IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-288

PLANNED PARENTHOOD OF MONTANA, and SAMUEL DICKMAN, M.D., on behalf of themselves and their patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, the MONTANA DEPARTMENT OF PUBLIC HEALTH & HUMAN SERVICES, and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services,

Defendants and Appellants.

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, Cause No. ADV 23-231, Hon. Mike Menahan Presiding

# APPELLEES' ANSWER BRIEF

**APPEARANCES:**

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

Michelle Nicole Diamond*
Alex W. Miller*
Rishita Apsani*
Sean Chang*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
michelle.diamond@wilmerhale.com

Dylan Cowit*
Planned Parenthood Federation of America, Inc.
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
Dylan.Cowit@ppfa.org

Diana O. Salgado*
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
(202) 973-4862
diana.salgado@ppfa.org

Peter Kurtz*
Wilmer Cutler Pickering Hale and Dorr LLP
1225 17th Street, Suite 2600
Denver, CO 80202
(720) 274-3135
peter.kurtz@wilmerhale.com

**Admitted pro hac vice*

**ATTORNEYS FOR PLAINTIFFS-APPELLEES**

Emily Jones
*Special Assistant Attorney General*
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

**ATTORNEYS FOR DEFENDANTS-APPELLANTS**

Austin Knudsen
*Montana Attorney General*
Michael D. Russell
Thane Johnson
Alwyn Lansing
*Assistant Attorneys General*
Montana Dept. of Justice
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov

## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1

STATEMENT OF THE ISSUES ..... 3

STATEMENT OF THE CASE ..... 4

STATEMENT OF FACTS ..... 8

A. Abortion Care in Montana ..... 8

B. The Challenged Laws ..... 12

1. HB 721 ..... 12

2. HB 575 ..... 12

STANDARD OF REVIEW ..... 13

SUMMARY OF THE ARGUMENT ..... 14

ARGUMENT ..... 16

I. The District Court Did Not Manifestly Abuse Its Discretion in Preliminarily Enjoining HB 721 and HB 575 ..... 16

A. HB 721 and HB 575 likely violate the Montana Constitution. ..... 16

1. The challenged laws infringe the right to privacy. ..... 17

a. HB 721 ..... 17

b. HB 575 ..... 19

2. The challenged laws fail strict scrutiny. ..... 21

a. HB 721 ..... 22

b. HB 575 ..... 23

B. HB 721 and HB 575 will cause irreparable harm absent preliminary relief. ..... 26

C. The balance of equities and public interest weigh in favor of relief. ..... 28

II. Providers Have Standing to Sue on Behalf of Their Patients ..... 29

III. The State's Arguments Concerning the Form of the District Court's Order Are Irrelevant and Meritless ..... 32

A. The district court applied the correct legal standard in its now-superseded oral preliminary injunction ruling. ..... 32

B. The district court did not manifestly abuse its discretion in adopting Providers' proposed order. ..... 35
C. The preliminary injunction is not overbroad. ..... 38
CONCLUSION ..... 41
CERTIFICATE OF COMPLIANCE ..... 42

## TABLE OF AUTHORITIES

### CASES

Page(s)

*Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 .....1, 3, 16, 21, 22, 29, 30

*Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987).....41

*Califano v. Yamasaki*, 442 U.S. 682 (1979) .....40

*Davis v. Westphal*, 2017 MT 276, 389 Mont. 251, 405 P.3d 73 .....33

*Ditton v. Department of Justice Motor Vehicle Division*, 2014 MT 54, 374 Mont. 122, 319 P.3d 1268 .....25

*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) .....30, 31

*Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021).....31

*Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) .....28

*Ellison v. Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989) .....34

*Evenson-Childs v. Ravalli County*, No. CV 21-89-M-DLC-KLD, 2023 WL 2705902 (D. Mont. Jan. 13, 2023) .....33

*Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576 .....39, 40

*In re Marriage of Boyer*, 261 Mont. 179, 862 P.2d 384 (1993).....35

*In re Marriage of George & Frank*, 2022 MT 179, 410 Mont. 73, 517 P.3d 188 .....35

*In re Marriage of Williams*, 2018 MT 221, 392 Mont. 484, 425 P.3d 1277 .....37

*Koeppen v. Bolich*, 2003 MT 313, 318 Mont. 240, 79 P.3d 1100.....25, 26

*McClanahan v. Salmonsen*, No. CV 22-20-H-BMM, 2023 WL 4409150 (D. Mont. July 7, 2023) .....33

*Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) .....3, 28

*Montana Cannabis Industry Ass'n v. State*, 2012 MT 201, 366 Mont 224, 286 P.3d 1161 .....7, 26, 27

*Montana Democratic Party v. Jacobsen*, 2022 MT 114, 410 Mont. 114, 518 P.3d 58 .....23

*Olsen v. McQueary*, 212 Mont. 173, 687 P.2d 712 (1984).....35, 38

*Planned Parenthood Great Northwest. v. State*, 522 P.3d 1132 (Idaho 2023) .....31

*Planned Parenthood of Montana v. State*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301 ..... 1, 14, 18, 21, 23, 26, 27, 32, 37

*Planned Parenthood of Montana v. State*, No. DV21-00999, 2021 WL 9038524 (Mont. Dist. Ct. Oct. 7, 2021).....23, 26, 27

*Playmakers LLC v. ESPN, Inc.*, 376 F.3d 894 (9th Cir. 2004).....34

*Reichert v. State ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455 .....39

*Satanic Temple, Inc. v. Rokita*, No. 1:22-CV-01859-JMS-MG, 2023 WL 7016211 (S.D. Ind. Oct. 25, 2023) .....31

*Singleton v. Wulff*, 428 U.S. 106 (1976) .....31

*State v. Reynolds*, 2017 MT 25, 386 Mont. 267, 389 P.3d 243 .....13

*U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091 (9th Cir. 2010).....33

*United States v. Moroyoqui-Gutierrez*, 602 F. App'x 378 (9th Cir. 2015) .....34

*United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).....39

*United States v. Robinson*, 20 F.3d 1030 (9th Cir.1994).....34

*University of Texas v. Camenisch*, 451 U.S. 390 (1981).....33

*Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4 ... 5, 13, 14, 16, 17, 26, 30

*Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798 ... 1, 5, 8, 16, 18, 21, 25

*Wurl v. Polson School District No. 23*, 2006 MT 8, 330 Mont. 282, 127 P.3d 436 .....35

**OTHER AUTHORITIES**

HB 575 (Mont. 2023)..... 2, 4, 5, 6, 7, 12, 13, 14, 15, 16, 19, 20, 21, 23, 26, 27, 28, 29, 30, 32, 36, 37, 38, 39, 40

HB 721 (Mont. 2023)..... 1, 2, 4, 5, 7, 12, 14, 15, 16, 17, 18, 21, 22, 26 27, 28, 29, 30, 32, 36

SB 191 (Mont. 2023) .....5, 15, 16, 33

## INTRODUCTION

Before the Court is the State's latest attempt to infringe Montanans' fundamental right to privacy and abrogate *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. For the third time in as many years, the State asks this Court to overturn an injunction protecting "a woman's right to seek and obtain pre-viability abortion services." *Id*. ¶ 39; *see also Planned Parenthood of Mont. v. State*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301; *Weems v. State*, 2023 MT 82, 412 Mont. 132; 529 P.3d 798 ("*Weems II*"). But the Montana Constitution no less "protects a woman's right to procreative autonomy" today than it did last year, or the year before that. *Armstrong*, ¶ 14. Article II, Section 10 "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference." *Planned Parenthood of Mont.*, ¶ 20 (quoting *Armstrong*, ¶¶ 2, 14). As a result, the State cannot prohibit pre-viability abortion care unless such restrictions are narrowly tailored to address "a medically acknowledged, *bona[ ]fide* health risk, clearly and convincingly demonstrated." *Id.* (quoting *Armstrong*, ¶¶ 34, 62). Once again, the State cannot clear that bar.

