IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0272

PLANNED PARENTHOOD OF MONTANA, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

MONTANA FAMILY FOUNDATION'S AMICUS CURIAE BRIEF

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INTRODUCTION

The Montana Family Foundation ("MFF") respectfully submits this *amicus curiae* brief in support of Appellants. While several issues of statewide importance are implicated by this matter, MFF writes to address whether the District Court's expansive interpretation of minor's rights under Article II, section 15 of the Montana Constitution impermissibly infringes on fundamental parental rights.

In evaluating the Parental Consent for Abortion Act (hereinafter the "Consent Act"), the District Court correctly recognized the "peculiar vulnerability of children," but erroneously characterized the exercise of parental rights and responsibilities as "interference." (Doc. 301 at 22). The irony of the District Court's mischaracterization of the role of parents is that it *interferes* with the exercise of fundamental parental rights and deprives minors of a long-recognized protection against youth and immaturity. Parents—who are presumed to act in the best interests of their children—have a right and obligation to make significant healthcare decisions on behalf of their children. To be sure, a parent's right to make healthcare decisions on behalf of their child does not supersede the States' power to regulate experimental and dangerous drugs or medical treatments. *See e.g., L.W. v. Skrmetti*, 83 F.4th 460, 2023 U.S. App. LEXIS 25697 (6th Cir. 2023) (holding broad parental authority over children does not grant a constitutional right to obtain banned

treatments for their children). For legal and available healthcare procedures, however, Article II, section 15 of the Montana Constitution must not be construed to deprive parents of their primary, and ultimate, decision-making authority with respect to their own children.

The District Court's opinion is inconsistent with our nation's traditional understanding that parents have a right to consent to, or withhold consent from, medical decisions on behalf of their children. This Court should reverse the District Court to enter summary judgment in favor of Appellants.

ARGUMENT

I. Parents have a fundamental right to make decisions about their children's healthcare.

It is "deeply rooted in [our] Nation's history and tradition" that parents have a right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). This recognition of parental rights is established "beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Likewise, in Montana, it is "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). These parental rights encompass "a fundamental right to make decisions concerning the medical care of their children." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927

F.3d 396, 418 (6th Cir. 2019); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19 (recognizing that parents have a "constitutional right to make decisions concerning the care, custody, and control of [their] child").

The United States Supreme Court has consistently framed parental rights in terms of a "decisional framework"—in other words, *who* has the responsibility to make decisions on behalf of a child. *Troxel*, 530 U.S. at 69. Moreover, the Court has long acknowledged that parents possess the primary, and ultimate, decision-making authority with respect to their own children. *E.g.*, *Yoder*, 406 U.S. at 232 (acknowledging the "primary role of the parents"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children.").

Put another way, "[p]arental rights are essentially a recognition of parents' authority to make decisions on behalf of or affecting their children, even when others (including state authorities) may disagree with those decisions." Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 Notre Dame J.L. Ethics & Pub. Pol'y 397, 402 (2023). The rights of parents are properly examined based upon who has the "ultimate decision-making authority." Martin Guggenheim, *The (Not So) New Law of the Child*, 127 Yale L.J. Forum 942, 947 (2018); *see* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 133 (2000)

(questioning whether children are better served if "contested matters" about their life "are determined by the State, rather than by [their] family").

The decision-making authority of parents is premised upon two assumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and that "natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232; *see* Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83, 108 (2009) (acknowledging common law understanding that parents have "both the responsibility and the authority to … make important decisions on their [child's] behalf"); *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring and dissenting) ("The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf.").

Included in the "broad parental authority over minor children" is a parent's right and responsibility to make decisions concerning their child's healthcare. *Parham*, 442 U.S. at 602. Parents have a "high duty"—and corresponding right—"to recognize symptoms of illness" in their child, and "to seek and follow medical advice." *Id*. As "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning … their need for medical care," parents "can and must

make those judgments." *Id*. at 603. Consequently, parents hold the decision-making authority to determine whether to grant or withhold informed consent for healthcare procedures on behalf of their children and to choose for their children which of the legally permissible medical options to pursue.

To understand the scope of parental rights "[h]istorical inquiries … are essential." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022). Examination of common law sources is particularly relevant. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing "liberty" in the Due Process Clause as "the right of the individual … generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

One of the most influential common-law sources, William Blackstone, wrote concerning the *duties* parents owe their children, as opposed to the *rights* parents hold against the state. *See* 1 William Blackstone, *Commentaries* *447-448, 450, 452 (10th ed. 1787).[1] The law permits a parent the decision-making authority over a child, "partly to enable the parent more effectually to perform his duty." *Id*. at *452. For example, at common law, minors required parental consent to marry, in order for the minor to be protected from "the snares of artful and designing persons." *Id*. Since the government expects parents to protect their children, parents are allowed to make

[1] https://hdl.handle.net/2027/mdp.35112203968112

decisions for their children, particularly with respect to significant decisions like marriage or healthcare.

