IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 21-0521

PLANNED PARENTHOOD OF MONTANA, ET AL.,

Plaintiffs and Appellees,

V.

STATE OF MONTANA,

Defendant and Appellant.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV-21-00999
The Honorable Michael G. Moses, Presiding

APPELLANT STATE OF MONTANA'S REPLY BRIEF

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
BRENT MEAD
Assistant Solicitors General
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
brent.mead2@mt.gov

KEVIN H. THERIOT
(AZ Bar No. 030446)*
DENISE M. HARLE
(FL Bar No. 81977)*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
dharle@ADFlegal.org

*Admitted Pro Hac Vice

Attorneys for Defendant-Appellant
Additional Counsel listed on next page

RAPH GRAYBILL
GRAYBILL LAW FIRM, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
rgraybill@silverstatelaw.net

ALAN SCHOENFELD*
MICHEL NICOLE DIAMOND
WILMER CUTLER PICKERING HALE
& DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com

GENE R. JARUSSI
1631 Zimmerman Tr., Ste. 1
Billings, MT 59102
gene@lawmontana.com

ALICE CLAPMAN*
PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC.
1110 Vermont Ave., NW Ste. 300
Washington, DC 20005
alice.clapman@ppfa.org

KIMBERLY PARKER*
NICOLE RABNER*
WILMER CUTLER PICKERING HALE
& DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
kimberly.parker@wilmerhale.com
nicole.rabner@wilmerhale.com

HANA BAJRAMOVIC*
PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC.
123 William St., 9th Floor
New York, NY 10038
hana.bajramovic@ppfa.org

**Admitted Pro Hac Vice*

Attorneys for Plaintiffs-Appellees

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INTRODUCTION

This case is about integrity. The integrity of unborn human lives and the medical profession, to be sure. But the integrity of the judiciary, too. Judges neither make nor unmake democratically enacted laws. But the unsettled, murky preliminary injunction standard allows lower courts to haphazardly veto laws that plaintiffs complain—but never demonstrate—violate their rights.

Speaking of "rights"—*Armstrong*. Twenty-three years ago, in an act of pure, unbridled judicial activism, this Court made up a state constitutional right to abortion. No reasonable argument justifies the decision. The Constitution is silent and—according to all the historical and contextual evidence—*intentionally* silent on abortion. That issue was emphatically and affirmatively entrusted to the Legislature—not the Courts. It's time for *Armstrong* to go.

And after Plaintiffs' and amici's briefing, it's clear that the district court simply rubber-stamped their arguments. HB 136, HB 171, and HB 140 are commonsense health and safety laws. Under any standard—including *Armstrong*—plaintiffs failed to meet their burden. The district court not only adopted Plaintiffs' arguments uncritically, it ignored the

State's trove of counter-evidence that eviscerate those arguments. The decision below was a manifest abuse of discretion.

This Court should, therefore, immediately vacate the preliminary injunctions and permit these life-saving laws to go into effect.

I. This Court should clarify the preliminary injunction standard.

Most plaintiffs—like those here—seek preliminary injunctions under MCA §§ 27-19-201(1) and (2), yet district courts consistently fail to apply those statutory standards correctly. The court below perfectly exhibits the disarray: it understands the statute to impose a burden on movants that amounts to little more than ensuring their pleadings mention "fundamental rights." But the unsurprising result—preliminary injunctions on-demand—perverts the law and unjustifiably displaces State laws. It's time for this Court to step in, reaffirm its prior holdings, clarify the standards, and re-kilter the subtle separation-of-powers problem the lower courts have precipitated.

1. Below, the court accused the State of concocting "additional elements" in the preliminary injunction standard. App.A. 15 n.2. Plaintiffs argue the same on appeal. PPMT.Br 13–16. But that's not so. The State merely seeks enforcement of the elements that already exist.