Two laws are at issue here. Both violate the fundamental right to privacy. House Bill ("HB") 721 effectively bans abortions beginning at 15 weeks of pregnancy by prohibiting dilation and evacuation ("D&E") abortions, which the

district court found are safe, effective, and the only feasible method for obtaining abortions in Montana at that stage of pregnancy. Order at 10, 13 (Supp. App. A). HB 575 bans the provision of medication abortions ("MABs") through telehealth by requiring every person seeking an abortion to first have an ultrasound, even when their provider determines that an ultrasound is medically unnecessary.

After considering the parties' briefing and affidavits, and conducting a full evidentiary hearing, the district court correctly concluded that these laws are likely unconstitutional because they infringe the right to seek and obtain pre-viability abortions without protecting pregnant patients from a medically acknowledged, bona fide health risk. Order at 7–8. The D&E abortions HB 721 bans are universally regarded as safe and effective. The ultrasounds HB 575 requires before every MAB impose severe burdens on accessing care for no medical purpose, and Planned Parenthood of Montana has been safely providing MABs using telehealth up to 11 weeks into pregnancy to eligible patients without an ultrasound for years. Accordingly, the district court correctly found that permitting HB 721 and HB 575 to take effect would irreparably harm providers' patients by prohibiting constitutionally protected health care. The district court then properly found that the balance of equities and public interest weigh in favor of preserving the status quo during the pendency of this litigation because "it is always in the public interest to

prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted).

On appeal, the State strikes a familiar refrain. It seeks to vitiate or overrule *Armstrong* by subjugating the fundamental right to privacy to ipse dixit assertions of "health and safety." Br. at 25–32 & 29 n.8. Against decades of precedent, it contests abortion providers' standing to sue on behalf of their patients. Br. at 21–23. And it recasts its inability to offer sufficient evidence (or more often, any evidence) as the district court's failure "to properly consider the facts" and exercise "independent judgment." Br. at 16. All of these arguments are meritless, most are inappropriate on appeal from a preliminary injunction, and none demonstrate the district court manifestly abused its discretion in preliminarily enjoining laws that violate the fundamental right "to seek and to obtain … a pre-viability abortion." *Armstrong*, ¶ 75. This Court should affirm.

## STATEMENT OF THE ISSUES

A. Whether the district court manifestly abused its discretion in preliminarily enjoining two laws that would unconstitutionally infringe Montanans' fundamental rights by banning safe methods of providing pre-viability abortions.

B. Whether, on appeal from a preliminary injunction, this Court should overrule decades of precedent correctly holding that abortion providers have standing to sue on behalf of their patients.

C. Whether the district court properly considered the State's evidence when making credibility determinations and weighing the record, first from the bench following a hearing, and then in the written order now on appeal.

## STATEMENT OF THE CASE

On April 10, 2023, Planned Parenthood of Montana ("PPMT") and its Chief Medical Officer Dr. Samuel Dickman (collectively, "Providers") filed a verified complaint challenging the constitutionality of HB 721 and moved for a temporary restraining order. The motion was initially denied as premature because the Governor had not yet signed the law. The following month, Providers filed an amended verified complaint adding a challenge to HB 575. Providers again sought temporary restraining orders, which were granted against HB 575 on May 4, 2023 and HB 721 on May 16, 2023. They also filed motions for preliminary injunctions against both laws. Evidentiary hearings on those motions, along with the pending motion for a preliminary injunction in DA-23-299, were set for May 23, 2023.

At the hearings, the court heard testimony from six witnesses, which for this case included Dr. Dickman, Providers' expert Dr. Steven Ralston, and the State's expert Dr. George Mulcaire-Jones. Dr. Mulcaire-Jones also submitted a written declaration in support of the State's opposition to the preliminary injunction motions. Following testimony and argument, the district court preliminarily enjoined both laws pending the issuance of a written order. Tr. 169:13–25 (Supp. App. B). The court explained that its decision was "based upon the evidence and testimony presented," and that a ruling from the bench was necessary because the laws would become effective immediately absent relief. Tr. 169:13–21. The court

stated it was applying the legislature's "recent enactment" of a preliminary injunction standard that "mirror[ed] … federal law" by requiring an evaluation of the merits of Providers' claims. Tr. 169:1–8.

The court issued its written order on July 11, 2023. It first held that Providers had standing to sue on behalf of themselves and their patients, relying on decades of precedent holding that "when governmental regulation directed at health care providers impacts the constitutional rights of women patients, the providers have standing to challenge the alleged infringement of such rights." Order at 5 (quoting *Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 350, 440 P.3d 4 ("*Weems I*")). The court then applied the four-part preliminary injunction standard set forth in Senate Bill ("SB") 191, 2023 Leg. Reg. Sess. (Mont. 2023) (amending § 27-19-201, MCA). In evaluating Providers' likelihood of success on the merits, the court concluded that HB 721 and HB 575 both ban certain pre-viability abortions, thereby infringing the right to privacy and triggering strict scrutiny. Order at 7. As a result, the State was required to show through clear and convincing evidence that the bans were necessary to prevent a "medically-acknowledged, [bona fide] health risk." Order at 7 (quoting *Weems II*, ¶ 37) (alteration in original).

After weighing the evidence and making credibility determinations, the court found that the State failed to do so. As to HB 721, the court determined that the preliminary injunction record demonstrated that D&E procedures are safe and

effective, and the State's proposed alternatives increase the risks to patients' health. As to HB 575, the court found that MABs provided directly to patients through telehealth are exceedingly safe, and that requiring all patients to undergo an ultrasound—which necessarily occurs in person—prior to receiving a MAB would not address any medically acknowledged, bona fide health risk. The court noted the State's expert's testimony that ultrasounds were "the standard of care" for abortions, but credited the contrary testimony of Dr. Dickman and Dr. Ralston because Dr. Mulcaire-Jones had never actually performed an abortion and the medical consensus contradicted his position. The court also credited Providers' evidence that ultrasounds are not always medically necessary to screen for ectopic pregnancies, in light of the evidence-based procedures Providers already have in place to screen for that risk and determine which patients can safely forgo an ultrasound. Finally, the court emphasized that "[t]here is no dispute that all MABs provided by Plaintiffs are pre-viability abortions" because PPMT provides direct-to-patient MABs only up to 11 weeks after a patient's last menstrual period ("LMP"), which is "nearly 13 weeks—or three months—before the 24-week point of fetal viability presumed by the text of HB 575," and "a provider can accurately determine gestational age" without an ultrasound for those patients that pass the screening procedures employed by PPMT. Order at 2, 9.

