiny framework applied to Respondents' state-constitutional challenge, rather than Petitioners' preferred balancing test, and (2) the Consent Act did not survive the state constitution's strict-scrutiny framework. The petition does not challenge either of those decisions. Petitioners do not ask this Court to review the Montana Supreme Court's decision to apply strict scrutiny, rather than their preferred balancing test. They do not argue that the federal Constitution compels alteration of state-constitutional standards of scrutiny. And they do not argue that the Montana Supreme Court misapplied the state constitution's standard of strict scrutiny.

Rather than challenge the Montana Supreme Court's analysis, Petitioners ask the Court to "define[] the scope of parents' fundamental rights" and "[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, including a right to know and participate in decisions concerning a minor's decision to seek an abortion." Pet. i, 3. But there is no reason for this Court to answer that question: (1) Petitioners have never asked any of the lower courts to define the scope of the parental right as guaranteed by the federal Constitution; and (2) even if the right exists as articulated, that would not disturb the Montana Supreme Court's judgment.

As explained above, none of the lower courts was asked to determine whether parental rights, as

guaranteed by the federal Due Process Clause, embraces the right to "know and participate in decisions" concerning a minor's decision to obtain an abortion. Every court simply assumed the existence of such a right. Pet. App. 37a ("Parents do have a fundamental right to parent. As the District Court held, the promotion of healthy families is undoubtedly a compelling state interest." (citation omitted)).

Petitioners' real grievance with the Montana Supreme Court's decision is not one of scope, but weight. They contend that the court "elevated a minor's state constitutional rights over parents' federal constitutional rights, contradicting this Court's parental rights decisions." Pet. 22. But the question presented does not contend that the Montana Supreme Court used the wrong scale, or that the federal Constitution compels treating parental rights differently in a state constitutional analysis. Petitioners' own *amici* support this: they argue that the *real* question is whether the asserted parental right "alter[s] [the state court's] view of the state constitutional issues." Florida Amicus Br. 3.

The question of "alteration" is both unpreserved and unpresented (even before this Court). Neither Petitioners nor their *amici* present any reason why this Court should discard the usual rule that "due regard for the appropriate relationship of this Court to state courts requires [it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered" by the Montana Supreme Court. *McGoldrick*, 309 U.S. at 434. Perhaps even more fatal to review is the fact that there is no federal basis for the question unpresented. The *amici* advancing this "alteration" theory do not

cite a single decision holding that the U.S. Constitution's guarantee of parental rights alters state constitutional standards of scrutiny to ensure that proper weight is given to those rights.

Finally, even if the question actually presented somehow subsumes the question of what, exactly, the U.S. Constitution's parental right requires vis-à-vis state laws, that question is hardly developed enough for this Court's review. Consider *Doe v. Uthmeier*, --- So. 3d ----, 2025 WL 1386707 (Fla. Dist. Ct. App. May 14, 2025), where a state intermediate appellate court invalidated a judicial waiver pathway for minors seeking to obtain abortions on the ground that it violated the rights of the minor's parents under the federal Constitution's Due Process Clause. The court expressed uncertainty about its decision, called on the Florida Supreme Court to provide additional guidance, and certified the case for the higher court's review. *Id.* at *7 ("[we] cannot profess the kind of certainty [we] would like to have about the arguments and record before us." (quoting *TikTok Inc. v. Garland*, 145 S. Ct. 57, 75 (2025) (Gorsuch, J., concurring)). Irrespective of the wisdom (or unwisdom) of the court's decision, the need for percolation on the scope of, and relative weight given to, parental rights, is clear.[1]

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[1] The court's analysis in *Uthmeier* also underscores the centrality of the state constitutional scheme in evaluating the validity of a state consent statute. After concluding that neither the U.S. Constitution nor the Florida Constitution recognizes a minor's right to obtain an abortion post-*Dobbs*, the court explained that "any deprivation of parents' due-process rights to notice and opportunity to be heard can no longer be justified by their children's asserted constitutional right to obtain an abortion." 2025 WL 1386707, at *7. But Montana indisputably protects the