Another influential common-law source, Chancellor James Kent—the "American Blackstone"—also expounded concerning the duties parents owe to their children. *See* Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent & the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 380 (2009). As Kent explains, children require protection, and a child's parents are "the most fit and proper" decisionmakers to provide that protection. *See* 2 James Kent, *Commentaries on American Law* *189 (10th ed. 1860)[2] (the "weaknesses of children render it necessary that some person maintains them…"). As a result, our American legal system acknowledges parental duties "prescribed … by those feelings of parental love and filial reverence which Providence has implanted in the human breast." *Id*.

In recognition of natural parental duties, our Nation's history and traditions have granted parents corresponding legal rights. *See* 2 James Kent, *Commentaries on American Law* *203 (recognizing parents "are bound to maintain and educate their children" so "the law has given them a right to such authority…"). Indeed, cultures which failed to acknowledge and grant such parental rights were built "upon the principle, totally inadmissible in the modern civilized world, of the absorption of the individual in the body politic, and of his entire subjection to the despotism of

[2] https://hdl.handle.net/2027/mdp.35112104656196

the state." *Id*. at *195; *see Meyer*, 262 U.S. at 402 (discussing antiquated notions about "the relation between individual and state" as "wholly different from those upon which our institutions rest"); *compare Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state"). Such "statist notion[s]" are "repugnant to American tradition." *Parham*, 442 U.S. at 603.

Montana law concerning a minor's fundamental right to marriage has not departed from these common-law roots. Mont. Code Ann. § 40-1-213. This statutory scheme provides for judicial discretion for the issuance of a marriage license and certificate to a 16- or 17-year-old "who has no parent capable of consenting" or, alternatively, a minor who has obtained "the consent of both parents." *Id*. In addition to obtaining parental consent, the minor must participate in at least two separate marriage counseling sessions at least 10 days apart. *Id*. As parents are presumed to act in the best interests of their children, the law affords them authority to make important decisions concerning their children, even when their child's fundamental rights—like marriage or healthcare—are implicated.

There is perhaps no right more "essential to our Nation's 'scheme of ordered liberty'" than a parent's right to make decisions for their children. *Dobbs*, 142 S. Ct. at 2246 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019)). It naturally follows that our entire societal framework presupposes that parents will act on behalf of their

children. *See Troxel*, 530 U.S. at 66 (plurality op.) (highlighting the Court's "extensive precedent" on this issue).

To fully appreciate what this means for a parent's right to make healthcare decisions requires an understanding of an adult's own healthcare decision-making authority. "At common law, even the touching of one person by another without consent and without legal justification was a battery." *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). Thus, "informed consent is generally required for medical treatment." *Id*. "The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." *Id*. at 270. As a general rule, the law affords adults the right to choose whether they will undergo a legally available healthcare procedure.

Parental decision-making authority on behalf of their children is not dissimilar to an adult's own decision-making authority. Parents generally have the right to make decisions for their minor children that children would make for themselves if they were adults, and "[n]either state officials nor federal courts are equipped to review such parental decisions." *Parham*, 442 U.S. at 603-04.

Consequently, parents have the right to consent to, or withhold consent from, healthcare procedures on behalf of their children, whether "a tonsillectomy, appendectomy, or other medical procedure." *Parham*, 442 U.S. at 603. A child's lack of capacity to care for themselves means they "do not possess the right to make

medical decisions for themselves." *Kanuszewski*, 927 F.3d at 419. Instead, the child's parents hold that right. *Id*.

The Ninth Circuit has opined similarly in its reversal of summary judgment against two parents' healthcare decision-making claim based on a county's failure to obtain their consent. *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1164, 1167 (9th Cir. 2018). The county had performed an invasive "gynecological and rectal exam" on the children, *id.* at 1158, despite having no need to collect evidence related to this exam, *see id*. at 1163. Performing such an exam "without notifying the parents about the examinations and *without obtaining either parents' consent* or judicial authorization" violated the parents' rights. *Id*. at 1161; *see also Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) ("It is not implausible to think that the rights invoked here—the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child—fall within this sphere of protected liberty.").

This jurisprudence does not render parental decision-making authority limitless, but our country's longstanding presumption is "that fit parents act in the best interests of their children," in healthcare decision-making and elsewhere. *Troxel*, 530 U.S. at 68 (plurality op.). "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent

to make the best decisions concerning the rearing of that parent's children." *Id*. at 68-69.

II. The District Court's Analysis Interferes with Fundamental Parental Rights.

The District Court mistakenly framed the application of the Consent Act as a "conflict of interest … between parent and child" and mischaracterized the exercise of parental decision-making authority as "interference." (Doc. 301 at 22). It is from this framework that the District Court reached an erroneous conclusion which, if applied to other potential parent and child conflicts of interest, would lead to absurd results.[3] Because parental rights are ultimately about *who* makes decisions on behalf of children, government actors violate those rights when they directly override a parental decision, make a decision that is otherwise reserved for parents, or when they attempt to "transfer the power to make [a] decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603.