The court then found that Providers had demonstrated irreparable harm, and that the public interest and balance of equities weighed in favor of preliminary relief. As the court explained, "[i]t is well-established that the deprivation of constitutional rights—including the right to privacy—is itself irreparable harm." Order at 11 (citing *Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161). Absent preliminary relief, patients would immediately be denied access to constitutionally protected pre-viability abortion care. Order at 11–13. In addition to the deprivation of constitutional rights, the court further found that "patients also face irreparable harm to their *health* if HB 575 and 721 are not preliminarily enjoined." Order at 12 (emphasis added). HB 575 "may cut off access to an abortion altogether" for some patients, and HB 721 would leave patients seeking abortions more than 15 weeks into their pregnancies with "no feasible alternatives … in Montana." Order at 12–13. As to the balance of equities and public interest, the court concluded that maintaining the status quo during the pendency of the litigation—and thus preserving Montanans' fundamental right to privacy—outweighs the State's (non-existent) interest in enforcing laws that likely violate the Montana Constitution. Order at 13.

## STATEMENT OF FACTS

### A. Abortion Care in Montana

Abortion is one of the safest medical procedures available in the United States and is markedly safer than carrying a pregnancy to term and giving birth. Amend. Compl. ¶ 29 (Supp. App. C); *Weems II*, ¶ 48 ("The overwhelming evidence amassed in the District Court record established that abortion care is one of the safest procedures in this country and the world."). Complications occur in only 0.05% to 4% of D&E abortions, and the procedure is "evidence-based and medically preferred because it results in the fewest complications for women compared to alternative procedures" available at the same stage of pregnancy. Amend. Compl. ¶ 44. MAB is also extremely safe—the associated risks are similar to those of taking commonly prescribed over-the-counter medications like ibuprofen. Amend. Compl. ¶¶ 64 n.16 & 65. MABs provided directly to patients via telehealth are just as safe as those provided in a health center, and requiring ultrasounds for every patient does not reduce the already low risk of complications. Amend. Compl. ¶ 65; Tr. 108:17–109:2.

PPMT is the largest provider of reproductive health care in Montana and one of the few abortion providers in the state. Amend. Compl. ¶ 15. Dr. Dickman is PPMT's Chief Medical Officer. Amend. Compl. ¶ 17. Dr. Dickman has extensive experience in primary and reproductive care, including providing and supervising

the provision of abortions. Amend. Compl. ¶ 17. PPMT is headquartered in Billings and operates five health centers: two in Billings (Planned Parenthood Heights and Planned Parenthood West), one in Missoula, one in Great Falls, and one in Helena.[1] Amend. Compl. ¶ 14. Through these centers and telehealth, PPMT serves more than 11,000 people annually, including many Montanans with low-incomes or in rural areas. Amend. Compl. ¶ 15.

PPMT offers clinical, educational, and counseling services. Amend. Compl. ¶ 15. These services include pregnancy diagnosis and counseling; contraceptive counseling; provision of all methods of contraception; HIV/AIDS testing and counseling; testing, diagnosis, and treatment of sexually transmitted infections; screenings for cervical and breast cancer; gender affirming care; miscarriage management; and abortions. Amend. Compl. ¶ 15.

PPMT provides both procedural abortions and MABs. Amend. Compl. ¶ 37. For procedural abortions beginning at approximately 15 weeks LMP, PPMT uses a D&E procedure. Amend. Compl. ¶ 42. In Montana, D&E is the safest, most common, and most effective abortion method available starting at approximately 15 weeks LMP. Amend. Compl. ¶ 42. PPMT offers MABs up to 11 weeks LMP.

[1] The Billings Heights health center has been closed since late December 2021 due to ongoing repairs stemming from a burst pipe. Patients are referred to other PPMT health centers or other providers when they call seeking medical services at the Billings Heights health center.

Amend. Compl. ¶ 32. It does so in-person and through two forms of telehealth: site-to-site and direct-to-patient. Amend. Compl. ¶ 34. Site-to-site MAB involves a patient at a PPMT health center connecting through a telehealth platform with an abortion provider located at another PPMT health center. Amend. Compl. ¶ 35 n.7. For direct-to-patient MAB, a patient located anywhere in Montana consults with a PPMT provider via telehealth. Amend. Compl. ¶ 36. When patients contact PPMT seeking to schedule a direct-to-patient MAB, they are initially screened with a series of questions about their LMP, medical history, and how they learned they are pregnant. Tr. 101:10–103:9. Patients are only eligible for a direct-to-patient MAB if they have no indications that would make an ultrasound medically necessary, such as risk factors, symptoms for an ectopic pregnancy, or uncertainty about the dates of their last menstrual period. Tr. 101:24–103:9. Patients that pass the eligibility screening are scheduled for a telehealth appointment with a provider. During the subsequent visit, the patient and provider review the patient's medical history together (including the date of the patient's LMP, which is used to calculate the gestational age of the pregnancy). Amend. Compl. ¶ 36. The provider then obtains the patient's informed consent, and explains options available to them. Amend. Compl. ¶ 36. For patients eligible for a direct-to-patient MAB, the provider instructs them on when and how to take the medication and counsels them on potential side effects. Amend. Compl. ¶ 36. Patients are then mailed the medications at a Montana

address, and given instructions on how to take them. Amend. Compl. ¶ 36. Patients who have a direct-to-patient MAB need not travel to a health care provider.

PPMT's ability to offer telehealth MABs—in particular direct-to-patient MABs that eliminate the need for an in-person visit—significantly expands access to abortion care. Amend. Compl. ¶¶ 35, 38. Montana's rural nature and the fact that 90% of its counties do not have an abortion provider mean that Montanans seeking an abortion may have to travel six to eight hours round trip to visit one of PPMT's health centers in person. Amend. Compl. ¶ 38. Such prolonged travel poses particular challenges for patients who are at risk of or experience intimate partner violence. Amend. Compl. ¶ 39.

PPMT also ensures abortion access by hiring and training advanced practice registered nurses ("APRNs") to provide abortions. APRNs provide safe and effective care at PPMT and throughout Montana. Amend. Compl. ¶ 71. As with physicians and physician assistants, PPMT has well-established protocols for training APRNs. Amend. Compl. ¶ 71. Allowing APRNs to provide abortions significantly expands the number of abortion providers that PPMT has on staff and enables PPMT to provide additional patients with safe and effective care. Amend. Compl. ¶ 71.

### B. The Challenged Laws

#### 1. HB 721

HB 721 bans D&E abortions. HB 721 § 2(4), § 3; Amend. Compl. ¶ 4. Because the district court found that D&E is the only abortion procedure available in an outpatient setting in Montana at or after approximately 15 weeks LMP, HB 721 thus effectively bans abortions beginning at that stage in pregnancy. Order at 3–4; Amend. Compl. ¶ 5. No fetuses are viable at 15 weeks LMP or at any later gestational ages at which PPMT provides abortions. Amend. Compl. ¶ 5. Providers who perform D&E abortions in violation of HB 721 are subject to severe criminal penalties, including up to 10 years' imprisonment. HB 721 § 3. A provider who violates the law also is deemed to have committed "unprofessional conduct" and faces mandatory license suspension for at least one year. HB 721 § 5(1). HB 721 contains only a narrow exception for an abortion provided "in a medical emergency," which "does not include mental or psychological conditions." HB 721 §§ 3(1), 9(b).

#### 2. HB 575

HB 575 requires that prior to any abortion, a "determination of viability must be … made in writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound." HB 575 § 1; Amend. Compl. ¶ 56. In other words, an abortion provider must review a patient's ultrasound prior to providing an abortion. *See* HB 575 § 1; Amend. Compl. ¶ 57. Because

ultrasounds can only be performed in person, HB 575 bans direct-to-patient medication abortions, which are provided via telehealth without the need for an in-person visit. HB 575's requirement that the determination of viability must be "made in writing by the *physician or physician assistant* performing an abortion," HB 575 § 1 (emphasis added), also indicates that abortions may be provided only by physicians and physician assistants, not APRNs. Amend. Compl. ¶ 58.

## STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for "manifest abuse of discretion." *Weems I*, ¶ 7. An abuse of discretion is "manifest" when it is "obvious, evident, or unmistakable." *Id.* Whether to grant injunctive relief "is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Id.*

The district court's factual findings are reviewed for clear error and should only be overturned "if they are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made." *State v. Reynolds*, 2017 MT 25, ¶ 13, 386 Mont. 267, 389 P.3d 243. To the extent the ruling is based on legal conclusions, this Court "determine[s] whether the interpretation of the law is correct." *Weems I*, ¶ 7. "A party's burden to overcome a presumption of constitutionality to succeed in abrogating an act of the Legislature

does not subject the party to a burden different from other parties who seek preliminary injunctions." *Planned Parenthood of Mont.*, ¶ 33; *accord Weems I*, ¶18 n.4 (holding that a plaintiff's "burden to defeat the presumptive constitutionality of a statute … arises in litigating the merits of the complaint," and she "is not required to sustain that ultimate burden to obtain a preliminary injunction").

## SUMMARY OF THE ARGUMENT

The district court did not manifestly abuse its discretion in concluding that Providers have shown (1) a likelihood of success on their constitutional claims; (2) that Providers' patients would suffer irreparable harm absent relief; (3) the balance of equities weighs in favor of preliminarily enjoining unconstitutional restrictions on pre-viability abortions; and (4) the public interest lies with protecting fundamental rights.

HB 721 and HB 575 straightforwardly infringe the right to privacy by banning common, safe, and effective forms of abortion care. Because the laws implicate a fundamental right, they are subject to strict scrutiny. The State must therefore demonstrate by clear and convincing evidence that HB 721 and HB 575 are narrowly tailored to prevent a medically acknowledged, bona fide health risk. The State has failed to do so, and the district court correctly held Providers have shown a likelihood of success on the merits. Denying patients access to these critical forms of abortion care would, if anything, *increase* the risks to their health. The State's contrary

arguments ignore the effects of HB 721 and HB 575, and seek to circumvent or overrule *Armstrong*.

Providers have also met the remaining requirements for preliminary relief under SB 191. Patients would be irreparably harmed absent relief because the laws will deny access to constitutionally protected health care, and the balance of equities and public interest necessarily weigh in favor of preserving the status quo by preliminarily enjoining the State from violating Montanans' fundamental rights.

The State's other arguments are meritless, not properly raised on an appeal from a preliminary injunction, or both. This Court has held for decades that abortion providers may bring suit to protect the rights of their patients, and the State admits its arguments to the contrary require overruling that unbroken precedent. These decisions were correct and should not be disturbed in an appeal that does not reach any final resolution on the merits. The State also lodges a variety of objections to the preliminary oral ruling on Providers' motion, but the court correctly applied the governing legal standard and, in any event, the now-superseded oral decision is not before this Court. The written ruling the State actually appealed also applied the new four-part test for preliminary relief, and the State's subjective disagreement with the district court's weighing of the evidence and credibility determinations cannot demonstrate a manifest abuse of discretion. This Court should affirm.

## ARGUMENT

### I. The District Court Did Not Manifestly Abuse Its Discretion in Preliminarily Enjoining HB 721 and HB 575

The district court's order properly applied the four-part standard set forth in SB 191. The State nevertheless asserts that the court "failed to properly consider the facts and demonstrated a complete lack of independent judgment." Br. at 16. But it identifies no "obvious, evident, or unmistakable" factual or legal error that would constitute a manifest abuse of discretion. *Weems I*, ¶ 7.

#### A. HB 721 and HB 575 likely violate the Montana Constitution.

Because HB 721 and HB 575 infringe the fundamental right to privacy by banning certain pre-viability abortions, the laws are subject to strict scrutiny. *Weems II*, ¶ 43. The State must therefore demonstrate that HB 721 and HB 575 are narrowly tailored to serve a compelling interest—in this case, that the restrictions are necessary "to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bona*[ ]*fide* health risk." *Armstrong*, ¶ 59. As the district court correctly found, prohibiting safe and effective abortion methods that are the only means for many Montanans to access care serves no such interest.

### 1. The challenged laws infringe the right to privacy.

#### a. HB 721

By prohibiting D&E abortions, HB 721 effectively bans abortions in Montana at approximately 15 weeks of pregnancy—well before fetal viability. The district court found that starting at about 15 weeks LMP, the procedure is the only form of abortion care available to Montanans at that stage of pregnancy through outpatient facilities like those operated by Providers. Order at 3; Amend Compl. ¶ 42. Because viability does not occur until at least 24 weeks LMP, banning D&E abortions thus prohibits pre-viability abortions and "Montana's constitutional right to privacy is implicated." *Weems I*, ¶ 19; Order at 6–7.

In response, the State offers circular reasoning and invites the Court to abrogate *Armstrong*. Br. at 28–29 & n.8. It first asserts that "*Armstrong* only protects a right to a 'lawful medical procedure,' and HB 721 outlaws a specific medical procedure." Br. at 28. But the State cannot circumvent *Armstrong*'s broad protection of the right to obtain "a pre-viability abortion" simply by declaring unlawful a method through which pre-viability abortions are obtained. Such a rule would render the *Armstrong* decision and the right it defined dead letters, because restrictions on the means of exercising a constitutional right are no less an infringement of the right itself. So for the same reason the State could not ban publishing newspapers without abridging the right to a free press, banning how an

abortion is provided limits the right to obtain one. As to the relevant constitutional question—whether banning D&E abortions restricts Montanans' ability to seek and obtain pre-viability abortions—the State contends only that "Providers may still perform abortions using alternative procedures." Br. at 29. That is both irrelevant and inaccurate. HB 721 infringes the right to privacy by restricting access to safe and effective pre-viability abortions regardless of whether there are other ways to exercise that right. *See Weems II*, ¶ 43 (holding that a law "implicates a patient's fundamental right of privacy because it removes qualified APRNs from the pool of health care providers," despite availability of other providers). Moreover, the State's brief offers no support or citation for the existence of "alternative procedures," and the district court found that there were no available alternatives that did not increase the risks to persons seeking abortions. Order at 10–11.

With nothing in the law or record to support its position, the State reverts to asking, yet again, that the Court overturn *Armstrong*. Br. at 29 n.8. And for the same reasons this Court declined to do so the last time the State appealed a preliminary injunction against laws banning pre-viability abortions, the Court should not upend decades of precedent in this appeal. *Planned Parenthood of Mont.*, ¶ 20 ("As we do not determine the ultimate merits of a case on appeal from a preliminary injunction, we decline to overrule precedent in such an appeal, when the very

purpose of a preliminary injunction is to maintain the status quo pending that final determination." (citation omitted)).

**b. HB 575**

HB 575 also infringes the right to privacy. The law requires every patient seeking an abortion to obtain an ultrasound before the abortion. Order at 6. But because ultrasounds are not always medically necessary prior to receiving MABs, Providers have long offered direct-to-patient MABs to eligible patients without requiring that they obtain an ultrasound or otherwise visit a provider in person. Order at 2–3. HB 575 prohibits that practice, which has greatly expanded access to pre-viability abortions for patients who would otherwise be unable to obtain care because of their distance from a health center, financial circumstances, disabilities, or risk of experiencing intimate partner violence, among other reasons. Order at 3. This limitation on access to pre-viability abortion care again infringes the right to privacy, triggering strict scrutiny.