B. The petition does not challenge the Montana Supreme Court's equal protection holding.

The Montana Supreme Court ruled that the Consent Act violates both a minor's right to privacy and a minor's guarantee of equal protection of the laws. *See* pp. 10-12, *supra*. The petition, however, all but ignores equal protection. The question presented focuses entirely on the right to privacy, noting that "the Montana Supreme Court held that the Consent Act violates a minor's fundamental right to privacy," and further that parental due process rights "superseded a minor's right to obtain an abortion." Pet. i. Outside of the background section, Petitioners do not once mention the Montana Supreme Court's equal protection analysis. Instead, when explaining why the Montana Supreme Court's decision is wrong, Petitioners object that the Montana Supreme Court "construed a minor's state right to privacy in a way that creates conflicts with parents' federal fundamental rights." *Id.* at 22 (further describing the Montana Supreme Court's decision as holding "that states may not pass laws to safeguard parents' federal constitutional rights if they burden a minor's state right to privacy").

While the Montana Supreme Court engaged in the same narrow tailoring analysis for both due process and equal protection, it otherwise explained that the two constitutional provisions present distinct legal questions. In particular, to analyze an equal protection claim, the court explained that it identifies

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right to an abortion, and so the Florida court's analysis therefore has no bearing on the outcome of Petitioners' challenge here.

the classes involved to determine if they are similarly situated, determines the appropriate level of scrutiny, and then applies that level of scrutiny to the challenged statute. Pet. App. 23a. The court's identification of the relevant classes (here, pregnant minors who seek abortion care and pregnant minors who do not seek abortion care) and the distinction between those classes is an entirely separate analysis from the court's analysis of the scope of a minor's right to privacy. *Id.* at 23a-24a. It also required consideration of different issues—including that "[m]inors can consent to many types of health care, including pregnancy-related care, but abortion is singled out." *Id.* at 35a. Indeed, while Justice Rice agreed with the court's ultimate holding that the Consent Act violates the right to privacy and equal protection, he concurred on the basis that the "proper distinction created by the Consent Act is between minors seeking an abortion and adults seeking an abortion." *Id.* at 48a. "In brief, the distinction is one of age." *Id.*

Petitioners never explain how their framing of the question presented or their analysis of parents' due process rights would alter the Montana Supreme Court's equal protection analysis. Even if Petitioners were correct that parental due process rights somehow override a minor's right to privacy, it in no way follows that the same is true with respect to an equal protection violation. Petitioners' failure even to address the Montana Supreme Court's equal protection holding—an independent basis for invalidating the Consent Act—is yet another reason this Court should deny the petition.

II. There is no disagreement among the courts.

A. Petitioners' asserted circuit split is illusory and, regardless, does not involve the issues at hand.

None of the cases cited in petitioners' circuit split involves parents using *their* constitutional rights to override the constitutional rights of their children. Instead, all of these decisions concern whether the state undertook an affirmative act that coercively interfered with the parent-child relationship. And even on that issue, there is no true split; each court reached its decision based on the particular facts before it, not because of some sweeping pronouncement about the scope of parental rights under the U.S. Constitution.

1. Unlike the cases cited in Petitioners' split, this case does not involve an affirmative act by the state action, let alone state interference or coercion. On one side of the split are cases that address state action that does not rise to the level of coercion or interference. The Third Circuit's decision in *Anspach ex rel. Anspach v. City of Philadelphia*, 503 F.3d 256, 258 (3d Cir. 2007), involved a state health clinic providing a minor with emergency contraceptive pills. *Doe v. Irwin*, 615 F.2d 1162, 1163 (6th Cir. 1980), involved state-funded distribution of contraceptives. The same is true of *Curtis v. School Committee of Falmouth*, 652 N.E.2d 580, 585-86 (Mass. 1995), which concerned the availability of contraceptives in school. These cases rejected a due-process claim because, notwithstanding the presence of state action, the state did not attempt to coercively interfere with the parent-child relationship: minors were not forbidden from talking to their parents, *Anspach*, 503

F.3d at 267; *id.* at 266 (state's actions did not "in any way compel[], constrain[], or coerce[]" a minor "into a course of action she objected to"), and mere exposure was not enough to constitute state coercion, *Curtis*, 652 N.E.2d at 586 (rejecting that a school contraceptive program is "coercive because … the program has been implemented in the compulsory setting of the public schools"); *Doe*, 615 F.2d at 1168 ("no compulsory requirements or prohibitions" resulting from distribution of contraceptives).

