FILED
03/24/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0521

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0521

PLANNED PARENTHOOD OF MONTANA, and JOEY BANKS, 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,

Defendant and Appellant.

BRIEF OF *AMICI CURIAE* THE CENTER FOR REPRODUCTIVE RIGHTS, ACLU OF MONTANA FOUNDATION, AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELEES.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Michael G. Moses, Presiding.

APPEARANCES:

Alex Rate
Akilah Lane
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
(406) 443-8590
ratea@aclumontana.org
lanea@aclumontana.org

Amy Myrick *
Alexander Wilson *
Astrid Ackerman *
Center for Reproductive Rights
199 Water Street
New York, NY 10038
(917) 637-3659
(917) 637-3783
(917) 637-3600
amyrick@reprorights.org
awilson@reprorights.org
aackerman@reprorights.org

Attorneys for Amici
*Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

INTEREST OF *AMICI CURIAE*

The Center for Reproductive Rights ("the Center"), the ACLU of Montana Foundation, Inc. ("ACLU-MT"), and the National Women's Law Center ("NWLC") (together, "*Amici*") respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellees. The Center has been involved in nearly all major litigation in the U.S. concerning reproductive rights, including state supreme courts and the U.S. Supreme Court. In particular, the Center represented the plaintiffs in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. ACLU-MT supports and protects civil liberties in the State of Montana and has a long history of advocating in support of the robust privacy protections guaranteed by the Montana Constitution. NWLC works to advance gender justice, including by advocating for state courts to protect access and secure the legal right to abortion.

Amici believe that their collective expertise on personal autonomy rights and national and state level perspective on the legal issues implicated in this matter will assist the Court in reaching a just decision.

SUMMARY OF THE ARGUMENT

Armstrong correctly held that the right to privacy in Article II, Section 10 of the Montana Constitution protects procreative autonomy, including the right to a previability abortion. *Id.* ¶ 14. Contrary to the State's assertion that *Armstrong* is a judicial whim that this Court should overturn, the high courts of Alaska, Florida, and

California have all determined that their constitutions' explicit privacy guarantees protect abortion as a fundamental privacy right. These courts and others, among them the courts in Kansas, Iowa, and Minnesota, have recognized that their constitutions were designed to protect individual rights under broadly worded text and rejected arguments that abortion is excluded simply because it is not enumerated.

As this Court has already established, the history and text of the Montana Constitution compel a similarly expansive definition of privacy that includes decision-making about family, bodily integrity, and medical care. *Armstrong* joins *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997), which first recognized the autonomy component of personal decision-making, to form the precedential cornerstones for Montana's right to privacy. Expansive privacy rights have been critical for LGBTQIA people challenging laws that target them for discrimination, harassment and violence, as well as for people seeking to end a pregnancy.[1] Overturning *Armstrong* would threaten to unravel privacy protections beyond abortion, to the detriment of already vulnerable individuals and communities in Montana. This Court should affirm *Armstrong*'s validity and continue to interpret privacy rights in Montana in a broad manner that allows their full force and effect.

ARGUMENT

[1] LGBTQIA refers to lesbian, gay, bisexual, transgender, queer, intersex, and asexual.

I. *Armstrong* Aligns with Other State High Courts Recognizing that Privacy Rights in Their Constitutions Include the Right to Abortion.

Armstrong is no outlier. The outcome in *Armstrong* is consistent with decisions reached by the several state courts across the country that have recognized their constitutions' explicit privacy guarantees protect a right to abortion. Because in urging this Court to overturn more than twenty years of precedent, the State argues that only "the sociological convictions of seven justices" gave rise to *Armstrong*'s holding that privacy includes the right to choose abortion, Appellant's Opening Br. at 15-17, it is instructive to look to these other state courts' decisions, which demonstrate that locating the right to abortion firmly within the right to privacy is both logical and necessary.

