IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–288

PLANNED PARENTHOOD OF MONTANA, et al.

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV 23–231, the Honorable Mike Menahan, Presiding

APPELLANTS' OPENING BRIEF

APPEARANCES:

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

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 Appellants

Raph Graybill
GRAYBILL LAW FIRM, P.C.
300 4th Street North, PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

Michelle Nicole Diamond
Alan E. Schoenfeld**
Rishita Apsani**
Rachel Craft**
Sean Chang*
WILMER CULTER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
michelle.diamond@wilmerhale.com
alan.schoenfeld@wilmerhale.com
rishita.apsani@wilmerhale.com
rachel.craft@wilmerhale.com
sean.chang@wilmerhale.com

Peter Kurtz**
WILMER CUTLER PICKERING
HALE AND DORR LLP
17th Street Plaza, 1225 17th St Suite 2600
Denver, CO 80202
(720) 274-3135
peter.kurtz@wilmerhale.com

Arjun K. Jaikumar**
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
arjun.jaikumar@wilmerhale.com

Melissa Cohen (pro hac vice)
Dylan Cowit (pro hac vice)
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 541-7800
melissa.cohen@ppfa.org
dylan.cowit@ppfa.org

Diana O. Salgado (pro hac vice)
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Avenue NW, Ste. 300
Washington, DC 20005
(202) 973-4862
diana.salgado@ppfa.org

Attorneys for Appellees

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3. Alternatively, did the District Court err in failing to properly narrow the scope of its preliminary injunction?

STATEMENT OF THE CASE

Planned Parenthood of Montana and Samuel Dickman, M.D.'s (collectively, "Abortion Providers") brought constitutional challenges to House Bill ("HB") 575 (2023) (attached as **Appendix C**) and HB 721 (2023) (attached as **Appendix D**). (Docs. 1, 22.) HB 575 amends the Montana Abortion Control Act to prohibit the abortion of unborn viable children unless necessary to preserve the life of the mother and to clarify the definition of "viability" as used therein. (App. C.) HB 721 creates a new section in Montana's statutes, titled the "Dismemberment Abortion Prohibition Act," prohibiting a single specific abortion procedure, dilation and evacuation ("D&E"), which entails the surgical destruction and dismemberment of a live fetus, except in cases of medical emergency. (App. D.)

On April 10, 2023, Abortion Providers filed their initial Verified Complaint (Doc. 1) against the State of Montana, Montana Department of Public Health and

Human Services ("DPHHS"), and Charlie Brereton, in his official capacity as DPHHS Director (collectively, "the State"), challenging HB 721. Abortion Providers simultaneously filed a Motion for *Ex Parte* Temporary Restraining Order ("TRO"), Preliminary Injunction and Show Cause Order (Doc. 6) and supporting Brief (Doc. 7). Judge Seeley[1] declined to issue a TRO that same day, noting that there was "no 'law' to enjoin" because the Governor had not yet signed HB 721. (Doc. 11 at 2.) Abortion Providers subsequently added their challenge to HB 575 when they filed their Amended Verified Complaint (Doc. 22) on May 3, 2023, as well as their Motion for TRO & Preliminary Injunction on HB 575 (Doc. 23) and supporting Brief (Doc. 24). The District Court granted the TRO the next day on May 4, 2023 (*see* Doc. 31),[2] and it later set the preliminary injunction hearing for May 23, 2023. (*See* Doc. 37.) The State filed its Response in Opposition (Doc. 41) on May 12, 2023.[3]

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[1] Judge Michael F. McMahon assumed jurisdiction of this matter after Judge Christopher D. Abbot recused himself, and Judge Kathy Seeley assumed jurisdiction after Abortion Providers moved to substitute Judge McMahon. (*See* Docs. 8–10.) Judge Mike Menahan assumed jurisdiction following the State's substitution of Judge Seeley. (Docs. 17, 18.)

[2] This was just before the District Court Clerk docketed Defendants' Response in Opposition. (Doc. 32.)

[3] Also on May 12, 2023, this Court issued its decision in *Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798, invalidating as unconstitutional Mont. Code Ann., Section 50-20-109(1)(a)'s prohibition of abortions performed by anyone other than a licensed physician or physician assistant. *Id.* at ¶ 51.

On May 16, 2023, Abortion Providers filed a Motion for TRO and Preliminary Injunction on HB 721 (Doc. 42) and supporting Brief (Doc. 43). The State filed its Opposition Brief (Doc. 44) the same day. The District Court granted the TRO on HB 721 on May 18, 2023, combining the preliminary injunction hearing on HB 575 and HB 721 with the preliminary injunction hearing on the Medicaid abortion coverage rule and HB 544 and HB 862. (Doc. 48.) Shortly thereafter, the parties submitted their Joint Stipulation Regarding Hearing Structure, which outlined the proposed timeline and structure for the parties' respective arguments and presentations of evidence at the preliminary injunction hearing. (Doc. 50.) The parties further stipulated that testimony presented in either case could be relied upon by the parties or the District Court in the other case, and (for the purposes of the preliminary injunction hearing only) the parties stipulated to the qualifications of Drs. Dickman, Pierucci, Mulcaire-Jones, and Ralston as medical experts. (*Id.*)

The District Court conducted the evidentiary hearing on Abortion Providers' requested preliminary injunctions on the afternoon of May 23, 2023. (Hearing Transcript (May 23, 2023) ("Tr."), **attached as Appendix A**.)[4] The District Court heard the statements and arguments of counsel, as well as testimony from a total of

[4] The State filed its Response in Opposition to Plaintiffs' Motion for Preliminary Injunction [of HB 721] (Doc. 61) and Second Affidavit of George Mulcaire-Jones, M.D. (Doc. 62) the morning of May 23, 2023, prior to the hearing. (Tr. at 69:18–70:4.)

six witnesses.[5] (*Id.* at 4–5, and *generally*.) At the conclusion of the hearing, the District Court ruled from the bench, enjoining both HB 575 and HB 721 "based on the evidence and testimony presented[.]" (*Id.* at 169:13–15.) The District Court further stated it was unsure how quickly it would issue a written order given its caseload. (*Id.* at 169:21–25.)