The cases on the other side of the split likewise involve state action—but state action that rose to the level of affirmative state coercion. The two Ninth Circuit decisions that Petitioners cite, *Mann v. County of San Diego*, 907 F.3d 1154 (9th Cir. 2018), and *Benavidez v. County of San Diego*, 993 F.3d 1134 (9th Cir. 2021), involve county employees conducting invasive investigatory medical examinations on children without parental notice or involvement. *Mann*, 907 F.3d at 1156-57 (examination of children whose parents were suspected of child abuse); *Benavidez*, 993 F.3d at 1150 (same); *see also van Emrik v. Chemung Cnty. Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990) (the Constitution "assures parents that, in the absence of parental consent, x-rays of their child may not be undertaken for investigative purposes").

Unlike every case cited within Petitioners' split, this case has nothing to do with an affirmative act by the state—whether government funding or provision of family planning services or state-sanctioned medical examinations. Rather, Petitioners seek to use the parental right as a cudgel against a minor's rights. Pet. App. 38a ("Where a minor seeks an abortion and

that decision is vetoed by a parent, the family *fundamentally* is in conflict."). Regardless of whether the Due Process Clause permits Petitioners to do so, that position finds no support in any of the cases within Petitioners' asserted split. Put differently, this case provides no basis for addressing the purported split.

Even putting that aside, there in fact is no split among the cases that involve state action. Petitioners cannot create a split by pointing to cases that came out differently on the generalized "parental right to be involved in a minor child's medical decisions." The availability of contraceptives in schools is worlds apart from county officials conducting intrusive investigative medical examinations of children whose parents are suspected of abuse. Petitioners do not even attempt to explain how courts' ultimate resolution of the interests at play in these two vastly different scenarios is attributable to a disagreement about the scope of the parental right.

2. Petitioners cannot fashion a split out of their other cases. Like the Montana Supreme Court here, the New Jersey Supreme Court in *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000), recognized "the right of parents to raise their children with limited government interference." *Id.* at 641. Likewise, the Alaska Supreme Court acknowledged "the State's compelling interest in encouraging parental involvement in minors' pregnancy-related decisions." *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1139 (Alaska 2016). On the question presented, these cases plainly do not conflict with the Montana Supreme Court's decision. Nor do they overlap with

the other cases in Petitioners' purported split, given the absence of any affirmative state action that has a coercive effect on the parent-child relationship.

Finally, the Fifth Circuit's decision in *Deanda v. Becerra*, 96 F.4th 750 (5th Cir. 2024), is equally irrelevant here. That decision concerned a parent's standing to challenge a federal rule that prohibited a healthcare provider from requiring parental notice or consent for a minor child's receipt of family planning services. To establish Article III standing, the parent claimed an injury to his "right to consent to his minor children's medical care" under Texas state law. *Id.* at 756 (citing Tex. Fam. Code § 151.001(a)(6)). The parent also happened to "claim[] interference with his parental rights under the Fourteenth Amendment." *Id.* at 758. The Fifth Circuit merely concluded that these injuries were sufficient for Article III standing.

All told, that this case presents no conflict for this Court to resolve provides yet another reason to deny the petition.

B. There is no patchwork of conflicting federal and state laws.

Petitioners separately object that "[p]arents shouldn't have to navigate federal and state laws and legal doctrines to exercise a fundamental federal right." Pet. 3; *see also id.* at 21, 28. Their concern is misplaced.

To start, there is no "patchwork" as to the question presented. The Montana Supreme Court's decision does not create or deepen an existing split: courts have dutifully recognized Petitioners' asserted parental rights as a compelling governmental interest. Petitioners contend that "Alaska, and now

Montana, place abortion providers between a rock and a hard place: if they're sued in federal court, Ninth Circuit caselaw requires parental involvement, but if they're in Montana's state courts, parental involvement is foreclosed." *Id.* at 21. But the Ninth Circuit has never held that parental involvement is necessary in the context of abortion—much less that parental rights automatically supersede any and all other constitutional interests. And neither the Alaska nor the Montana Supreme Courts has held that parents have no federal due process right in this context. Petitioners' patchwork is entirely illusory.