Armstrong follows a similar approach to recognizing a right to abortion as the high courts of Alaska, Florida, and California, all of which have interpreted their constitutions' explicit privacy guarantees to include abortion as a fundamental privacy right. These courts hold that it is the right of the individual—not the state—to decide the personal, family, and medical implications of ending a pregnancy. *See Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997) ("[R]eproductive rights are . . . encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution . . . . These fundamental reproductive rights include the right to an abortion."); *In re T.W.*, 551 So. 2d 1186,

1193, 14 Fla. L. Wkly. 531 (Fla. 1989) ("The Florida Constitution embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy.") (alterations omitted) (internal quotation marks omitted)); *Comm. To Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 798, 29 Cal. 3d 252, 284, 172 Cal. Rptr. 866, 885 (Cal. 1981) ("By virtue of the explicit protection afforded an individual's inalienable right of privacy by . . . the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman . . . is guaranteed the constitutional right to make that decision . . . .").

Courts in each of these states have reasoned that the right to personal decision-making free from unwarranted government interference—including the right to choose abortion—flows logically from explicit protections for privacy that exceed the federal analog and encompass matters relating to procreation, bodily integrity, family, and sex.

In an opinion that laid the foundation for a robust privacy jurisprudence in the state, the Alaska Supreme Court recognized that the state constitution's express privacy clause protects the right to abortion. *Mat-Su*, 948 P.2d at 966-69. Applying this right, the Court struck down a non-profit hospital's policy prohibiting abortion except in extremely limited circumstances. *Id.* at 965. The court explained:

> A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is necessary for . . . civilized life and ordered liberty . . . . [T]he right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language.

Id. at 968 (internal citations and quotations omitted). The court interpreted privacy to protect procreative decisions as "among the most private and sensitive" matters, noting that "few things are more personal than one's body." *Id.* (internal citations and quotations omitted).

Subsequent decisions from the Alaska Supreme Court affirmed that the right to privacy includes personal decision-making without government interference, including the right to choose abortion. *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 39 (Alaska 2001) (recognizing that the right to privacy extends to minors in parental consent law); *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581-82 (Alaska 2007) (striking down parental consent law as "the primary purpose of [] [the privacy] section is to protect Alaskans' personal privacy and dignity against unwarranted intrusions by the State") (internal quotations and citations omitted); *see also State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 906, 909 (Alaska 2001) (striking down public funding restriction on abortion on equal protection grounds because it "affects the exercise of a constitutional right, the right to reproductive freedom"); *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1003 (Alaska 2019) (same); *Planned Parenthood of The Great Nw. v. Alaska*,

375 P.3d 1122, 1143 (Alaska 2016) ("The Notification Law's discriminatory barrier to those minors seeking to exercise their fundamental privacy right to terminate a pregnancy violates Alaska's equal protection guarantee.").

In Florida, the supreme court invalidated a requirement for minors to obtain parental consent or a judicial bypass to access abortion, recognizing that the state constitution's express privacy clause, which confers rights beyond the U.S. Constitution, protects abortion as a fundamental right. *In re T.W.*, 551 So. 2d at 1188, 1191-92. The court explained:

> [t]he Florida Constitution embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.

Id. at 1193 (alterations in original) (internal citations and quotations omitted).

The Florida court emphasized the express right to privacy was a unique and robust guarantor of the fundamental right to make personal decisions without improper government interference and would render invalid laws that failed to serve a compelling state interest through the least intrusive means possible. *Id.* at 1192 ("[N]o government intrusion in the personal decisionmaking cases . . . has survived."). The court grounded this right in other Florida state court decisions protecting medical decision-making and non-disclosure of personal information under the privacy clause. *Id.*; *see also N. Fla. Women's Health & Counseling Servs.,*

Inc. *v*. *State*, 866 So.2d 612, 632, 28 Fla. L. Weekly S641 (Fla. 2003) (invalidating statute requiring parental notice for minors seeking abortions, and reiterating "few decisions are more private and properly protected from government intrusion than a woman's decision whether to continue her pregnancy.") (citing *In re T.W.*, 551 So.2d at 1193).