The State initiated the current appeal the following day, on May 24, 2023, when it filed its Notice of Appeal. (Doc. 69.) The Montana Supreme Court Clerk received and filed the District Court record (Docs. 1–74) on June 12, 2023. (Doc. 75.) Three days later, on June 15, 2023, Abortion Providers filed an unsolicited proposed Order Granting Plaintiffs' Motions for Preliminary Injunction (attached as **Appendix B**). To the State's knowledge, the District Court never requested that Abortion Provider prepare any proposed order. Nearly a month later, on July 11, 2023, the District Court signed and entered Abortion Providers' proposed Order verbatim, without any revisions or additions—the District Court did not even remove the word "[PROPOSED]" from the title of the document. (Doc. 84.)

[5] An apparent miscommunication led defense counsel to believe that one of Abortion Providers' witnesses—Helen Weems—would be present to testify in the courtroom, but her remote testimony inhibited his ability to ask her questions regarding her prior deposition testimony, so the parties stipulated to the State submitting an offer of proof referencing that testimony. (Tr. at 98:13–21; 99:17–18.) The State provided the District Court with relevant excerpts from Ms. Weems's deposition testimony on May 31, 2023 via its Formal Offer of Proof. (Doc. 70.)

STATEMENT OF THE FACTS

HB 575

HB 575 amends Mont. Code Ann. § 50-20-109(1)(b) to explicitly prohibit the abortion of unborn viable children unless necessary to preserve the life of the mother. (App. C at 2–3.) HB 575 also amends Mont. Code Ann. § 50-20-104(6)'s definition of "viability" to specify that a qualified provider must review an ultrasound in determining gestational age—and therefore viability—of a fetus. (*Id.* at 2.) HB 575 does not require the ultrasound to be performed by the provider making the viability determination or by any other specific provider, nor does it dictate the specific time or location where the ultrasound must be performed. (*Id.*) It merely requires the provider making the viability determination to review an ultrasound during that process. (*Id.*) HB 575 also establishes a presumption of viability beginning at twenty-four weeks gestational age, further providing that "[a] calculation of gestational age must take into account a margin of error and, if uncertainty exists regarding viability, there is presumption of viability." (*Id.*) Importantly, HB 575 does not prohibit any particular type of pre-viability abortion according to its plain language and explicit terms. (*Id., generally*.)

The Importance of Ultrasounds and Determining Fetal Viability

Obtaining an ultrasound is the standard of care for determining the viability of a fetus. (Doc. 41 at Ex. A, ¶ 16; Tr. at 55:16–17, 56:21–23.)[6] This is in part because ultrasounds ensure the accuracy of viability determinations and bolster providers' ability to obtain patients' informed consent. (Doc. 41 at Ex. A, ¶ 16.) Other benefits of ultrasounds include confirming whether the fetus is alive or dead, confirming gestational age, ruling out twins, ruling out ectopic pregnancies, and determining the location of the placenta so the abortion can be done safely. (Tr. at 55:20–57:17.) Even Helen Weems (a Plaintiff in in Cause No. ADV 23–299) routinely uses ultrasounds to confirm her patient is pregnant, to confirm the pregnancy is located in the uterus (*e.g.*, rule out ectopic pregnancy), and to determine gestational age. (Doc. 70 at Ex. A, 29:2–8, 71:5–8; 73:17–20.) Ms. Weems also recommends a follow-up ultrasound a week later to confirm the pregnancy termination is complete. (*Id.* at 74:10–14.) Moreover, obtaining and reviewing an ultrasound in determining fetal viability substantially mitigates the legal and medical risks associated with a provider's potentially inaccurate gestational age determinations. (Doc. 41 at Ex. A, ¶ 17; Tr. at 58:5–11.)

[6] Pre-abortion ultrasounds are also the standard of care in Canada. (Tr. at 57:18–58:6.)

Ultrasounds are generally available at hospitals throughout Montana, including critical care access hospitals, Indian Health Service ("IHS") facilities, and other clinics serving rural areas of the state. (Doc. 41 at Ex. A, ¶ 18; Tr. at 128:5–9.) Indeed, fifty-one of Montana's sixty-nine hospitals offer ultrasounds. (Tr. at 52:22–25; 61:14–16.) It is common practice for a patient to have an ultrasound at one facility and have the results transferred to another provider. (*Id.* at 53:9–54:2, 60:17–22; 123:20–25.) Ultrasound results can be transferred electronically, by fax, or by hand. (*Id.* at 61:11–13, 61:22–62:1.)

HB 721

HB 721 prohibits a person from "purposely or knowingly perform[ing], induc[ing], or attempt[ing] to perform or induce a dismemberment abortion procedure[,]" except in a medical emergency. (App. D at 4.) "Dismemberment abortion" is defined as "a procedure that involves: (a) the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn human being; and (b) dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts form a living unborn human being." (*Id.* at 3.) Violation of HB 721 is a felony punishable by a $50,000 fine or five to ten years in prison. (*Id.* at 4.) However, "[a] woman on whom an abortion is

performed, induced or attempted [. . .] may not be prosecuted for a conspiracy to commit a violation of [HB 721]." (*Id.*)

In the preamble to HB 721, the Legislature identified numerous findings underlying this legislation, including but not limited to:

> [A]t 12 weeks' gestation an unborn human being can open and close fingers, starts to make sucking motions, senses stimulation from the world outside the womb, and can likely experience pain, and…the unborn human being has taken on "the human form" in all relevant aspects…
>
> [D]ismemberment abortion procedures…involve tearing apart and extracting piece-by-piece from the uterus what was until then a living child…[and which are] usually done during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating…
>
> [T]he dismemberment abortion procedure involves the use of clamps, grasping forceps, tongs, scissors, and similar instruments that through the convergence of two rigid levers slide, crush, or grasp a portion of an unborn human being's body in order to cut it, rip it off, or crush it…
>
> [T]he intentional commission of such acts for nontherapeutic or elective reasons is a barbaric practice, is dangerous for the pregnant woman, and is demeaning to the medical profession…
>
> Montana's legitimate interest specifically includes respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability…