The State primarily defends HB 575 by eliding its effects. The State first claims that patients can still have abortions after getting an ultrasound, Br. at 25–26, but that ignores that requiring a medically unnecessary in-person visit *itself* interferes with the right to obtain a pre-viability abortion. Moreover, although not relevant to whether HB 575 infringes the right to privacy, the State's assumption that ultrasounds are widely accessible does not hold true for the many rural

Montanans who do not have easy access to health centers equipped to provide first-trimester ultrasounds. Order at 3. And it ignores that many Montanans do not have the necessary funds and the ability to travel, or are at risk of intimate partner violence in connection with their decision not to carry a pregnancy to term. *Id.* The State further contends that HB 575 requires only that providers determine whether a fetus is viable prior to providing an abortion, and thus "ensure[s] compliance" with *Armstrong*'s holding that the fundamental right to privacy protects pre-viability abortions. Br. at 27. But even setting aside that Providers already determine viability before any abortion and only offer MABs months before any fetus could be viable, infringement turns on whether HB 575 restricts access to pre-viability abortions protected by the Montana Constitution. The law indisputably does: it bans a critical form of health care relied on by people who would not otherwise be able to obtain abortions. Order at 6–7; Amend. Compl. ¶ 10.

Finally, the State argues that *Armstrong* "necessarily implies some authority … to regulate procedures such as MABs," Br. at 27, but this response again conflates whether a restriction on pre-viability abortions can be justified under strict scrutiny with whether such a restriction implicates the right to privacy in the first instance. Because HB 575 would limit Montanans' ability to obtain abortions by requiring in-person visits in all cases, it necessarily infringes the right. And regardless of whether *Armstrong* contemplates that some restriction on MABs might be permissible, this

appeal turns on whether the limits set forth in HB 575 are constitutional. For the reasons explained below, they are not.[2]

**2. The challenged laws fail strict scrutiny.**

Because HB 721 and HB 575 infringe the right to pre-viability abortion, strict scrutiny applies. The State must therefore demonstrate that the restrictions are "narrowly tailored to effectuate … 'a medically acknowledged, *bona*[ ]*fide* health risk, clearly and convincingly demonstrated.'" *Planned Parenthood of Mont.*, ¶ 20 (quoting *Armstrong*, ¶¶ 34, 62). "Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state." *Armstrong*, ¶ 59. After weighing the evidence and making credibility determinations based on live testimony, the district court properly concluded that the State failed to make such a showing. The health care HB 721 and HB 575 prohibits is safe and effective, and the State has presented no evidence that these restrictions are narrowly tailored to address bona fide health risks.

---

[2] The State does not address HB 575's restriction on the ability of APRNs to provide abortions, other than conceding that any such limitation would be unconstitutional after this Court's decision in *Weems II*. Br. at 40; *see also Weems II*, ¶ 1 ("[T]here is no medically acknowledged, bona fide health risk for the State to restrict the availability of abortion care by preventing APRNs from performing abortions").

### a. HB 721

Start with HB 721. Based on the testimony and record evidence, the district court found that D&E abortions banned by HB 721 are "safe and effective," and "at the gestational ages at which PPMT performs D&E abortions (between approximately 15 and 21.6 weeks LMP), D&E abortions are safer than childbirth." Order at 10. Moreover, the district court found that the alternative abortion methods that the State proposed were largely unavailable in Montana, and create additional health risks for patients. *Id.* As a result, HB 721 is not narrowly tailored to address a medically acknowledged, bona fide health risk.

Against medical consensus and the weight of the evidence, the State claims that HB 721 is justified by its interests in "respect for and preservation of prenatal life at all stages of development, the elimination of particularly gruesome or barbaric medical procedures, the preservation of the integrity of the medical profession, and the mitigation of fetal pain." Br. at 30 (cleaned up). But this Court has already determined that prior to viability, abortion restrictions must be narrowly tailored to address a medically acknowledged, bona fide health risk to Montanans. *Armstrong*, ¶ 49. And although the State asserts that D&E abortions are "dangerous to the mother" because of potential complications based on the declaration of its expert, the district court found that testimony insufficient when weighed against the overwhelming evidence of the safety of these procedures. Order at 10–11. Said

otherwise, "D&E procedures are extremely safe," and nothing indicates an outright ban is narrowly tailored to any health or safety interest. Order at 11. Such findings of fact are entitled to "great deference" and "reviewed only for clear error." *Montana Democratic Party v. Jacobsen*, 2022 MT 114, ¶ 11, 410 Mont. 114, 518 P.3d 58 (citation and quotation marks omitted). Claims by a party that its evidence was simply more persuasive cannot overcome that standard of review.

**b. HB 575**

The district court also correctly concluded that HB 575 fails strict scrutiny. Relying on the testimony of Dr. Ralston and Dr. Dickman, the district court found that direct-to-patient MABs provided without an ultrasound are exceedingly safe. Order at 8. Both doctors explained that "based on their own experience as abortion providers" and the consensus of peer-reviewed medical research, "MABs can be provided safely and effectively without an ultrasound and without increasing the rate of complications resulting from the MAB." Order at 8; Tr. 108:17–109:2 (testimony of Dr. Dickman that "complication rates don't vary from state to state" based on ultrasound requirements). As a different district court considering the State's last attempt to ban these same Providers from offering telehealth abortions found, "medication abortion by … telehealth is just as safe and effective as in person." *Planned Parenthood of Mont. v. State*, No. DV21-00999, 2021 WL 9038524, at *12 (Mont. Dist. Ct. Oct. 7, 2021), *aff'd Planned Parenthood of Mont.*, 2022 MT 157,

409 Mont. 378, 515 P.3d 301. The district court in this case likewise found that the State had presented no persuasive evidence contradicting PPMT's record of providing MABs safely and effectively to qualified patients without ultrasounds or the peer-reviewed research that supports this practice. Order at 8. Because the record thus did not support requiring every MAB to be preceded by an ultrasound, the district court properly held that the law was not narrowly tailored to address a medically acknowledged, bona fide health risk and thus failed strict scrutiny.

On appeal, the State contests these factual findings and the district court's credibility determinations, but does not come close to demonstrating a manifest abuse of discretion. The State primarily asserts that the district court "ignore[d]" evidence that ultrasounds assist with determining viability and identifying ectopic pregnancies; that some providers perform ultrasounds "routinely"; and that ultrasounds are "generally available at hospitals throughout Montana." Br. at 6–7, 38–39. But the district court did no such thing. After considering the parties' submissions and the live testimony, the court found that "it is not the standard of care to require ultrasounds prior to eligible direct-to-patient MABs," and there was "no evidence suggesting that [Providers'] methods for screening for ectopic pregnancies without an ultrasound are inadequate or unsafe in the context of an eligible, direct-to-patient MAB." Order at 9–10. Although the State claims that ultrasounds are helpful for assessing gestational age (and thus viability), Dr.