Finally, much like the people of Montana, the people of California in 1972 voted to include an express right to privacy under their constitution that is more explicit than under the U.S. Constitution. *See Comm. To Defend Reprod. Rts.*, 625 P.2d at 784, 29 Cal. 3d at 262, 172 Cal. Rptr. at 871. Invalidating budget provisions that would have excluded abortion services from the state's public insurance program for low-income people, the California Supreme Court held that abortion is part of the "constitutional right of procreative choice" that the right to privacy includes, as it is "essential to [the pregnant person's] ability to retain personal control over her own body." *Id.* at 784, 792, 29 Cal. 3d at 262, 275, 172 Cal. Rptr. at 872, 879; *cf. Armstrong*, ¶ 39 ("[P]rocreative autonomy[] is a protected form of personal autonomy.").The court explained, "an abortion is so private and so intimate that each woman in this state rich or poor is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion." *Comm. To Defend Reprod. Rts.*, 625 P.2d at 798, 29 Cal. 3d at 284, 172 Cal. Rptr. at 885.

Contrary to the State's assertion that "procreative autonomy" is a concept that arose with *Armstrong*, Appellant's Opening Br. at 18, the California Supreme Court thus identified "procreative choice" as an essential component of privacy eighteen years earlier, in the first state supreme court case that protected abortion rights under an express privacy clause. *Id.* at 784, 792, 29 Cal. 3d at 262, 275, 172 Cal. Rptr. at 872, 879. And notably, the Alaska Supreme Court in *Mat-su* explicitly rejected another argument the State puts forth in this case: that privacy only applies to "government snooping." *See* Appellant's Opening Br. at 18. The Court held that the Alaska Constitution's plain text ("the right of the people to privacy is recognized") "is a broad protection of privacy rights," and the legislative history was insufficient to justify excluding abortion. *Mat-Su*, 948 P.2d at 969. Relying similarly on plain constitutional language and the absence of persuasive legislative history to the contrary, the high courts in Florida, and California have also recognized that privacy guarantees in their constitutions encompass more than "government snooping."[2]

Armstrong is not alone. An explicit right to privacy necessarily guarantees that individuals can make personal decisions about family, procreation, and medical

[2] Furthermore, the State's suggestion that privacy rights shield against governmental access to private information, but not government interference with private decision-making involving the body, would lead to absurd results. For example, it would allow the state to force people to have medical procedures, but disallow its collection of private medical data about such procedures.

care, including choosing to end a pregnancy without unwarranted interference by the state.

II. Other State High Courts Have Recognized that Intentionally Broad State Constitutional Provisions Protect Reproductive Autonomy, Rejecting that Abortion is Excluded Because It is Not Enumerated.

This Court's decision in *Armstrong* is also in line with other state courts' interpretations of inclusive and flexible provisions in their constitutions as protecting reproductive autonomy, even in the absence of an express privacy clause. The State charges this Court with "invent[ing]" a constitutional protection for abortion "from whole cloth." Appellants' Opening Br. at 15. But, as with other state constitutions, Montana's constitutional delegates intended that the state constitution's protections of individual rights be "broad and undefined." *Armstrong*, ¶ 45. Like this Court in *Armstrong*, the Kansas, Iowa, and Minnesota Supreme Courts have interpreted their state constitutions to recognize reproductive autonomy rights in similarly expansive provisions. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 612, 440 P.3d 461, 463 (2019) (natural inalienable rights); *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 212 (Iowa 2018) (due process rights); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 26, 31 (Minn. 1995) (Article I, Sections 2, 7 and 10 of the Minnesota Constitution, which guarantee a broad range of rights). These courts recognized that their constitutions were designed to protect individual

rights under broadly worded text and rejected arguments that abortion is excluded because it is not enumerated.[3]