Moreover, if a federal court is asked to resolve a state constitutional claim (like the claim below), then the federal court will look to the state constitution and state caselaw. *See, e.g.*, *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1384-85 (9th Cir. 1994) (evaluating parents' claims against a school district under the California Constitution). Or it will certify the inquiry to the relevant state court. *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1175 (9th Cir. 2010) (in a case brought by parents challenging campground lease terms on religious grounds, certifying "three issues to the California Supreme Court because they require interpretation of the state constitution's religion clauses"). Either way, the federal court endeavors to follow the state court—not to split from it.

Finally, to the extent Petitioners are complaining about the patchwork of consent laws more generally, the patchwork is the point, according to *Dobbs*. "Ordered liberty sets limits and defines the boundary between competing interests." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022). "[T]he

people of the various States may evaluate those interests differently." *Id.*; *see also id.* at 339 (Kavanaugh, J., concurring) ("[A]ll of the States may evaluate the competing interests and decide how to address this consequential issue."). Petitioners do not explain why the asserted parental right to participate in a minor child's abortion decisionmaking demands uniformity across different state constitutional frameworks. Instead, they seek to dissolve the "boundary between competing interests" by arguing that, at all times, the parental right must be "elevated" over the minor child's. *See* Pet. 22.

Petitioners' ill-formed concern about the purportedly "unworkable" "patchwork of conflicting and state laws" hardly provides a reason to grant the petition.

III. The Montana Supreme Court's decision is correct.

There has never been any dispute in this case that "[p]arents do have a fundamental right to parent," and that "the promotion of healthy families is undoubtedly a compelling state interest." Pet. App. 37a (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). "[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*

The Montana Supreme Court described that right as the ability to "parent free from state interference." *Id.* at 38a. As Petitioners' *amici* concede, this Court's decisions recognizing "a parent's constitutional rights … have thus far been understood to operate against

the government, not private actors." Florida Amicus Br. 12.

There is good reason for that: the decisions of this Court enforcing the bedrock right of "parents to make decisions concerning the care, custody, and control of their children" have all involved instances where the government sought to use its coercive power to affirmatively intrude upon the relationship between a parent and a child.

1. First came *Meyer v. Nebraska*, 262 U.S. 390 (1923). There, the Court held that Nebraska could not use its "compulsory laws" to punish a teacher for teaching a child German at the direction of the child's parents, as the Due Process Clause protected the parents' right "to engage him so to instruct their children." *Id.* at 400. This was within "the power of parents to control the education of their own." *Id.* at 401.

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court held that a compulsory education requirement "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The Fourteenth Amendment, the Court explained, "excludes any general power of the state to standardize its children *by forcing them* to accept instruction from public teachers only." *Id.* at 535 (emphasis added).

About two decades later, when Massachusetts convicted a mother of violating child labor laws after her daughter was found distributing Jehovah's Witness magazines, the Court began sketching the outer limits of the parental right. *Prince v.*

Massachusetts, 321 U.S. 158 (1944). While recognizing that there is a "private realm of family life which the state cannot enter," *Prince* held that "the family itself is not beyond regulation in the public interest." *Id.* at 166. The Court acknowledged "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. In *Prince*, "the rightful boundary of [Massachusetts'] power ha[d] not been crossed." *Id.* at 170.