(*Id.* at 1–2) (cleaned up). The Legislature further referenced reports of numerous significant risks associated with abortion that increase with gestational age. (*Id.* at

2.) The State's expert, George Mulcaire-Jones, M.D., outlined this procedure in detail and substantiated many of the Legislature's concerns about the associated risks and complications, all with numerous citations to supporting scholarly works. (Doc. 62 at 4–9, nn.1–7.) Although Dr. Mulcaire-Jones has never performed a dismemberment abortion to terminate a pregnancy, he has performed many of those same procedures throughout his long career for purposes of miscarriage management. (*Id.* at 3; Tr. at 54:17–22, 55:10–13.) The only step Dr. Mulcaire-Jones has not performed is killing a live fetus. (Doc. 62 at 3; Tr. at 54:13–16.)

STANDARD OF REVIEW

This Court reviews a District Court's grant or denial of a preliminary injunction for a manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (citation omitted); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citation omitted); A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bound of reason resulting in substantial injustice." *Id.* at ¶ 5 (citation omitted). "A manifest abuse of discretion is one that is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (citing *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 ("*Weems I*") (quotation omitted).

If a preliminary injunction decision was based on legal conclusions, however, this Court reviews those conclusions de novo. *Planned Parenthood of Mont.*, ¶ 5

(citing *Driscoll*, ¶ 12.) The Court reviews the District Court's legal conclusions to determine if its interpretation of the law is correct. *Driscoll*, ¶ 12 (citation omitted). "Issues of justiciability, such as standing and ripeness, also are questions of law, for which [this Court's] review is de novo." *Id.* (citation omitted).

Review of constitutional questions is plenary. *Weems v. State*, 2023 MT 82, ¶ 33, 412 Mont. 132, 529 P.3d 798 ("*Weems II*") (citation omitted). "A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which [this Court] review[s] to determine whether the conclusion is correct." *Id.* (quotation omitted). Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("*MCIA*"). Parties presenting a facial challenge must demonstrate that "no

set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If any constitutional application is shown, the facial challenge fails. *Id.* at ¶ 29. If any doubt exists, it must be resolved in favor of the statute. *MCIA*, ¶ 12. The party challenging the constitutionality of the statute bears the burden of proof. *Id.*

SUMMARY OF THE ARGUMENT

The District Court erred in several ways in enjoining HB 575 and HB 721. The District Court applied the wrong legal standard in issuing its oral injunction when it focused on "maintaining the status quo" instead of evaluating the laws under the four-part conjunctive test required by Senate Bill ("SB") 191 (2023). In fact, the District Court criticized the new standard, and simply ignored it. Then, the District Court rubber stamped Abortion Providers' unsolicited Proposed Order verbatim, and further erred by failing to properly consider the facts and exercise independent judgment in its written ruling. It relied too heavily on Abortion Providers' proposed findings—excluding any meaningful consideration of the State's written submissions, exhibits, affidavits, or hearing testimony.

A de novo review demonstrates that Abortion Providers did not meet their burden of proof to obtain a preliminary injunction. Abortion Providers cannot

succeed on the merits because they lack standing as a threshold matter. HB 575 and HB 721 do not violate the right to privacy. Neither Abortion Providers nor their patients will suffer irreparable harm because neither HB 575 nor HB 721violate their constitutional rights. The balance of the equities and public interest favor the State, which has the duty to ensure the faithful execution of its laws and compelling interests in the protection of viable life, the health, safety, and well-being of women and unborn children, as well as preserving the integrity of the medical profession.

Finally, the District Court's Order almost exclusively considered evidence presented by Abortion Providers while ignoring the substantial evidence presented by the State. The State presented ample evidence of medically acknowledged, bona fide health risks addressed by HB 575 and HB 721, as well as numerous other interests served by this legislation. These many errors mandate reversal of the District Court's preliminary injunction.

ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). A preliminary injunction is "never awarded as of right." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); see also *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933) (injunction is not a remedy which issues as of

course); *Yakus v. United States*, 321 U.S. 414, 440 (1944). A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

Furthermore, in each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24 (citing *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)); see also *Hooks v. Nexstar Broad. Inc.*, 54. F.4th 1101, 1114 (9th Cir. 2022) (injunctive relief must be evaluated on a case-by-case according to traditional equitable principles and without the aid of presumptions or a "thumb on the scale" in favor of issuing such relief).

I. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS, FAILED TO PROPERLY CONSIDER THE FACTS, AND FAILED TO EXERCISE INDEPENDENT JUDGMENT.

The Montana standard for issuing preliminary injunctions is now the same standard that federal courts have employed for decades. *See* SB 191. Under this new standard, a preliminary injunction may be granted only when the applicant establishes: (a) likelihood of success on the merits; (b) likelihood of suffering irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest. *Id.*

This new legal standard changes the requirements for obtaining a preliminary injunction in Montana in at least the following significant ways: First, the burden of proof no longer rests with the Defendants to show why an injunction should not issue. The burden of proof now rests squarely with the applicants to show why an injunction should issue. Second, the former five-part disjunctive test to obtain a preliminary injunction is now a four-part conjunctive test. Applicants for an injunction bear the burden of proving all four elements. The Legislature expressly stated its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Contrast* SB 191 *with* Mont. Code Ann. §§ 27-19-201 (2021) and 27-19-315 (2021).