In striking down a ban on the most common second trimester abortion procedure, the Kansas Supreme Court held that the Kansas Constitution protects the right to choose abortion as "an inalienable natural right." *Hodes & Nauser*, 309 Kan. at 613, 440 P.3d at 466. It rejected the state's argument that the Kansas Constitution's drafters did not intend for natural rights to include abortion, holding that "the historical record overwhelmingly shows an intent to broadly and robustly protect natural rights and to impose limitations on governmental intrusion into an individual's rights." *Id.* at 623, 440 P.3d at 471. Recognizing that the nature of government intrusions may change over time, it found that an interpretive approach tethered to enumerated rights, or those fixed at the time of drafting, could not fulfill Kansas's "constitutional value[s]." *See id*. at 659, 440 P.3d at 491; *id.* at 628, 440 P.3d at 474 (noting that the Kansas constitutional drafters incorporated a broad concept of natural rights instead of attempting to list all protected rights); *id* at 657, 440 P.3d at 490 ("[N]othing in the history of the [constitutional] Convention or the text of the Kansas Constitution indicates the framers intended to create any exceptions to the natural right of personal autonomy.").

[3] The broadest overview of federal constitutional jurisprudence highlights the flaws with the State's argument that a word must appear in the text to establish a right. The First Amendment, for instance, does not mention "writing," which is inarguably an essential and protected form of speech.

In *Planned Parenthood of the Heartland*, the Iowa Supreme Court held that a law imposing a medically-unnecessary 72-hour waiting period for abortion (requiring patients to make two separate visits to a provider) violated the state constitution's due process and equal protection clauses. 915 N.W.2d at 212. The Court recognized abortion as a fundamental right supported by intertwined concepts of liberty and equality. It wrote that "[the state's] constitution recognizes the ever-evolving nature of society, and thus, [that the] inquiry cannot be cabined within the limited vantage point of the past." *Id.* at 233. Accordingly, "the profoundly personal decisions Iowans make about family, procreation, and child rearing," might change over time, but all fell under broad liberty guarantees that the state constitution's framers drafted to "gather meaning from experience," *id*. at 234-35. The Iowa court rejected the state's argument that because the constitution did not expressly include reference to "abortion," it could not be a fundamental right encompassed in the liberty clause. *Id.* at 235. As the court commented: "A constitution would not use concepts to express individual rights and guarantees if specificity were needed." *Id.* at 236; *see also id*. ("At the same time, a constitution would express individual rights and guarantees with specificity if concepts could only express those rights and guarantees associated with the concept at the time.").[4]

[4] Showing that personal autonomy rights are under attack beyond Montana, the Iowa Attorney General has asked the Iowa Supreme Court to overturn its holding that the Iowa Constitution fundamentally protects the right to abortion,

The Minnesota Supreme Court, too, held that the Minnesota Constitution's bill of rights confers privacy rights that protect personal decision-making from government interference, including abortion. *Women of Minn.*, 542 N.W.2d at 19 (striking down statutes prohibiting use of public funds for abortion but not for childbirth). It located these rights in Article I, Sections 2, 7 and 10 of the state constitution, *id.*, which collectively address rights ranging from privileges of citizens, to protection from slavery, to due process in criminal proceedings, to freedom from unreasonable searches and seizures. Drawing on these broad provisions, the court observed, "the right of privacy begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." *Id.* at 27 (internal quotations omitted) (citing *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988) (protecting right to refuse medical treatment)). Based on these principles, "[t]he right of procreation without state interference has long been recognized as one of the basic civil rights of man." *Id.* at 27 (internal quotations omitted) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (prohibiting forced sterilizations)). Even in the absence of an explicit right to privacy such as exists in Montana, the court held that

advancing the already-rejected argument that the lack of an enumerated right forecloses protection. *See* Michaela Ramm, *Iowa Supreme Court hears arguments over 24-hour abortion waiting period*, Iowa Gazette, Feb. 23, 2022, https://www.thegazette.com/health-care-medicine/iowa-supreme-court-hears-arguments-over-24-hour-abortion-waiting-period/. If this threadbare argument succeeds, it will tarnish Iowa's constitutional legacy of strongly recognizing rights including and beyond abortion.

