IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0572

SCARLET VAN GARDEREN, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.,

Defendants and Appellants.

AMICUS CURIAE BRIEF OF COMPASSION & CHOICES

On Appeal from the Montana Fourth Judicial District Court, Missoula County
Case No. DV 2023-541, the Honorable Jason Marks, Presiding

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STATEMENT OF INTEREST

Compassion & Choices is a non-profit corporation whose mission is to improve care, expand options, and empower everyone to chart their end-of-life journey. Its services include educating the public about the importance of documenting their end-of-life values and priorities, empowering individuals to control their end-of-life care by providing information about the full range of available options at the end of life, advocating for expanded end-of-life options and improved medical practices that focus on patients, and defending existing end-of-life options from efforts to restrict access.

Given its mission and services, Compassion & Choices is uniquely positioned to comment about the importance of maintaining Montana's broad constitutional privacy provision, which protects personal medical decision making. It submits this brief to inform the Court that a ruling in favor of Appellants could have consequences far beyond limiting access to gender-affirming care in Montana by diminishing an individual's ability to make complex and highly sensitive end-of-life decisions in line with their needs, values, and beliefs.

ARGUMENT

The decisions we make about our medical care are some of the most intimate and consequential we will make in our lifetimes. This is particularly true at the end of life, when we weigh a lifetime of experiences, values, and beliefs to decide what

treatments we want, or do not want, before we leave this world. Article II, Section 10 of the Montana Constitution was drafted precisely to protect these decisions from governmental intrusion. *See Armstrong v. State*, 1999 MT 261, ¶ 32, 296 Mont. 361, 989 P.2d 364, citing Montana Constitution Convention, Verbatim Transcript, March 7, 1972, p. 1681 ("[T]he delegates to Montana's 1972 Constitutional Convention viewed the textual inclusion of this right in Montana's new constitution as being necessary for the protection of the individual in 'an increasingly complex society . . . our area of privacy has decreased, decreased, decreased.'").

The State threatens to limit this critical constitutional protection in passing SB99, impermissibly restricting an individual's ability to access a wide range of gender-affirming treatments. SB99 invites governmental invasion of Montanans private, intimate, medical decision-making spaces and sanctions the very conduct that Article II, Section 10, Mont. Const. is meant to protect against. To overturn the District Court's ruling would be to unravel over a quarter century of Montana Supreme Court legal precedent and counter the direct and explicit will of the people when they voted to ratify Article II, Section 10, of the Montana Constitution, over fifty years ago, threatening medical decision making writ large, including at the end of life.

I. SB99 Is An Impermissible Intrusion Into The Private, Constitutionally Protected Healthcare Relationship Between An Individual And Their Chosen Healthcare Provider.

Montana's Constitution affords "significantly broader protection than the federal constitution," *Weems v. State by & through Knudsen (Weems II)*, 2023 MT 82, ¶ 35, 412 Mont. 132, 529 P.3d 789, offering "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong*, ¶ 34. The drafters intended Article II, Section 10 to be expansive, reflecting Montanan's deeply-held belief that there are some individual decisions so intimate they must be free of government interference absent extraordinary justification. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). ("[The right of privacy] is perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.")

These robust protections include private medical decisions, with this Court finding that Article II, Section 10, Mont. Const., "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." *Armstrong*, ¶ 14. Implicit in the protection of the partnership between individuals and their healthcare provider is recognition of the intimate,

complex, and sensitive nature of medical decisions. *Armstrong*, ¶ 54, citing *Andrews v. Ballard* 498 F.Supp. 1038, 1047 (D.C. S.D. Tex 1980) (medical treatment decisions are, to an extraordinary degree, intrinsically personal) (quotations omitted).

While the State can reasonably exercise its police power to regulate the administration of healthcare, it can only interfere in those private conversations and decisions when such interferences are narrowly tailored to meet a compelling state interest. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, 366 Mont. 224, P.3d 1161 ("*MCIA*").

In *Weems II*, the State argued that a statute restricting only licensed physicians and physician assistants to provide early abortion care did not restrict a fundamental privacy right, but was merely a justified regulation on who could provide a surgical procedure. *Weems II*, ¶ 42. This Court disagreed. The statute did not simply regulate who could provide abortion services; it "interfere[d] with a woman's right of privacy and her decision to obtain lawful healthcare from a qualified provider of her choice." *Weems II*, ¶ 43. A compelling state interest was needed to justify this intrusion, which the State could not show. *Weems II*, ¶ 51.

Here, the State justifies SB99's invasion of the well-established and private medical decision-making space by arguing it is a reasonable and restrained exercise of its police power to prohibit gender-affirming care for the "health,

safety, welfare, or morals" of the public. (Appellants' Br. at p. 35). Contrary to the State's characterization, and as in *Weems II*, SB99 goes beyond justified healthcare regulations, infringing on broad privacy protections by prohibiting a wide range of care options.

Unlike in *MCIA*, the legislature is overstepping its power to regulate particular medications, and is instead forbidding a range of treatments aimed to address gender dysphoria. To let the legislature enact this ban would place the government squarely between an individual and their healthcare provider in private medical conversations and decisions, depriving those individuals of their right to decide what medical treatment they do or do not receive. Such intrusions are solidly outside the bounds of permissible government regulation.[1]

When State regulations remove certain healthcare options altogether absent the most compelling justification–whether it be reproductive care, gender-affirming care, or access to end-of-life options–the government, and not the individual, is deciding the immensely personal question of what healthcare an individual will or will not receive. Article II, Section 10, Mont. Const., is meant to prevent this harm.