A. THE DISTRICT COURT'S ORAL INJUNCTION IGNORED SB 191.

In issuing an oral preliminary injunction from the bench, the District Court erred by relying on a single factor—maintaining status quo—without any analysis of likelihood of success on the merits or the other factors of the test. In fact, the District Court was openly critical of the new preliminary injunction standard, stating:

> In the ten years I've been on the bench I don't think I've ever granted a temporary restraining order or preliminary injunction by finding on the ultimate issue of the merits of the case. I think that the Montana legislature enacting the most recent changes to Montana's restraining order injunction, preliminary injunction, final injunction, I think it puts the District Court judges in a difficult position because it requires us to issue an order making a finding, essentially a legal conclusion on the law and the evidence of the case, when the facts haven't been fully

> developed during the course of the litigation, nor have all the arguments on the legal matters been presented. But the legislature with its recent enactment to mirror, I think, federal law passed—has the Court consider that.
>
> I think the purpose of an injunction is to maintain the status quo. That, above all considerations, is the most important one for me. So I'm granting the preliminary injunction on that matter. I'm also granting, again based upon the evidence and testimony presented, the preliminary injunction related to the enforcement of House Bills 575 and 721.

(Tr. at 168:18–169:15.)

But federal courts have been applying this same SB 191 standard for decades, analyzing likelihood of success on the merits as the weightiest factor of the preliminary injunction test. "At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits." *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). Demonstrating a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco v. United States.*, 944 F.3d 773, 789 (9th Cir. 2019) (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted). Not only did the Court fail to consider this factor or the other three factors in issuing an oral injunction, it expressly declined to do so. (Tr. at 168:18–169:12.) This was clear error.

B. THE COURT'S WRITTEN ORDER FAILED TO PROPERLY CONSIDER THE FACTS AND LACKED INDEPENDENT JUDGMENT.

Not only did the District Court err in failing to consider the applicable preliminary injunction test when issuing its ruling from the bench, but its written Order—drafted by Abortion Providers and adopted verbatim—also failed to properly consider the facts and demonstrated a complete lack of independent judgment. Thus, the written Order's discussion of the SB 191 legal standard does not overcome the District Court's initial error. Instead, it creates another legal basis to reverse the preliminary injunction.

This Court has expressed its dissatisfaction—if not outright disapproval—of verbatim adoption of proposed findings of fact. *Tomaskie v. Tomaskie*, 191 Mont. 508, 510–12, 625 P.2d 536, 538–39 (1981); *In re Marriage of Hunter*, 196 Mont. 235, 245–46, 639 P.2d 489, 495 (1982); *In re Marriage of Wolfe*, 202 Mont. 454, 457–458, 659 P.2d 259, 261–62 (1983); *In re Marriage of Merry*, 213 Mont. 141, 149, 689 P.2d 1250, 1254 (1984); *Eaton v. Morse*, 212 Mont. 233, 243–44, 687 P.2d 1004, 1009–10 (1984).

> It is wise practice for the trial court to prepare and file its own findings and conclusions. Only in that fashion can the parties know that the trial court has carefully considered all the relevant facts and issues involved. This is not to say, however, that the trial court shouldn't have guidance from the lawyers on both sides. But guidance in an adversary system is always such that the findings and conclusions may not indicate a thorough treatment of the facts and law to be applied. But proposed findings and conclusions give the trial judge good insight as to just what factors and what law the parties deem to be important. It is then up to

> the trial court to translate its own judgment and conclusions into appropriate findings and conclusions. It is becoming increasingly apparent to this Court, however, that the trial courts rely too heavily on the proposed findings and conclusions submitted by the winning party. That is wrong!

Tomaskie, 191 Mont. at 512, 625 P.2d at 538–39 (citation omitted). A judge relies "too heavily" upon proposed findings when they are used "to the exclusion of a consideration of the facts and the exercise of his own judgment." *In re Marriage of Wolfe*, 202 Mont. at 457, 689 P.2d at 261 (citing *In re Marriage of Hunter*, 196 Mont. at 245, 639 P.2d at 495). "We have time and time again paid lip service to the oft-stated but usually ignored rule that, while not error per se, district courts should not adopt verbatim the findings of fact and conclusions of law of the prevailing party." *In re Marriage of Davies*, 266 Mont. 466, 480, 880 P.2d 1368, 1377 (1994) (Nelson, J. concurring) (citations omitted). "[E]rror occurs when the court accepts one party's proposed findings of fact without proper consideration of the facts and where there is a lack of independent judgment by the court." *Id.*, 880 P.2d at 1377 (citations omitted).

Here, the District Court's Order amounts to an unsolicited, one-sided, rubber-stamped ratification of Abortion Providers' desired outcome. The District Court adopted verbatim the facts as framed by Abortion Providers. This raises serious questions as to whether the District Court exercised independent judgment. For example, the Order made no specific references or citations to anything other than

Abortion Providers' Verified Amended Complaint (Doc. 22). (*See* Doc. 84.) The District Court completely ignored the State's opposing Briefs (Docs. 41, 61), both Affidavits of George Mulcaire-Jones, M.D. (Doc. 41 at Ex. A, Doc. 62), and the State's Formal Offer of Proof (Doc. 70). The Order likewise makes no mention of any of the exhibits that the parties stipulated were authentic and admissible. (Tr. at 8:12–15.)

Moreover, the Order is riddled with inconsistencies and contradictions compared to the evidence presented at the hearing. Among the most glaring examples is the Order's reference to Dr. Dickman's testimony addressing a study conducted in Montana as ostensible support for Abortion Providers' argument that ultrasounds are unnecessary (Doc. 84 at 8), even though it sustained defense counsel's hearsay objection to that same testimony, stating:. (Tr. at 107:16–108:17.)

> [S]o the objection is sustained, but his testimony based upon his knowledge and experience is that the complication rates don't vary from state to state between those states where an ultrasound is required such as Texas where he has personal experience, and states like Montana which, thus far, have not required them. That would be the factual finding that I would find.

(Tr. 107:16–24.) Perhaps the District Court could have made that finding had Abortion Providers included it in their Proposed Order, but they clearly did not. (Doc. 84.)

Another example is the Order's reference to Dr. Dickman's testimony "about one recent patient who lives on a Native American reservation who he believes likely

would not have been able to obtain an abortion" if required to obtain an ultrasound beforehand. (Doc. 84 at 12.) The District Court neglected to mention that, upon cross-examination, Dr. Dickman reluctantly admitted that the IHS hospital *on that reservation* would have been required to provide his patient with a free ultrasound. (Tr. at 127:20—128:9.)