In 1972, when confronted by Illinois' attempt to strip an unwed father of his parental rights without a hearing on his fitness to be a father, this Court repudiated that attempt under the Fourteenth Amendment, citing its protection of "[t]he integrity of the family unit." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."). That same year, when Wisconsin tried to punish Amish parents for violating a compulsory school-attendance law by not sending their children to school because their faith prohibited it, this Court concluded that the Due Process Clause forbade Wisconsin "from compelling [the parents] to cause their children to attend formal high school to age 16." *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

Fast forward to this millennium. In *Troxel v. Granville*, 530 U.S. 57 (2000), this Court addressed whether a state court's decision to award visitation rights violated the Fourteenth Amendment. A plurality of the Court concluded that it did, as the state court pressed its thumb on the scale "in favor of

grandparent visitation," while not according "any material weight" to the "fit custodial parent." *Id.* at 72 (O'Connor, J., plurality op.). The plurality cautioned that the decision was limited to its facts, and noted the plurality's hesitation to hold "that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73. Justice Scalia, dissenting against "[j]udicial vindication of 'parental rights,'" noted that "no one believes[] the parental rights are to be absolute." *Id.* at 92-93 (Scalia, J., dissenting).

In each of these cases, a state undertook an affirmative act that interfered with—or in some cases, terminated—the parent-child relationship. *See Bellotti v. Baird*, 443 U.S. 622, 639 n.18 (1979) (explaining that this line of cases, including *Pierce*, *Yoder*, and *Prince*, "all have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State"). As the Montana Supreme Court correctly concluded, none of these decisions endorses the power of the State being used "to enhance parental control" in a manner that places the minor and the parent "obviously in conflict," leaving "the family structure … fractured." Pet. App. 38a. The right for which Petitioners advocate is an affirmative one that allows parents to effectively conscript the State into ensuring that the minor's pregnancy decision is dictated by the parent's will. There is no basis in our federal Constitution for such commandeering.

2. Petitioners seek a sweeping declaration that a minor's right to privacy cannot "artificially limit[] parents' fundamental rights." Pet. 28. After *Dobbs*, they reason, there is no need to "balanc[e] parents'

and minors' federal fundamental rights," as such balancing "no longer makes sense." *Id.* at 27.

But Petitioners' apparent conception of parental rights as absolute has never been compelled by this Court's *abortion* jurisprudence. Rather, this Court has long recognized that the broader interests of the child must be accounted for along with parental rights—it is this analysis that curbs what would otherwise be an absolute parental right. That principle is almost as old as the recognition of the constitutional parental right itself, as *Prince* so demonstrates. *See* 321 U.S. at 166 ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control…."). Petitioners' interest in protecting parental rights cannot be "absolute to the exclusion or subordination of all other interests." *Yoder*, 406 U.S. at 215. This Court has always resisted the sort of broad pronouncements about the *weight* of parental rights that Petitioners seek here regarding a minor's medical decisions. *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[P]arents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized."); *Yoder*, 406 U.S. at 233-34 ("the power of the parent, even when linked to a free exercise claim, may be subject to limitation … if it appears that parental decisions will jeopardize the health or safety of the child"); *see also Troxel*, 530 U.S. at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context.").

The Montana Supreme Court properly considered parents' rights as supported by this Court's century of precedent. The court's protection of a minor's right to

privacy is not any less of a deserving counterweight to the federal Constitution's guarantee of parental rights, simply because that protection inheres in Montana's constitution.

3. Petitioners' claim (at 22) that the Montana Supreme Court got it "egregiously wrong" on parental rights is more punchline than precedent. The petition repeats superficial references to the *Troxel* plurality's observation that the Court has long recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. It makes no meaningful effort to link this Court's line of parental-rights precedents to its assertion of an apparently absolute right of parents to "participate in important decisions about the minor's medical care." Pet. 22-23. That is no surprise, given that Petitioners' attempt to turn parental rights into a legislative cudgel is entirely inconsistent with this Court's caselaw, which characterizes those rights as a shield from state interference.

Instead, Petitioners play *Dobbs* as a trump card that vitiates any need to consider "parents' and minors' fundamental rights." *See id.* at 23-24. They cite pre-*Dobbs* decisions on whether parental notification and consent laws violate a minors' federal due process rights, as if to suggest that *Dobbs* has wiped the slate clean. *See id.* at 23; *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (per curiam) (summarizing this Court's prior decisions on parental notification and consent laws). But none of the pre-*Dobbs* decisions held that there is a constitutional guarantee of parental notice or consent. And the absence of a federal right to abortion is not a basis for

trampling state constitutional rights. *Dobbs* does not diminish the independent force of these state constitutional safeguards.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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