Dickman testified that PPMT only provides MABs without an ultrasound to patients who can accurately recall the date of their LMP, and MABs are only offered up to 11 weeks LMP—more than three months before viability. Order at 9. The district court also credited evidence "that for some patients, the ultrasound requirement may cut off access to an abortion altogether," and for all patients seeking a direct-to-patient MAB, the ultrasound requirement "forces [them] to undergo additional stress, expense, and unnecessary travel to a health center," subjecting them to additional "health risks by delaying critical abortion care, for no corresponding medical benefit." Order at 12; *see also Weems II*, ¶ 50 (delays in abortion care "result in comparatively higher risk, greater expenses, and even ineligibility for medication abortion as pregnancy advances").

The State's grievance (Br. at 38–39) with the district court's credibility findings is even less availing. This Court has repeatedly held that because "the fact-finder is uniquely in the best position to judge the credibility of witnesses," it "defer[s] to the trial court regarding the credibility of witnesses and the weight to be accorded their testimony." *Ditton v. Dep't of Just. Motor Vehicle Div.*, 2014 MT 54, ¶ 33, 374 Mont. 122, 319 P.3d 1268. And "the finder of fact is entitled to disregard [expert testimony] if it finds the testimony unpersuasive." *Koeppen v. Bolich*, 2003 MT 313, ¶ 51, 318 Mont. 240, 79 P.3d 1100 (citing cases). The district court did

exactly that—having found Dr. Mulcaire-Jones' testimony "unpersuasive," the court "disregard[ed]" it. *Id.*[3]

### B. HB 721 and HB 575 will cause irreparable harm absent preliminary relief.

The district court correctly found that HB 721 and HB 575 will cause irreparable harm if they are allowed to take effect. It is well-settled that the deprivation of a constitutional right—including the right to privacy—is itself irreparable harm. *See, e.g.*, *Planned Parenthood of Mont.*, 2021 WL 9038524, at *12 (ban on telehealth abortions resulted in irreparable injury by infringing the right of privacy); *Montana Cannabis Indus. Ass'n*, ¶ 15 ("[T]he loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."); *Weems I*, ¶ 25 (violation of right to privacy causes irreparable harm). Because Providers are likely to succeed on the merits of their constitutional claims, *see supra*, at 16–26, they have thus demonstrated the harm necessary to secure preliminary relief.

[3] The State devotes much attention to whether the preliminary injunction against an earlier ban on telehealth MABs affirmed in *Planned Parenthood of Montana*, 2022 MT 157, controls the analysis here. Br. at 25–26. But the district court's order enjoining HB 575 stated only that those prior decisions "*corroborate* this Court's conclusion that at this stage of the litigation, Plaintiffs have shown that direct-to-patient MABs can be provided safely without the need for an ultrasound." Order at 8 n.3 (emphasis added). That is because HB 575's constitutional infirmities warrant preliminary relief regardless of the State's past unconstitutional conduct.

The State asserts that these constitutional injuries are insufficient because other forms of abortion would remain available absent relief, but that is wrong on both the law and the facts. On the law, prohibiting common and safe forms of abortion care infringes the right to privacy regardless of whether alternatives are available, *supra*, at 17–20, and precedent forecloses any argument that the violation of Montanans' constitutional rights does not suffice to demonstrate irreparable harm. *Planned Parenthood of Mont.*, 2021 WL 9038524, at *12; *Montana Cannabis Indus. Ass'n*, ¶ 15. On the facts, the State ignores the district court's extensive findings regarding the effects HB 721 and HB 575 will have on access to care in Montana. HB 721 eliminates access to abortions for pregnant patients starting at approximately 15 weeks. The district court found that "contrary to Defendants' assertions, there are no feasible alternatives to D&Es in Montana." Order at 13. And although the State has not identified what it means by "safe alternative procedures" on appeal, *see* Br. at 34, the "alternatives" it offered below either are not available to most people in Montana or introduce additional risks to the patient. Order at 13. As to HB 575, whether or not *some* patients will still be able to have abortions, and whether or not ultrasounds must be procured from any particular provider, Br. at 33, the law restricts access to abortion by requiring *all* abortion patients to make an in-person visit when eligible patients could otherwise obtain direct-to-patient MABs through telehealth. Order at 12; Tr. at 109:8–110:17 (testimony of Dr. Dickman). The

district court found that requirement may "cut off access to an abortion altogether" for some people. Order at 12. For the same reason, the fact that PPMT provides site-to-site MABs for some patients and instructs patients to visit a health center in the event of complications does not obviate the harms caused by imposing medically unnecessary procedures on patients who would previously have been able to have abortions without an in-person visit. Order at 8–9, 12.

### C. The balance of equities and public interest weigh in favor of relief.

The district court properly found that the balance of equities and the public interest weigh in favor of preliminarily enjoining HB 721 and HB 575 to maintain the status quo. Order at 13–14. Although the State postulates that the affected interests "amount to ensuring a marginally increased level of convenience," Br. at 36, the district court correctly found that the challenged laws likely violate the Montana Constitution by eliminating or significantly restricting Montanans' ability to seek and obtain pre-viability abortions. The State has no legitimate interest in enforcing laws that infringe upon Montanans' fundamental rights. As federal courts applying the equivalent preliminary injunction standard have held, "the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented," *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017), and "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres*, 695 F.3d at 1002.

* * *

The evidence demonstrates that Providers meet all the requirements for a preliminary injunction. HB 721 and HB 575 likely violate the right to privacy, Providers' patients would suffer irreparable harm absent relief, and the remaining preliminary injunction factors favor preventing the State from violating Montanans' fundamental rights during the pendency of this litigation. The district court thus did not manifestly abuse its discretion in preliminarily enjoining the challenged laws.

## II. Providers Have Standing to Sue on Behalf of Their Patients

Unable to meet the demanding standard for overturning the district court's findings of fact and application of *Armstrong*, the State seeks to overturn a different line of precedent by challenging the Providers' right to sue on behalf of their patients. But as the State concedes, this Court has held for decades that abortion providers have standing to assert claims on behalf of their patients when laws infringe on those patients' constitutional right to obtain pre-viability abortions. *See* Br. at 23–24 (citing *Armstrong*, ¶¶ 12–13). In *Armstrong*, this Court held that "health care providers have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong*, ¶ 13. This Court reaffirmed that holding in *Weems I*, explaining that "when 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,'

the providers have standing to challenge the alleged infringement of such rights." *Weems I*, ¶ 12 (quoting *Armstrong*, ¶¶ 8–13).

Because HB 721 and HB 575 "impact the constitutional rights of women patients" and are "directed at health care providers," Providers have standing. *Weems I*, ¶ 12. HB 721 prohibits abortion providers from performing a common and safe medical procedure, again interfering with their exercise of medical judgment and preventing patients from accessing abortions starting at approximately 15 weeks LMP (*i.e.*, pre-viability). HB 575 requires ultrasounds to be performed even when providers deem them medically unnecessary, preventing pregnant patients from obtaining MABs without an in-person visit. Contrary to the State's assertion that "HB 575 and HB 721 do not implicate the constitutional rights of women patients," Br. at 24, these facts thus fit comfortably within the standing framework established in *Armstrong* and *Weems I*, and the district court properly held that Providers have standing to challenge both laws.

With no argument under the Montana law governing this appeal, the State claims that recent federal decisions regarding the right to abortion mean that this Court should require Providers to demonstrate anew the existence of a "close relationship" to their patients and some "hindrance to these women's ability to bring suit." Br. at 24. But federal law on provider standing has not changed. The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597

U.S. 215 (2022), itself involved a challenge by abortion providers on behalf of their patients, and did not purport to overrule any decisions regarding standing. Indeed, the court specifically declined to take up the question whether to overturn its precedent on abortion providers' standing. *Compare* Pet. for a Writ of Cert., at i, *Dobbs*, 597 U.S. 215 (June 15, 2020) (asking the Court to consider "[w]hether abortion providers have third-party standing" to sue on behalf of their patients), *with Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021) (granting petition for writ of certiorari solely on the merits question).