According to *this* Court, obtaining a preliminary injunction under MCA § 27-19-201(1) requires a showing of "'likelihood of success on [the] merits.'" *M.H. v. Mont. High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996). Courts need not decide "the ultimate merits of the action," but must nevertheless determine "whether a sufficient case has been made out to warrant the preservation of … rights." *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981); *see also Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 20, 326 Mont. 28, 106 P.3d 1185; *Bye v. Somont Oil Co.*, 2021 MT 271N, ¶ 11, 407 Mont. 439, 497 P.3d 275. To determine whether a sufficient case has been made, courts must consider the evidence and determine that "*the applicant is likely to succeed on … her underlying claim*." *M.H.*, 280 Mont. at 136, 929 P.2d at 247 (emphasis added). That's what MCA § 27-19-201(1) requires.

Because MCA § 27-19-201(1) and (2) are "not unrelated," that requirement corresponds to the showing demanded by MCA § 27-19-201(2). *M.H.*, 280 Mont. at 135, 929 P.2d at 247. If an applicant is likely to succeed on her claim, she will, "as a result … suffer a 'wrong or damage done to … [her] rights.'" *Id.* at 136, 929 P.2d at 247 (quoting Black's Law Dictionary, 924 (1968)). Similarly, to find irreparable harm based on the

alleged deprivation of a constitutional right, a court must necessarily determine that the applicant is likely to succeed on the merits of her constitutional deprivation claim. *Id.*; *Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs*, 2000 MT 147, ¶ 26, 300 Mont. 66, 2 P.3d 825 (requiring a "sufficient showing of a material injury"); *Bye*, ¶ 16 (requiring a showing that the injury is "great or irreparable"); *Weems v. State*, 2019 MT 98, ¶ 25, 395 Mont. 350, 440 P.3d 4 (considering the parties' evidence even under a subsection (2) analysis); *id.* ¶ 30 (Rice, J., concurring) (noting that courts cannot simply assume events will unfold how Plaintiffs predict).

Two important takeaways emerge from these observations. First, MCA §§ 27-19-201(1) and (2) are disjunctive, but both require a showing that the applicant is at least likely to succeed on her claims. And second, satisfying these standards requires more than merely alleging constitutional injuries. State.Br. 7–8; *see also prima facie*, Black's Law Dictionary (7th ed. 1999).

2. Eager to maintain the watered-down standard the court employed below, however, Plaintiffs take the trusted tack of simply refusing to engage with the State's arguments on the meaning of "prima

facie" vis a vis MCA §§ 27-19-201(1) and (2). They instead repeat "prima facie" and quote extensively from this Court's catalogue of "prima facie" mentions. PPMT.Br 13–16. Never do Plaintiffs grapple with the State's arguments about what "prima facie" actually means *in those cases*.

It's clear Plaintiffs believe the magic words, "prima facie," reduce their burden considerably. Plaintiffs point to *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, 395 Mont. 160, 437 P.3d 142. But the *BAM* Court found MCA § 27-19-201(2) is satisfied only when it appears that the continuation of an act would produce an irreparable injury. *BAM*, ¶ 15; PPMT.Br 13. "[A]ll requests for preliminary injunctive relief require some *demonstration* of threatened harm or injury." *Id.*, ¶ 16.

Plaintiffs interpret "demonstration" to mean the act of putting words on paper. Indeed, in their one, brief foray into the meaning of "prima facie," they argue that "appears … entitled to" means "prima facie" and confidently conclude that this "decides the question." PPMT.Br 13–14. They then recite Black's definition of "prima facie" (so did the State) and arrive at their analytical conclusion: the requisite burden requires only the appearance of a violation of constitutional

rights. *Id.*[1] That's wrong, of course, because it ignores this Court's directly contrary holdings in *M.H.*, *Sweet Grass Farms*, *Bye*, and *Weems*, discussed above.

And as discussed in the State's Opening Brief, "prima facie" only establishes a fact or presumption until its rebutted, like the State did below. *See* State.Br. 9 n.1; *see also Porter*, 192 Mont. at 182, 627 P.2d at 840 (concluding that the defendant successfully rebutted the prima facie case at the preliminary injunction stage). If Plaintiffs were right about the standard, why would the State ever provide rebuttal evidence at the preliminary injunction stage? It would be ignored entirely (as it was below) because Plaintiffs could procure a preliminary injunction by merely alleging a constitutional violation. This Court's cases—including *BAM*—uniformly reject this.