the state's unique traditions—among them a strong commitment to protecting the rights of all people, regardless of their circumstances—compelled the strongest protections for reproductive decision-making. *Women of Minn.*, 542 N.W.2d at 30. *See also Right to Choose v. Byrne*, 91 N.J. 287, 303, 306, 450 A.2d 925, 933, 943 (1982) (holding that "expansive" language in the state constitution protects rights that are "implicit," including the "fundamental right of a woman to control her body and destiny"); *Moe v. Sec'y of Admin. & Fin.,* 382 Mass. 629, 646-50, 417 N.E.2d 387, 397-99 (1981) (finding a right to abortion in the implicit right to privacy guaranteed by the state constitution's due process provision).

That the specific word "abortion" does not appear in the Montana Constitution's text is similarly of no moment. *Contra* Appellants' Opening Br. at 15. The constitutional question is whether the right to privacy encompasses protection for personal and procreative autonomy, including abortion. It does. The Constitution's drafters had an "unmistakable intent to textualize" Montana's broad concept of individual privacy by protecting citizens from "legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 48; *Gryzcan*, 283 Mont. at 455, 942 P.2d at 125. And few matters more directly implicate an individual's bodily integrity and personal autonomy than "a woman's moral right and moral responsibility to decide 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." *Armstrong,* ¶¶ 49, 53. As other state courts have found, when courts interpret purposefully broad and robust constitutional provisions, rejecting a right simply because it is unenumerated would violate the spirit and intent of their constitutions. *See Hodes & Nauser*, 309 Kan. at 650, 440 P.3d at 4861 (emphasizing harms that would flow from failure to "recognize the founders' intent" to broadly protect natural rights).

III. Overturning *Armstrong* Would Threaten to Unravel Privacy Protections Well Outside the Sphere of Reproductive Rights, to the Detriment of Already Vulnerable Individuals and Communities in Montana.

By asking this Court to exclude from protection the right to abortion on the basis that it is not explicitly mentioned in the constitution's text, the State seeks to undo a far broader swathe of the interwoven privacy and personal rights that Montana's robust privacy guarantee now provides. Doing so would leave a gaping hole in the state's constitutional jurisprudence and leave many already marginalized groups and individuals with lesser protections. Although *Armstrong* specifically concerned abortion, the Court made it clear that its holding was rooted in additional liberty concerns that were intended to apply beyond the procreative-autonomy realm. In particular, it expanded on *Gryczan*, Montana's seminal case firmly identifying the personal autonomy component of the right to privacy in striking down a restriction targeting same-sex intimacy. 283 Mont. at 455, 942 P.2d at 125.

Gryzcan and *Armstrong* are inextricably interwoven in establishing the privacy rights that individuals have relied on to challenge laws that intruded into the most intimate personal decisions and targeted them for discrimination, harassment, and violence. *Gryzcan* demonstrates that *Armstrong* correctly articulated a broad right to procreative autonomy, and conversely, overturning *Armstrong* would damage *Gryzcan*'s foundational premise, to the detriment of individuals who face continuing attacks.