After *Dobbs*, federal and state courts alike have continued to recognize that abortion providers have standing to vindicate the constitutional rights of their patients. *See, e.g.*, *Satanic Temple, Inc. v. Rokita*, No. 1:22-CV-01859-JMS-MG, 2023 WL 7016211, at *7 (S.D. Ind. Oct. 25, 2023) ("[S]tanding is permissible for 'abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.'"), *appeal filed*, No. 23-3247 (7th Cir. Nov. 22, 2023); *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1160 (Idaho 2023) ("The *Dobbs* decision did not, however, abrogate the basic third-party standing principle that '[a]side from the woman herself … the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision [to get an abortion].'" (quoting *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)) (alterations in original)). And regardless, the State

has offered no justification for overturning *this Court's* longstanding precedent on the basis of federal decisions involving different constitutional protections and justiciability requirements, especially in the context of an appeal from a preliminary injunction. *See Planned Parenthood of Mont.*, ¶ 20 (declining to overturn precedent in an appeal from a preliminary injunction).

## III. The State's Arguments Concerning the Form of the District Court's Order Are Irrelevant and Meritless

Beyond contesting settled authority and asking this Court to reweigh the evidence, the State challenges the means by which the district court enjoined HB 721 and HB 575. None of these arguments affects whether the laws violate the Montana Constitution, and the district court's injunction is well-supported by precedent and the record. Regardless, each of the State's objections is meritless.

### A. The district court applied the correct legal standard in its now-superseded oral preliminary injunction ruling.

The State contends that the district court's initial oral ruling from the bench applied the incorrect preliminary junction standard. Br. at 14–15. That argument is both wrong on the facts and legally irrelevant.

As an initial matter, the district court applied the correct standard when issuing the preliminary injunction from the bench. The court explained that the Montana Legislature, "with its recent enactment to mirror … federal law," now "requires [the court] to issue an order making a finding, essentially a legal conclusion on the law

and the evidence of the case" and "has the Court consider" the merits of the case. Tr. 169:1–8. The district court's subsequent reference to preservation of the status quo as "the purpose of an injunction," Tr. at 169:9–10, is fully consistent with that standard. In the course of reviewing preliminary injunction orders, this Court has itself stated that the "purpose of preliminary injunctions [is] to preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73. Moreover, federal courts applying the same standard set by SB 191 have long held that a preliminary injunction is appropriate where "the purpose" is preservation of the status quo. *See, e.g.*, *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) ("[The] purpose of a preliminary injunction … is to preserve the status quo and the rights of the parties until a final judgment issues in the cause."); *McClanahan v. Salmonsen*, No. CV 22-20-H-BMM, 2023 WL 4409150, at *6 (D. Mont. July 7, 2023) (Morris, J.) ("[A preliminary injunction is] a tool to preserve the status quo and prevent irreparable loss of rights before judgment."); *Evenson-Childs v. Ravalli Cnty.*, No. CV 21-89-M-DLC-KLD, 2023 WL 2705902, at *21 (D. Mont. Jan. 13, 2023) ("The basic function of a preliminary injunction is to preserve the status quo pending a determination [of] the

action on the merits."). Nor does the district court's acknowledgement of recent changes to the preliminary injunction standard show that "it expressly declined to" consider the other factors, as the State contends. Br. at 15. To the contrary—the district court acknowledged that it was bound to consider those factors, in particular Providers' ultimate likelihood of success on the merits. Tr. 169:6–8.

But even assuming that the district court misstated the preliminary injunction standard in its oral order—and it did not—the subsequent written decision controls. *See United States v. Moroyoqui-Gutierrez*, 602 F. App'x 378, 379 (9th Cir. 2015) (holding that although "the district court orally stated an incorrect legal standard on the record during [a] hearing … the district court issued a written order applying the correct … standard" and "the district court's written order is the operative decision"); *Playmakers LLC v. ESPN, Inc.*, 376 F.3d 894, 896 (9th Cir. 2004) ("Where the record includes both oral and written rulings on the same matter, '[w]e review the written opinion and not the oral statements.'" (quoting *United States v. Robinson*, 20 F.3d 1030, 1033 (9th Cir.1994)) (alteration in original)); *Ellison v. Shell Oil Co.*, 882 F.2d 349, 352 (9th Cir. 1989) ("We are aware of no case directing us to review the oral judgment rather than the written judgment."). As a result, this Court should "review the written opinion and not the oral statements." *Robinson*, 20 F.3d at 1033. And here, that written opinion indisputably applied the correct standard. Order at 4, 14.

### B. The district court did not manifestly abuse its discretion in adopting Providers' proposed order.

Nor did the district court abuse its discretion or fail to exercise independent judgment in adopting Providers' proposed findings of fact and conclusions of law, which were comprehensive and supported by the evidence. *See* Br. at 16–20, 37–39.

This Court has repeatedly "approved the verbatim adoption of findings and conclusions where they are comprehensive and detailed and supported by the evidence." *In re Marriage of George & Frank*, 2022 MT 179, ¶ 84, 410 Mont. 73, 517 P.3d 188; *see also Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, ¶ 29, 330 Mont. 282, 127 P.3d 436 ("A district court may adopt a party's proposed order where it is sufficiently comprehensive and pertinent to the issues to provide a basis for the decision."); *In re Marriage of Boyer*, 261 Mont. 179, 862 P.2d 384 (1993) ("A court's verbatim adoption of the prevailing party's proposed findings, conclusions, and judgment is not prohibited."); *Olsen v. McQueary*, 212 Mont. 173, 179, 687 P.2d 712 (1984) (approving verbatim adoption of proposed orders where "the findings and conclusions of the District Court [are] supported by substantial credible evidence.").

That is the case here: Rather than "completely ignore[]" the State's submissions, Br. at 18, the district court's order appropriately considered the comprehensive factual record and concluded that Providers' evidence outweighed

that presented by the State. *See supra* at 16–26. At the hearing, both parties had the opportunity to present their evidence and question each other's witnesses. *See, e.g.*, Tr. 51:6–62:2 (direct examination of Dr. Mulcaire-Jones); *id.* at 70:12–73:7 (cross-examination of Dr. Mulcaire-Jones); *id.* at 100:2–129:13 (direct and cross-examination of Dr. Dickman), *id.* at 131:16–151:9 (direct and cross-examination of Dr. Ralston). For the State, that included introducing the testimony of an expert witness, Dr. Mulcaire-Jones, and cross-examining PPMT's Chief Medical Officer, Dr. Dickman, and Providers' expert witness, Dr. Ralston. When issuing its oral order preliminarily enjoining HB 721 and HB 575, the court then explicitly said that it was doing so "based upon the evidence and testimony presented." *Id.* at 169:13–15; *see also* Br. at 3–4. The court's written order discusses the credibility and testimony of both parties' experts on a range of issues, including the use of ultrasounds to determine gestational age, the standard of care for direct-to-patient MABs, and the safety of D&E abortions. *See generally* Order at 8–11.