The District Court's decision to discredit Dr. Mulcaire-Jones's expert testimony solely because he does not perform abortions is similarly galling. Remarkably, the District Court highlighted Dr. Ralston's and Dr. Dickman's "extensive experience providing abortion care"—as if Dr. Mulcaire-Jones's equally (if not more) extensive experience making the exact same determinations and performing the exact same procedures at issue can and should be cast aside as meaningless, all because he does not take the extra step of killing a live human fetus. (Doc. 84 at 9; Doc. 63 at 3; Tr. at 54:13–22.)

Regardless of whatever contorted reasoning supports this conclusion, this Court has already rejected it in *Weems II*. Indeed, this Court repeatedly and explicitly referenced Dr. Mulcaire-Jones's expert testimony in that case as support for its conclusion that, if APRNs have the requisite expertise to provide miscarriage management care—the functional equivalent of abortion care—they have the competence to provide abortion care as well. *Weems II*, ¶¶ 9, 12–13, 29–30, 47. Suffice it to say that the District Court's verbatim adoption of Abortion Providers'

reasoning in outright dismissing Dr. Mulcaire-Jones's testimony against this backdrop is untenable.[7]

In sum, it is clear that the District Court manifestly abused its discretion in relying exclusively on Abortion Providers' proposed findings, to the exclusion of any meaningful consideration of the State's written submissions, exhibits, affidavits, and hearing testimony. The District Court failed to exercise its own independent judgment, instead adopting Abortion Providers' desired outcome verbatim. This is unmistakable error.

II. APPLYING THE CORRECT STANDARD DE NOVO SHOWS THAT A PRELIMINARY INJUNCTION SHOULD NOT ISSUE.

Because the District Court failed to correctly apply the preliminary injunction standard, as discussed above, the Court must apply the correct legal standard de novo. *Planned Parenthood of Mont.*, ¶ 5 (citing *Driscoll*, ¶ 12.) Applying the four-part conjunctive test to the laws at issue demonstrates that Abortion Providers cannot meet all four parts of the test. In fact, they cannot even clear the first hurdle of demonstrating a likelihood of success on the merits.

In applying for injunctive relief, Abortion Providers' only legal basis was that HB 575 and HB 721 violate their patients' right to privacy (Count One their Verified

[7] This further raises the question of how Abortion Providers might attempt to explain away Helen Weems's use of ultrasounds as her own standard of care. (*See* Doc. 70 at Ex. A, 29:2–8, 71:5–8; 73:17–20.)

Amended Complaint). (Doc. 22 at 17–18; Doc. 24 at 6–9; Doc. 43 at 5–8.) Abortion Providers never discussed the merits of their claims under Counts Two or Three. (*Id.*) The District Court's verbatim adoption of Abortion Providers' proposed Order likewise grants a preliminary injunction solely on the legal basis of the right to privacy. (Doc. 84 at 14.) However, neither HB 575 nor HB 721 violates this constitutional right, and the preliminary injunction should be reversed.

A. ABORTION PROVIDERS ARE UNLIKELY TO SUCCEED ON THE MERITS.

The first prong of the preliminary injunction standard requires that a party demonstrate "a likelihood of success on the merits." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citing *Mazurek*, 520 U.S. at 972). While satisfaction of this prong has been approached on a case-by-case basis, federal courts have held that showing of a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco*, 944 F.3d at 789 (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted).

1. Abortion Providers Lack Standing.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases and controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citation omitted); *see also* U.S. Const. art. III, § 2; Mont. Const. art. VII, § 4. "'The

irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Id.* at ¶ 32 (citations omitted). "Beyond these minimum constitutional requirements, the Supreme Court has adopted several prudential limits: the plaintiff generally must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law invoked." *Elk Grove Unif. Sch. Dist.*, 542 U.S. 1, 12 (2004); *see also Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties); *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145.

Courts recognize a "limited" exception to this rule, but to qualify a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004); *Baxter*, ¶ 15 (citing *see also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). Recently, the U.S. Supreme Court has "disavowed the theories of third-party standing that previously allowed doctors to raise patients' claims in abortion cases."

Alliance for Hippocratic Med. v. FDA, 2023 U.S. App. LEXIS 8898, n.4 (5th Cir. 2023) (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 and n.61 (2022) (comparing *Warth*, 422 U.S. at 499 and *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 15 with *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Alito, J. dissenting), (Gorsuch, J. dissenting) (collecting cases) and *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 632, n.1 (2016) (Thomas, J. dissenting))). This is because "[a] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *June Med. Servs L.L.C.*, 140 S. Ct. at 2168 (Alito, J., dissenting), *abrogated by Dobbs*, 142 S. Ct. at 2275 and n.61. Moreover, "abortionists have a 'financial interest in avoiding burdensome regulations,' while women seeking abortions 'have an interest in the preservation of regulations that protect their health.'" *Id.* Third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 9, 15, and n.7.

Notwithstanding that abortion providers generally cannot meet the third-party standing test, this Court has carved out a special exception. When the State directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures, abortion 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 v. State*, 1999 MT 261, ¶¶ 12–13, 296 Mont. 361, 989 P.2d 264; *see also Weems I*, ¶ 12 ("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.") (quoting *Armstrong*, ¶¶ 8–13). In reliance on *Armstrong* and *Weems I*, Plaintiffs bring their claims on behalf of themselves "and their patients." (Doc. 22 at 2.) But HB 575 and HB 721 do not implicate the constitutional rights of women patients. Because of this—and considering the shifting legal landscape—the Court should apply the federal test for third-party standing (also recognized by this Court), which Abortion Providers cannot meet here.

Abortion Providers have failed to demonstrate sufficient third-party standing. They have neither pled nor argued that they have a "close relationship" to the women to whom they provide direct-to-patient telehealth medication abortions ("MABs") or dismemberment abortions or that any hindrance to these women's ability to bring suit exists. (*See generally* Doc. 22.) Additionally, Abortion Providers have no constitutional or fundamental rights to perform any particular type of abortion or to be free from laws regulating abortion. They cannot establish a concrete injury in fact sufficient to confer standing. Because they cannot clear this threshold jurisdictional issue, they are not likely to succeed on the merits of their claims.