In *Gryczan*, the Montana Supreme Court held that all adults have a right to privacy in non-commercial, consensual sexual conduct—regardless of whether dominant values approve of such conduct. The *Gryczan* Court, relying on the transcripts from the 1972 Montana Constitutional Convention and providing extensive historical context, determined that the "separate textual protection" for an individual's right to privacy "in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." 283 Mont. 455, 942 P.2d at 125. *Gryczan* furthermore contemplated the expansive evolution of privacy rights in order to provide Montanans with continued protection from governmental intrusion. *Id.* at 447-449, 942 P.2d at 121-23. Taking up *Gryzcan*'s baton, *Armstrong* made clear that beyond protecting relationships and private conduct in non-public settings, "the personal autonomy component of this right 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 the interference of the government." *Armstrong*, ¶ 75. In discussing the meaning and scope of protections afforded under the right to privacy, the *Armstrong* Court concluded:

> while it may not be absolute, no final boundaries can be drawn around the personal autonomy component of the right of individual privacy. It is, at one and the same time, as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government—as in *Gryzcan*—and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Id. ¶ 38.

By building on *Gryczan*, *Armstrong* broadened avenues for individuals to challenge discriminatory state action and "excessive interference in their personal lives." *See Gryczan*, 283 Mont. 455, 942 P.2d at 125. LGTBQIA individuals in particular have faced such "excessive interference" as evidenced by the slew of anti-transgender laws and referendums that the Montana State Legislature has proposed in recent years. As a consequence, transgender individuals must rely on personal autonomy rights to exercise the most basic freedoms, such as use of public facilities and possessing gender-conforming state identity documents.

For instance, in *Hobaugh v. State of Montana*, several transgender Montanans, parents of a transgender child, and the city of Missoula challenged the constitutionality of the anti-LGBTQIA I-183 ballot initiative, which sought to

restrict transgender and gender-nonconforming Montanans from using public facilities that correspond with their gender identity. Compl. for Declaratory and Injunctive Relief, *Hobaugh, et al. v. State*, (Mont. 8th Jud. Dist. Ct. Oct. 17, 2017) (No. CDV-17-0673), at 2-3, 6-7.[5] Plaintiffs brought both personal and informational autonomy claims to argue that when and where to use a bathroom or public facility should be, undoubtedly, a private decision free from government intrusion. *Id.* at 26-28. Specifically, plaintiffs relied on *Armstrong's* holding that the right to privacy in the Montana Constitution "should protect . . . citizens from . . . legislation and government practices that interfere with the autonomy of each individual to make decisions generally considered private." *Id.* at 26 (quoting *Armstrong*, ¶ 33). Furthermore, in order to comply with I-183, transgender individuals would have been forced to reveal their transgender status and unwillingly "out" themselves every time they needed to use a public facility, contrary to *Armstrong*'s rejection of state attempts to "condemn those found to be socially repugnant or politically unpopular." *Armstrong*, ¶ 38.

Additionally, as *Armstrong* provided, the personal autonomy component of the right to privacy "broadly guarantees" that medical treatment and decisions made

[5] This Court did not have the opportunity to reach the merits of the privacy claim, after it rejected the sufficiency of the statement and note accompanying the proposed initiative, voiding all of the signatures that the proponents had gathered. The proponents then failed to gather enough signatures to place the initiative on the ballot. American Civil Liberties Union, *Hobaugh v. Montana* (Oct. 17, 2017), https://www.aclu.org/cases/hobaugh-v-montana.

between a treating provider and an individual should remain free from government interference. *Id.* ¶ 75. Many transgender individuals suffer from the serious medical condition of gender dysphoria. Treatment for gender dysphoria entails living one's life consistently with one's gender identity, including use of accordant single-sex spaces such as restrooms. Transgender individuals forced to use a bathroom or public facility that did not align with their gender identity would have had to ignore the private medical recommendations of their doctors, in violation of their right to privacy. As *Armstrong* provided, the personal autonomy component of privacy "broadly guarantees" that medical treatment and decisions made between a treating provider and an individual should remain free from government interference. *Id.*