There are a number of examples from across the nation as to how parental rights are violated in this context. First, in *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swim coach, suspecting that a swimmer was pregnant, discussed the matter with others and then pressured the girl to take a pregnancy test,

[3] As Appellants note, the District Court's analysis would eviscerate the parental decision-making authority in other laws. *See* Mont. Code Ann. § 40-1-213 (right to marry); Mont. Code Ann. § 41-1-402 (right to consent to medical services); Mont. Code Ann. § 45-8-344 (right to bear arms).

rather than obtaining consent from her parents. *Id*. at 295-97, 306. The mother sued, arguing that the coach's "failure to notify her" "obstruct[ed] [her] parental right to choose the proper method of resolution." *Id*. at 306. Although the court found that the defendants had qualified immunity, it also held that the mother had "sufficiently alleged a constitutional violation" premised on the coach's "arrogation of the parental role": "Public schools must not forget that 'in loco parentis' does not mean 'displace parents.'" *Id*. at 306-07. From the court's perspective, the coach had "usurp[ed]" the mother's decision-making authority over a particular decision involving the child—how to handle the pregnancy. *Id*.

Likewise, in *Arnold v. Bd. of Educ. of Escambia Cnty*., 880 F.2d 305 (11th Cir. 1989), the court found a parental-rights violation where school staff allegedly coerced a minor student to obtain an abortion and to hide this from her parents. *Id*. at 308-09. This "unduly interfere[d] with parental authority in the household and with the parental responsibility to direct the rearing of their child." *Id*. at 313. Hiding the decision from the parents "deprive[d] [them] of the opportunity to counter influences on the child [they] find inimical to their religious beliefs or the values they wish instilled in their children." *Id*. Such action violated parental rights because the government actors made significant healthcare decisions for a particular child—the sort of decision that parents "can and must make." *Parham*, 442 U.S. at 603.

As outlined above, a parent's decision-making authority includes the right to say "no" to a child's request, or in the context of healthcare, the right to withhold consent. "The fact that a child may balk … does not diminish the parents' authority to decide what is best for the child." *Id*. at 604. Thus, parental rights are violated when parental decision-making authority is circumvented, and the parental role is abrogated such that they are prevented from consenting, or withholding consent, to health care services. *E.g., Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) (noting "the general rule … that the consent of the parent is necessary for an operation on a child").

In all of the above cases and examples, the parents' right and duty to make decisions concerning their children—a role reserved for parents—has been displaced, replaced, or otherwise abrogated. Such evisceration of parental decision-making authority is "repugnant to American tradition." *Parham*, 442 U.S. at 603. While states are permitted to regulate what kinds of medical treatments are generally available (e.g., abortion procedures), it cannot act as the parent and make a decision for a particular child, or worse yet, leave a child of "peculiar vulnerability" to make significant healthcare decisions without the benefit and guidance of their parents. *Belloti v. Baird*, 443 U.S. 622, 634 (1979) (plurality op.).

When making healthcare decisions for their children, parents exercise an individual right that their children lack capacity to exercise. "[T]he legal parents of

a child have an implicit fundamental constitutional right to the custody, care, rearing, companionship, and to determine the best interests of their child or children vis-à-vis nonparent third parties including state governments under state law." *Sayler v. Yan Sun*, 2023 MT 175, ¶ 33. This Court has thus held, as a matter of law, that "a parent's fundamental federal constitutional right to parent his or her child thus 'prevails over' any nonparent's claim of parental or custodial interest or right regarding the child." *Id*. at ¶¶ 33, 37 (discussing legislative policy to uphold the "integrity of the family unit" by preserving the "parent-child relationship in accordance with the parent's constitutional right to 'control of [the] child.'"). This parental right is, at the core, "derivative from, and therefore no stronger than" a child's own right to consent to an available medical procedure. *Whalen v. Roe*, 429 U.S. 589, 604 (1977). Conversely, a parent's "rights to make decisions for his daughter can be no greater than his rights to make medical decisions for himself." *Doe ex rel. Doe v. Pub. Health Tr. of Dade Cnty*., 696 F.2d 901, 903 (11th Cir. 1983).

Ultimately, this Court has the chance to correct and clarify the District Court's interpretation of Article II, section 15 of the Montana Constitution to account for the fundamental rights of parents to "make decisions concerning the care, custody, and control of [their] child." *Snyder*, 2010 MT 151, ¶ 19. Given the law's general presumption that parents act in their child's best interests, parents must be afforded the opportunity to exercise their fundamental rights, particularly when dealing with

significant medical decisions related to their children. The District Court's analysis does not *enhance* protections for minors; instead, it is a hindrance to parents, who have an obligation to protect their children and who have the right to consent to, or withhold consent from, medical procedures for their minor children.

CONCLUSION

For the reasons stated herein, this Court should reverse and instruct the District Court to enter summary judgment in favor of the State.

DATED this 15th day of November, 2023.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Montana Family Foundation *Amicus Curiae* Brief is proportionately spaced, printed with the typeface Times New Roman, 14 point font, is double-spaced, is not longer than 14 pages, and contains 3,195 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

DATED this 15th day of November, 2023.

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