2. HB 575 and HB 721 Do Not Violate the Right to Privacy.

HB 575

Abortion Providers unilaterally declare HB 575 to be an outright ban on direct-to-patient MABs and therefore invalid under *Armstrong*. (*See* Doc. 24 at 1, and *generally*.) They base this conclusion on a strained attempt to equate HB 575 with HB 171 (2021)—legislation that created an entirely new section of Montana's statutory code entitled the "Montana Abortion-Inducing Drug Risk Protocol Act"—which the Thirteenth Judicial District Court preliminarily enjoined. (Doc. 41 at 3–4.) However, a cursory review of HB 575's plain language, HB 171's various provisions, and the reasoning underlying the HB 171 preliminary injunction exposes Abortion Providers' dubious argument.

HB 575 is anything but 'virtually identical' to HB 171 as Abortion Providers argue. A side-by-side comparison of the bills demonstrates this obvious reality—HB 575 prohibits the abortion of viable fetuses unless necessary to preserve the life of the mother and requires that an ultrasound be used in viability determinations, whereas HB 171 enacted an entirely new statutory scheme regulating MABs in extensive detail. HB 575's effect on direct-to-patient MABs is only to require an ultrasound in determining fetal viability before the MAB can proceed. Nothing in HB 575 prevents patients seeking MABs from obtaining an ultrasound wherever available in Montana (or elsewhere), having it emailed to an abortion provider, or

receiving MABs through the mail. This stands in stark contrast to HB 171, which explicitly bans providers from providing MABs to patients by mail. Indeed, aside from HB 575's discrete ultrasound requirement, it bears absolutely no substantive resemblance to HB 171. This only scratches the surface of the respective bills' many differences, but it should be obvious that Abortion Providers' argument falls flat in this regard.

It further strains the bounds of credulity for Abortion Providers to claim that the preliminary injunction on HB 171 has any bearing on the analysis in this case. That decision not only addresses a completely different statute, but it is also predicated on the application of a preliminary injunction standard that no longer exists in Montana law. (Doc. 41 at Ex. C, 14) ("Under the Montana Code Annotated (MCA), a preliminary injunction may be granted on five enumerated grounds. § 27-19-201(1–5). Only two are relevant for the purposes of this matter."); *Contra* SB 191. Abortion Providers also grossly overstate the focus on HB 171's ultrasound requirements in its analysis of that bill's provisions and the reasoning underlying the preliminary injunction. The ultimate reality is that the HB 171 preliminary injunction was predicated on numerous provisions and a legal standard that simply do not apply to HB 575. The HB 171 injunction therefore provides no precedential value or meaningful guidance for the consideration of the preliminary injunction here, and Abortion Providers fail to demonstrate otherwise.

HB 575 also comes nowhere near running afoul of *Armstrong*, which explicitly limits a woman's right to obtain an abortion to pre-viability abortions. *Armstrong*, ¶ 49 ("Implicit in this right of procreative autonomy is a woman's moral right and moral responsibility to decide, *up to the point of fetal viability*, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation.") (emphasis added). HB 575's viability determination requirements not only comport with *Armstrong*, but they also ensure compliance with that precedent by establishing an effective mechanism to verify gestational age and viability.

Moreover, HB 575's ultrasound requirement falls well within the State's inherent power to regulate for the health and safety of its citizens. *Wiser v. Mont. Dept. of Comm.*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133. This Court has made clear that the right to health care is limited to the right to obtain a "lawful medical procedure" from a "competent" and "licensed" provider. *Id.* at ¶ 15–16 (quoting *Armstrong*, ¶ 62). The notion that a procedure must be lawful necessarily implies some authority of the State to regulate procedures such as MABs. Indeed, "an individual does not have a fundamental affirmative right of access to a particular drug[, and a] patient's 'selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health,' and regulation of that medication does not implicate a fundamental constitutional right."

MCIA, ¶ 24 (citation omitted); *see also Weems II*, ¶ 38 ("[E]very restriction on medical care does not necessarily impermissibly infringe on the right to privacy.").

Thus, HB 575's discrete ultrasound requirement neither implicates nor violates any fundamental right under Montana's constitution. Abortion Providers therefore failed to establish a likelihood of success on the merits of their claims, particularly considering the presumption as a matter of law that HB 575 is constitutional. The District Court, accordingly, erred in granting a preliminary injunction motion.

HB 721

Abortion Providers also fail to establish a likelihood of success on the merits of their challenge to HB 721 for similar reasons. HB 721 does not implicate the fundamental right to privacy under *Armstrong* because 1) it does not prohibit pre-viability abortion; and 2) *Armstrong* only protects a right to a "lawful medical procedure," and HB 721 outlaws a specific medical procedure. This Court in *Armstrong* held that the Montana Constitution protects "the right to seek and to obtain a specific *lawful* medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14 (emphasis added). It further explained

that strict scrutiny applies only where "legislation *infringe[s]* the exercise of the right." *Id.* at ¶ 34 (emphasis added).[8]

But HB 721 does not infringe on the right to a lawful pre-viability abortion. Instead, it renders a specific procedure—a dismemberment abortion—*unlawful*, while allowing women to continue having pre-viability abortions by other methods. HB 721 prohibits "a procedure that involves . . . dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts form a *living* unborn human being." (App. D at 3) (emphasis added). In other words, Abortion Providers may still perform abortions using alternative procedures that do not dismember a live fetus capable of feeling pain.