These considered findings are hardly "galling" or a manifest abuse of discretion, Br. at 19, and crediting Providers' experts and evidence rather than the State's reveals defects in the State's case, not the district court's judgment. To the extent the State disagrees with the district court's weighing of the evidence, "it raises only a factual dispute to be resolved by the trier of fact on the ultimate merits of the case and thus is not proper for resolution on preliminary injunction." *Planned*

*Parenthood of Mont.*, ¶ 49. And in any event, "[i]t is not this Court's function to reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court." *Id.* ¶ 41 (quoting *In re Marriage of Williams*, 2018 MT 221, ¶ 23, 392 Mont. 484, 425 P.3d 1277).

The State's additional mischaracterizations of the district court's order fare no better.

*First*, the district court did not "wrongly state[] that the State provided only two 'purported rationales for [HB 575's] ultrasound requirement.'" Br. at 37. The district court's order accurately states that the State offered two purported rationales for HB 575's ultrasound requirement "[a]t the hearing." Order at 8; *see also, e.g.*, Tr. 161:23–163:8 (asserting that assessing gestational age accurately is a "bona fi[de] medical reason"), *id.* at 164:12–24 (asserting ultrasound requirement "is also there to prevent ectopic pregnancies"). The additional rationales the State offers in its brief are largely encompassed by these interests, which the State has consistently framed as the primary justifications for HB 575. *See* Br. at 38 (asserting interests in "determining gestational age," "ensuring the pregnancy is intrauterine," "protecting … from inaccurate viability determinations"). Those interests the State now asserts that are even arguably distinguishable, like "ruling out twins," were merely referenced in passing by their expert during his testimony, which the district court expressly considered in evaluating HB 575 under strict scrutiny. Order at 9

(addressing Dr. Mulcaire-Jones's testimony "that ultrasounds are the standard of care").

*Second*, the State briefly takes issue with the district court's reference to peer-reviewed research on the safety of MABs that was not admitted as substantive evidence and the likelihood that one of Dr. Dickman's patients could access an ultrasound outside of PPMT's health centers. Br. at 18–19. According to the State, mentioning these facts means the preliminary injunction order "is riddled with inconsistencies and contradictions." *Id.* at 18. But the order relied on Dr. Dickman's and Dr. Ralston's testimony "based on their own experience as abortion providers *and* their review of peer-reviewed literature," Order at 8, and the relevant facts regarding the safety of MABs and difficulty of obtaining ultrasounds in Montana are well-supported by the record, *see, e.g.*, Tr. 101:2–103:9, 107:8–24, 114:24–115:3 (testimony of Dr. Dickman regarding safety of direct-to-patient MABs and access to ultrasounds). Dr. Dickman also testified, again based on his personal experience and knowledge, to the safety and efficacy of D&E, as well as the risks of alternative procedures. *See* Tr. 115:11–118:10. This "substantial credible evidence" suffices to support the district court's findings and conclusions. *Olsen*, 212 Mont. at 179.

### C. The preliminary injunction is not overbroad.

The State briefly argues that the district court should not have preliminarily enjoined the entirety of HB 575, Br. at 39–40, but the scope of the preliminary

injunction reflects that the ultrasound requirement is essential to effectuating HB 575's remaining provisions.

Courts have an "obligation to avoid judicial legislation" and should not "attempt to redraft [a] statute" to save it. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995). And when a statute (like HB 575) does not contain a severability clause, this Court has advised against severing unconstitutional portions unless "the remainder of the statute, if and when the unconstitutional provisions are severed, [is] complete in itself and capable of being executed in accordance with the apparent legislative intent." *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 26, 314 Mont. 314, 65 P.3d 576. This is particularly true where "the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment." *Id.* ¶ 25; *see also Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 86, 365 Mont. 92, 278 P.3d 455 ("[A] statute is not destroyed in toto because of an improper provision, unless such provision is necessary to the integrity of the statute or was the inducement to its enactment.").

Because HB 575 contains no severability clause, all of its provisions must be enjoined unless the law is "complete in itself and capable of being executed in accordance with the apparent legislative intent" absent the (unconstitutional) ultrasound requirement. *Finke*, ¶ 26. That is not the case here. HB 575 restricts abortions by conditioning providers' conduct on a viability determination that is

made through detailed and specific procedures: Section 1(6)(b)(i) establishes the method for assessing viability that must be used (an ultrasound), § 1(6)(b)(ii) establishes how providers must interpret that finding ("based on the best available science and survival data, with viability presumed at 24 weeks gestational age and any period of time after that"), and § 2(b)(ii) then uses viability determined through those procedures to restrict providers' conduct. All of these parts function together to implement the legislative goal of regulating how and for what purpose providers determine viability when providing abortions. This is further reflected in the conjunctive relationship and mandatory nature of the statutory terms: A determination of viability must satisfy both § 1(6)(b)(i) "*and*" § 1(6)(b)(ii), and "an abortion *may not* be performed" pursuant to § 2(b)(ii) without a determination meeting those requirements. HB 575 (emphasis added). These parts must thus either stand or fall together. Because the ultrasound requirement falls, they all do.

Resisting the text and evidence of legislative intent, the State cites inapposite cases concerning the proper scope of injunctive relief in the class action context—*i.e.*, whether to maintain a nationwide class or whether to limit relief to particular jurisdictions or parties. *See* Br. at 39 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome

than necessary to redress the complaining parties."); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) ("We conclude that the district court did not abuse its discretion in ordering what is in effect nationwide relief.")). These decisions have nothing to do with this case, where the district court enjoined laws that directly prohibited Providers from delivering constitutionally protected medical care.

## CONCLUSION

For these reasons, the district court's order should be affirmed.

Respectfully submitted this 29th day of January, 2024.

/s/ Raph Graybill
Raph Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

## CERTIFICATE OF COMPLIANCE

The undersigned, Raph Graybill, certifies that the foregoing brief complies with the requirements of Rule 11, M. R. App. P., is double spaced, except for footnotes, quoted, and indented material, and it is proportionally spaced utilizing a 14-point Times New Roman typeface. The total word count for this document is 9,708 words, as calculated by the undersigned's word processing program.

/s/ Raph Graybill
Raph Graybill
Attorney for Plaintiffs-Appellees

## CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-29-2024:

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Charles Brereton, Montana Department of Public Health and Human Services, State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Charles Brereton, Montana Department of Public Health and Human Services, State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Charles Brereton, Montana Department of Public Health and Human Services, State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Charles Brereton, Montana Department of Public Health and Human Services, State of Montana
Service Method: eService

Dylan Cowit (Attorney)
123 William St.
9th Floor
New York NY 10038
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: eService

Alan Schoenfeld (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Michelle Nicole Diamond (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Michael Noonan (Attorney)
215 N Sanders St
P.O. Box 201401
Helena MT 59620-1401
Representing: Charles Brereton, Montana Department of Public Health and Human Services, State of Montana
Service Method: E-mail Delivery

Rishita Apsani (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Sean C. Chang (Attorney)
7 World Trade Center 250 Greenwich Street
New York NY 10007
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Rachel Craft (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Peter Kurtz (Attorney)
1225 Seventeenth Street, Suite 2600
Denver CO 80202
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana
Service Method: E-mail Delivery

Diana Olga Salgado (Attorney)
1110 Vermont Ave, NW, Ste 300
Washington DC 20005
Representing: Samuel Dickman, M.D., Planned Parenthood of Montana

Service Method: E-mail Delivery

Electronically signed by Emma Edwards on behalf of Raphael Jeffrey Carlisle Graybill
Dated: 01-29-2024