In another recent case, transgender plaintiffs challenging a restriction on Montana birth certificates, SB 280, asserted their right to privacy in their transgender status, their medical records, and their right to be free from state interference with medical decision-making. Compl. for Declaratory and Injunctive Relief, *Marquez v. Gianforte, et al.* (Mont. 13th Jud. Dist. Ct. July 16, 2021) (No. 13-DV-21-0873) at 15-16.[6] SB 280 makes it difficult, if not impossible, for a transgender individual to correct the sex designation on their birth certificate by requiring that, regardless of need, want, or feasibility, transgender individuals undergo an undefined surgery,

[6] Illustrating the potential impact of overturning *Armstrong* on privacy in the state, litigation in Yellowstone County District Court is ongoing, with decisions pending on the preliminary injunction and motion to dismiss.

submit proof of such surgery to a court in order to receive a court order indicating that the sex of the person "has been changed by surgical procedure," and submit a copy of that order to the Department of Health and Human Services. *See* S.B. 280, 67th Leg. Reg. Sess. (Mont. 2021). Through passage of SB 280, the legislature attempted to interfere in relational and medical self-determination. Relying on *Armstrong*'s holding that "Article II Section 10 of the Montana Constitution 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, the challengers contended that the State should not be able to coerce them into surgery in exchange for an accurate identity document. Compl. for Declaratory and Injunctive Relief, *Marquez* (No. 13-DV-21-0873), at 13-14. Furthermore, they argued that the state lacks medical authority to dictate what medical procedures are appropriate to bring a person's body in line with their gender identity. *Id.* at 16-17. *Accord Armstrong*, ¶ 62 ("[L]egal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community.").

If granted, the State's request to overrule *Armstrong* would enable brazen attempts to dictate matters of the conscience through laws that unconstitutionally

infringe upon personal autonomy. *Gryzcan* and *Armstrong* are inextricably linked in rejecting such attempts. Together, they hold that to fully exercise personal autonomy and self-determination, individuals must retain the right to make choices without State interference, especially those related to the most personal and intimate decisions, such as who to partner with and what medical procedures to undergo. The State seeks not only to do away with accessible abortion, but also to put at risk interwoven personal autonomy rights that confer much broader protections. This Court should uphold *Armstrong* to ensure that individuals, in particular members of marginalized communities, remain protected from state overreach into the most intimate and private zones of their lives.

CONCLUSION

Armstrong correctly recognized that the explicit right to privacy in the Montana Constitution protects personal decision-making free from unwarranted government interference, including the right to choose abortion. Many other state high courts have similarly interpreted expansive provisions in their constitutions to protect abortion, rejecting arguments that a right must be spelled-out to exist. *Armstrong*'s broad articulation of the right to privacy also protects often-marginalized individuals beyond the abortion context, preventing the State from intruding on personal decision-making simply because "a vocal and powerful constituency" does not approve of or understand a relationship choice, medical

condition or status. *Armstrong*, ¶ 15. Overturning *Armstrong* would irreparably damage constitutional protections for privacy in Montana.

Respectfully submitted this 24th day of March, 2022.

/s/ *Akilah Lane*

Akilah Lane
Alex Rate
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-203-3375
lanea@aclumontana.org
rate@aclumontana.org

/s/ Amy Myrick

Amy Myrick
Alexander Wilson
Astrid Ackerman
Center for Reproductive Rights
199 Water Street
New York, NY 10038
(917) 637-3659
(917) 637-3783
(917) 637-3600

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that the foregoing brief is printed with proportionately-spaced Times New Roman typeface in 14-point font; is double spaced except for lengthy quotations or footnotes, and the word count calculated by the word processing software does not exceed 4,854 words, excluding the cover page, tables, and certificates.

Dated: March 24, 2022

/s/ *Akilah Lane*

ACLU of Montana Foundation, Inc.