Dobbs is clear that rational basis review should apply to state abortion regulations. 142 S. Ct. at 2284. Regardless, HB 721 survives strict scrutiny. The Montana Supreme Court explained in *Armstrong* that "the state . . . may demonstrate

[8] This is also bad precedent, justifying overturning *Armstrong*. *Dobbs*, 142 S. Ct. at 2283–2284 (States may regulate abortion for legitimate reasons; courts should not "substitute their social and economic beliefs for the judgment of legislative bodies;" respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance; abortion regulations are entitled to a "strong presumption of validity" and must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests, including respect for and preservation of prenatal life at all stages of development, protection of maternal health and safety, elimination of particularly gruesome or barbaric medical procedures, preservation of the integrity of the medical profession, mitigation of fetal pain, and prevention of discrimination.) (citations omitted).

a compelling interest in and obligation to legislate or regulate 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; *see also Weems II*, ¶ 37. The State also has compelling interests in the "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." *Dobbs*, 142 S. Ct. at 2284; *see also* Mont. Code Ann. §§ 45-5-102 and -116(3) (including as a "deliberate homicide" the purposeful or knowing causation of the death of "the fetus of another"); Mont. Code Ann. § 45-5-103 ("mitigated deliberate homicide" includes "purposely or knowingly caus[ing] the death of a fetus of another [while] under the influence of extreme mental or emotional stress"); Mont. Code Ann. § 72-38-303(6), ("a parent may represent and bind the parent's minor *or unborn child* if a conservator or guardian for the child has not been appointed") (emphasis added); Mont. Code Ann. § 41-1-103 ("A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.")

Moreover, Montana "has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of … [dismemberment] abortions." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018). It also

"has an interest in protecting the integrity and ethics of the medical profession from being tarnished by participation in gruesome procedures." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (cleaned up). This, of course, includes preventing the infliction of the brutal pain unborn children experience during these procedures, limiting increased danger and pain to their mothers, and protecting the medical profession's integrity by "promot[ing] respect for life, including life of the unborn." *Id.* at 158.

HB 721 is narrowly tailored to advance these compelling interests. D&E procedures use surgical instruments to crush and tear the live unborn child apart before removing pieces of the dead child from the womb. (*See generally* Doc. 62.) These procedures are invasive and dangerous to the mother because they can cause sepsis, uncontrollable bleeding, infection, chronic pain, and infertility, among other medically recognized, bona fide health risks. (*Id.* at ¶¶ 33–45.) This procedure also opens the door for a litany of other potential complications. Such a brutal procedure obviously "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician." *Cf.* Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. 1531 §§ 2(14)(J), 2(14)(K).

HB 721 is not a gestational limit on abortion. It simply prohibits one particularly gruesome, barbaric, and dangerous procedure. It also does not infringe in any way on a woman's ability to obtain an abortion in the first trimester when the

overwhelming majority of abortions take place. "In 2020, 93% of abortions occurred during the first trimester—that is, at or before 13 weeks of gestation, according to the CDC. An additional 6% occurred between 14 and 20 weeks of pregnancy, and 1% were performed at 21 weeks or more of gestation." J. Diamant & B. Mohammed, *What the data says about abortion in the U.S.*, Pew Research Center (Jan. 11, 2023). Given that fewer than 7% of abortions are dismemberment abortions, limiting this barbaric, gruesome, and dangerous procedure cannot reasonably been characterized as impeding a woman's ability to obtain a pre-viability abortion. Because HB 721 is narrowly tailored to advance compelling government interests, Abortion Providers cannot establish a likelihood of success on the merits for this reason as well. Thus, the District Court erred in granting their request for preliminary injunction.

B. ABORTION PROVIDERS WILL NOT SUFFER IRREPARABLE HARM.

Abortion Providers must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("Wright & Miller") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable

harm before a decision on the merits can be rendered"); Wright & Miller at 154–155 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

Abortion Providers neither plead nor present any convincing argument that HB 575's ultrasound requirement will imminently result in such irreparable harm that would justify the drastic remedy of a preliminary injunction prior to full adjudication of their claims on the merits. Abortion Providers argue direct-to-patient telehealth MABs are "a critical form of abortion care for Montanans[]" because they mitigate the burdens associated with travel, but they ignore the fact that HB 575 in no way requires patients seeking MABs to travel to any specific provider. (Doc. 24 at 4.) They can simply obtain an ultrasound from the nearest available source and transmit the results to their chosen provider who can then have MABs mailed directly to the patient. This is similar to (and more flexible than) the available option of "site-to-site telehealth, in which a patient at a health center meets by video with a provider located at another health center." (Doc. 24 at 2–3.) Abortion Providers fail to convincingly explain how such options do not allow for a patient to obtain an ultrasound and subsequent MABs while simultaneously addressing their purported concerns about travel burdens.

Further, Abortion Providers admit that, in the possible event of complications from MABs, patients "can speak to a PPMT provider…in person at a health center,

regardless of the fact that their initial visit was conducted through telehealth." (Doc. 22 at ¶ 41.) In other words, Abortion Providers undercut their own argument regarding the burdens of travel in admitting that patients do in fact presently have access to in-person visits with providers, and therefore ultrasounds, if necessary. Abortion Providers also make no allegation or showing that any MABs will imminently occur but for HB 575 such that would justify a preliminary injunction.

Abortion Providers and their patients also will suffer no irreparable harm absent an injunction of HB 721 because safe alternative procedures remain available. Thus, HB 721 does not interfere with Abortion Providers' patients' ability to obtain a pre-viability abortion. HB 721's exception for "medical emergenc[ies]" further mitigates any risk to patients' health. (App. D at 4.) Thus, Abortion Providers will continue to be able to provide abortions safely. "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. Accordingly, neither Abortion Providers nor their patients face an imminent risk of irreparable harm. The District Court erred in failing to reject Abortion Providers' request for a preliminary injunction on this basis.

C. THE OTHER FACTORS FAVOR THE STATE.

A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir.