[1] To the extent that this Court makes a distinction between the privacy rights of adults and minors, amicus curiae do not weigh in on when full constitutional protections should attach. Regardless of any such distinction, Montana's Constitution should offer the broadest possible privacy protections after weighing any countervailing interests unique to a minor's ability to make important and deeply personal health care decisions.

II. Narrowing Constitutional Privacy Protections Risks Eroding The Right Of Patients To Make Important And Immensely Personal End-Of-Life Decisions.

The private treatment decisions made between an individual and their trusted physician involve substantive, complex medical issues that deserve constitutional protection. This is true whether this decision is to receive gender-affirming care or to consent to or refuse end-of-life treatment. *Stand Up Mont. vs. Missoula Cnty. Pub. Schools*, 2022 MT 153, ¶¶ 12, 14, 409 Mont. 330, 339, 514 P.3d 1062, 1068 (right to privacy is implicated when a statute infringes on a person's ability to obtain or reject medical treatment, citing *MCIA*, ¶ 27.)

The right to privacy in medical decision making is critical to preserving end-of-life care options, including the right to be free from forced treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287-89, 110 S.Ct. 2841, 2856 (1990), O'Connor, concurring (imposition of medical treatment on an unwilling competent adult violates an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.) Many states have recognized that the right to make medical decisions about what end-of-life treatments an individual does or does not want is rooted in their state's constitutional right to privacy. *Matter of Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976); *Conservatorship of Wendland*, 26 Cal. 4th 519, 530, 28 P.3d 151, 158 (2001); *Foody v. Manchester Mem'l Hosp.*, 40 Conn. Supp. 127, 132, 482 A.2d 713, 717

(1984). This Court's recognition that such decisions are protected by Article II Section 10, even if the individual treatments have not received specific federal or state constitutional recognition, would therefore follow a line of precedent from within and without Montana.

To require, as the State suggests, specific constitutional recognition of the right to a particular treatment before constitutional privacy protections attach would severely limit existing protections, allowing governmental interference in private medical decisions in all but a small set of cases. End-of-life care decisions such as whether to refuse or consent to a particular treatment could be intruded upon under the guise of the State's police power under the theory that specific end-of-life treatments and methods of care sought are not, in and of themselves, constitutionally protected.

A patient's end-of-life medical decisions can be extraordinarily complex, both in their medical implications and in their moral heft, and an individual must be able to trust the privacy of their relationship with their medical team. Broadly speaking, these medical decisions can include whether to receive palliative care or aggressively treat an underlying cause of illness, to sustain or withdraw food and nutrition, and, in Montana, to receive medical assistance to hasten an impending death at the hour and place of one's choosing. *Baxter v. State* 2009 MT 449, 354 Mont. 235, 224 P.3d 1211.

To properly consider these decisions a patient must trust in the accurate and honest communication of complex medical information. For example, a patient must be able to have frank discussions with a doctor about how they've determined their life-expectancy, at what point their refractory symptoms will be sufficiently distressing to incorporate the practice of palliative sedation,[2] whether they will experience pain if hydration and nutrition are removed, or the efficacy and expected effects of medical aid-in-dying medication. To permit the legislature to unnecessarily insert itself into this relationship and highly personal decision-making process erodes the privacy and trust that patients rely on during such high-stress times.

End-of-life decisions are not limited to those that hasten death or withdraw care. Individuals at the end of their lives facing aggressive and advancing cancer diagnoses, for instance, must also be free to decide whether to continue treatment including chemotherapy, radiation, immunotherapy, and surgical intervention. Approaches to such treatment decisions vacillate wildly between patients, with some choosing to exhaust all possible treatments and others opting to forgo treatments with an improbability of success or that will serve only to minimally extend the length of that individual's life. Only the individual, with the support of

[2] *See* Poonam Bhyan et al., Palliative Sedation in Patients with Terminal Illness (last updated, January 19, 2024), available https://www.ncbi.nlm.nih.gov/books/NBK470545/.

their trusted physicians and loved ones, should be able to make these important and highly individual treatment decisions.

Even when a specific treatment has not received constitutional recognition, the underlying health care relationship falls within the scope of the right to privacy as articulated in *Armstrong* and *Weems II*, particularly when the decisions being made are deeply personal, intimate, and sensitive. Montana's constitutional right to privacy protects the substance of the medical decision-making process and only allows the legislature to substitute its moral, political, or value judgment for the judgment of the patient and their trusted physician when it can meet the strictest standard of scrutiny. *Armstrong*, ¶ 51. ("Unless fundamental constitutional rights—procreative autonomy being the present example—are grounded in something more substantial than the prevailing political winds, Huxley's Brave New World or Orwell's 1984 will always be as close as the next election.")

CONCLUSION

Montana's broad constitutional privacy protections are critical in ensuring individuals at the end of life can openly discuss their medical options with a trusted physician, make a fully-informed treatment decision, and have that treatment decision respected. SB99 threatens to erode these critical protections. Consequently, this Court should uphold the lower court's ruling.

DATED this 18th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Answer brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,000 words or less (2,247 words), excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance.

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