CERTIFICATE OF SERVICE

I, Akilah Lane, hereby certify that I have served a true and accurate copy the forgoing document to the following on March 24, 2022:

Raphael Graybill
Graybill Law Firm, PC
Representing: Plaintiffs/Appellees
Service Method: eService

Kimberly Parker
Nicole Rabner
Wilmer Cutler Pickering Hale & Dorr LLP
Representing: Plaintiffs/Appellees
Service Method: eService

Alan Schoenfeld
Michelle Nicole Diamond
Wilmer Cutler Pickering Hale & Dorr LLP
Representing: Plaintiffs/Appellees
Service Method: eService

Gene R. Jarussi
Representing: Plaintiffs/Appellees
Service Method: eService

Hana Bajramovic
Planned Parenthood Federation of America, Inc.
Representing: Plaintiffs/Appellees
Service Method: eService

Alice Clapman
Planned Parenthood Federation of America, Inc.
Representing: Plaintiffs/Appellees
Service Method: eService

Austin Knudsen
Montana Attorney General

Kristin Hansen
Lieutenant General
David M.S. Dewhirst
Solicitor General
Kathleen L. Smithgall
Brent Mead
Assistant Solicitors General
Representing: Defendant/Appellant
Service Method: eService

Kevin H. Therot (AZ Bar No. 030446)
Denise M. Harle (FL Bar No. 81977)
Alliance Defending Freedom
Representing: Defendant/Appellant
Service Method: eService

/s/*Akilah Lane*
Dated: March 24, 2022.

CERTIFICATE OF SERVICE

I, Akilah Maya Lane, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 03-24-2022:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kristin N. Hansen (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: State of Montana
Service Method: eService

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Patrick Mark Risken (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: eService

Gene R. Jarussi (Attorney)
Bishop, Heenan & Davies
1631 Zimmerman Tr, No. 1
Billings MT 59102
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: eService

Emily Jayne Cross (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Delegates
Service Method: eService

Kyle Anne Gray (Attorney)
P.O. Box 639
Billings MT 59103
Representing: Delegates
Service Method: eService

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Delegates
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., National Women's Law Center, Center for Reproductive Rights
Service Method: eService

Lindsay Beck (Attorney)
1946 Stadium Drive, Suite 1
Bozeman MT 59715
Representing: American College of Obstetricians and Gynecologists, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, Montana Chapter, American College of Medical Genetics and Genomics, American College of Nurse-Midwives, American College of Osteopathic Obstetricians and Gynecologists, American College of Physicians,

American Gynecological and Obstetrical Society, American Medical Association, American Medical Women's Association, American Society for Reproductive Medicine, American Urogynecologic Society, Council of University Chairs of Obstetrics and Gynecology, American Academy of Pediatrics, National Association of Nurse Practitioners in Women's Health, Society for Adolescent Health and Medicine, Society for Maternal-Fetal Medicine, Society for Reproductive Endocrinology and Infertility, Society of Family Planning, Society of OB/GYN Hospitalists
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Asian Institute on Gender-Based Violence, Aspen, Caminar Latino, Custer Network Against Domestic Abuse, Inc., District 4 Human Resources Development Council, Domestic and Sexual Violence Services, Idaho Coalition Against Sexual & Domestic Violence, Latinos United for Peace and Equity, Legal Voice, Montana Coalition Against Domestic and Sexual Violence, National Coalition Against Domestic Violence, Richland County Coalition Against Domestic Violence
Service Method: eService

Mike Dennison (Interested Observer)
Service Method: E-mail Delivery

Holly Michels (Interested Observer)
Service Method: E-mail Delivery

Kimberly Parker (Attorney)
1875 Pennsylvania Avenue NW
Washington DC 20006
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Hana Bajramovic (Attorney)
123 William St., Floor 9
New York NY 10038
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Alice Clapman (Attorney)
1110 Vermont Ave, NW Ste 300
Washington DC 20005
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Nicole Rabner (Attorney)
1875 Pennsylvania Avenue NW
Washington DC 20006
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Alan Schoenfeld (Attorney)

7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Michelle Diamond (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: E-mail Delivery

Electronically Signed By: Akilah Maya Lane
Dated: 03-24-2022