2013) (citing *Winter*, 555 U.S. at 20). Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quotation omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* (citation omitted). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

Here, the balance of the equities and the public interest strongly favor the State. The State has numerous interests that outweigh Abortion Providers' claimed interests with respect to HB 575's ultrasound requirement. *See* Statement of Facts,

supra; Mont. Code Ann. § 50-20-102(1) ("The legislature finds that a compelling state interest exists in the protection of viable life"). The State also has the constitutional duty to ensure that the laws passed by the Legislature are faithfully executed. Mont. Const. art. VI, § 4. That interest with HB 575 in mind is to ensure that abortions are generally limited to pre-viability abortions in accordance with the will of the people of Montana and in compliance with *Armstrong*. The State further has an interest in protecting the health, safety, and well-being of women and unborn children by imposing requirements surrounding viability determinations, thereby helping to ensure that the services are high quality and performed in accordance with the applicable standard of care and with meaningful informed consent.

In contrast, Abortion Providers' claimed interests amount to ensuring a marginally increased level of convenience for unidentified future patients by preserving the ability to provide direct-to-patient MABs without an ultrasound. Abortion Providers make no sufficient showing of any real hardship imposed by HB 575 and only make speculative arguments as opposed to the State's compelling interest in protecting the health and safety of women and the lives of unborn viable children. Abortion Providers have no legitimate interest in preventing adequate and reliable viability determinations, especially on the basis of avoiding minor inconvenience.

The public interest further contravenes an injunction against HB 721 because it protects unborn children from brutal and inhumane procedures and their mothers from the drastic health complications that can result from a D&E abortion. *See Armstrong*, ¶ 59 ("[T]he state . . . may demonstrate a compelling interest in and obligation to legislate or regulate 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."). And "every citizen of this state is interested in seeing to it that our laws are obeyed." *State ex rel. Steen v. Murray*, 144 Mont. 61, 67, 394 P.2d 761 (1964). The District Court erred in failing to reject Abortion Providers' requests for preliminary injunctions because they failed to meet these requirements for a preliminary injunction.

III. THE DISTRICT COURT ERRED IN ISSUING A PRELIMINARY INJUNCTION WITHOUT ADEQUATE EVIDENTIARY SUPPORT.

The examples of the District Court's errors and lack of independent judgment resulting from its verbatim adoption of Abortion Providers' Proposed Order as described above simultaneously demonstrate the lack of evidentiary support for its resulting preliminary injunction. Those, alone, are sufficient to demonstrate this additional basis for reversal. However, those are not the only examples.

Notably, the District Court wrongly states that the State provided only two "purported rationales for [HB 575's] ultrasound requirement[.]" (Doc. 84 at 8.) The first rationale it identified is "to determine gestational age accurately, which in turn

advances the State's interest in preventing post-viability abortions." (*Id.* at 8–9.) The second is that it is "medically necessary to screen for ectopic pregnancies[.]" (*Id.* at 9–10.) While those are rationales underlying the ultrasound requirement, they are far from a complete list, which also includes: determining gestational age to determine what kind of procedure is safe and appropriate (Tr. at 55:25–56:6); determining whether the fetus is alive or dead (*Id.* at 55:20–21); ruling out twins (*Id.* at 56:25–57:1); determining the location of the placenta so the abortion can be done safely (*Id.* at 57:6–7); ensuring the pregnancy is intrauterine (*Id.* at 57:8–17); protecting both the woman and the provider from inaccurate viability determinations (*Id.* 58:5–11); and bolstering the providers' ability to obtain patients' informed consent. (*Id.* at 68:20–21; Doc. 41 at Ex. A, ¶ 16.) The District Court simply ignored these numerous additional rationales and wrongly excluded them from its analysis.

The District Court also found that the State "presented no evidence that HB 575 is necessary to protect patients from a medically acknowledged, bona fide health risk." (Doc. 84 at 8.) This again ignores the evidence presented by the State regarding the numerous rationales underlying HB 575's ultrasound requirement. Similarly, the District Court found that the State presented "no evidence that HB 721 addresses a medically acknowledged, bona fide health risk." (Doc. 84 at 10.) This fails to acknowledge the evidence offered by the State, including the risks outlined and numerous scholarly works relied upon by Dr. Mulcaire-Jones. (*See* Doc. 62 at 4–9,

nn.1–7.) Aside from its adoption of Abortion Providers' obtuse reasoning in discrediting Dr. Mulcaire-Jones's testimony, the Order makes no attempt to explain its conclusion that the State offered "no evidence" to these ends. Ultimately, the lack of evidentiary support for the District Court's preliminary injunction under these circumstances is clear, and this Court should reverse.

IV. ALTERNATIVELY, THE DISTRICT COURT ERRED IN FAILING TO PROPERLY NARROW THE SCOPE OF ITS PRELIMINARY INJUNCTION.

Even assuming, *arguendo*, that the District Court did not err in granting a preliminary injunction, it still erred in failing to properly narrow the scope of that injunction. Any injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987).

The District Court made no effort to tailor its injunction to the harm Abortion Providers alleged or argued. For example, Abortion Providers did not even challenge HB 575's prohibition of abortions of viable children, its presumption of viability at twenty-four weeks gestational age, its requirement to consider a margin of error in gestational age calculations, its presumption of viability if uncertainty exists, or (perhaps most notably) its exception allowing for *post-viability* abortions if

necessary to preserve the life of the mother. (Doc. 84.) The District Court could have simply enjoined the ultrasound requirement and the purported limitation on the practice of abortion to the exclusion of APRNs in light of this Court's decision in *Weems II*, but it instead enjoined HB 575 in its entirety. This amounts to yet another reversible error of the District Court, and this Court should reverse the preliminary injunction for this reason as well.

CONCLUSION

For all the reasons set forth herein, this Court should reverse the District Court's grant of a preliminary injunction of HB 575 and HB 721.

DATED this 30th day of October, 2023.

Austin Knudsen
Montana Attorney General

/s/ Michael D. Russell
Michael D. Russell
Thane Johnson
Assistant Attorneys General
MONTANA DEPT. OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 9,850 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

/s/*Michael D. Russell*
Michael D. Russell

APPENDIX

Document **Tab Number**

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-30-2023:

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

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

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
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)
1233 Quail Ridge Dr
Kalispell MT 59901
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)
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

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 Deborah Bungay on behalf of Michael D. Russell
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