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[1] Plaintiffs assure the Court this doesn't "allow plaintiffs to obtain relief based on mere allegations." PPMT.Br.13.n.5. But that's precisely what their argument means. PPMT.Br.15 (arguing they "are required to establish *only* a prima facie case) (emphasis added). And that's what happened below. The suggestion that the district court engaged in "exhaustive analysis" of the arguments and evidence belies reality. More on that below.

Separately, if—in an effort divine the applicable standard—both parties are consulting dictionaries to define *this Court's gloss* on statutory language, the State respectfully suggests that it's probably time to polish up the relevant jurisprudence.

3. Plaintiffs' burdenless standard, readily employed by the district court, also entirely writes off the presumption of constitutionality, which applies—in some form—*at every stage of a constitutional challenge*. *See City of Billings v. Cnty. Water Dist.*, 281 Mont. 219, 231, 935 P.2d 246, 253 (1997); *See also Driscoll*, 2020 MT 247, ¶¶ 37, 51, 401 Mont.405, 473 P.3d 386 (Sandefur, J., dissenting); *Weems*, ¶¶ 34–35 (Rice, J., dissenting). Plaintiffs counter by boldly brandishing a legal principle the State doesn't dispute: that applicants need not sustain their "ultimate burden" of proving a statute unconstitutional beyond a reasonable doubt at the preliminary injunction stage. PPMT.Br 13 (quoting *Weems*, ¶ 18 n.4; citing *Driscoll*, ¶ 16). The State's argument here is simple. Plaintiffs' "ultimate burden" on the merits requires them to prove that each of the challenged laws are unconstitutional beyond a reasonable doubt. But to obtain a preliminary injunction under MCA §§ 27-19-201(1) or (2), Plaintiffs must demonstrate they are *likely to prove* that the challenged laws are unconstitutional *beyond a reasonable doubt*.[2] Even at the preliminary injunction stage, the presumption of constitutionality

[2] The State knows of no discernible legal principle that strips a statute of its presumptive constitutionality at the preliminary injunction stage and then restores it at the merits stage.

raises the standard an applicant must meet. Likelihood of success on the merits requires more in a constitutional challenge because the ultimate claim requires more.

Plaintiffs counterintuitively argue that the preliminary injunction standard should be *less* burdensome in constitutional challenges because important rights may be at stake. PPMT.Br 15–16. That's certainly a Plaintiff-centric position, but it's not the law—at least not according to this Court. *See City of Billings*, 281 Mont. at 231, 935 P.2d at 253; *see also Driscoll*, ¶¶ 37, 51 (Sandefur, J., dissenting); *Weems*, ¶¶ 34–35 (Rice, J., dissenting). The problem when courts ignore presumptive constitutionality at this or any stage of litigation is that it allows judges to substitute their will for that of the democratically expressed will of the People. That problem reared its head below.

The district court bungled the preliminary injunction standard below. That's partially because the caselaw is confusing, and partially because some district courts assiduously cite precedent from this Court but then shirk any serious legal analysis. The State has articulated the standards under MCA §§ 27-19-201(1) and (2). The Court should now articulate for lowers courts—clearly and unequivocally—the proper

preliminary injunction standard. Under the proper standard—or indeed anything like it—the Plaintiffs aren't entitled to relief. Giving it to them under an erroneous standard was an abuse of discretion.

II. This Court should overturn *Armstrong*.

The should Court revisit *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, here and now. It was a manifestly wrong decision the day it was decided and has poisoned this Court's jurisprudence ever since. *See* State.Br. 15–23.

1. Despite Plaintiffs' claims to the contrary, the district court extensively—almost exclusively—relied on *Armstrong* in rendering its decision. *See* App.A 16, 17, 18, 19, 20, 21, 22, 24, 26, 31, 33; *see also supra* Section II. Importantly, overruling *Armstrong* won't resolve this case on the merits, for—as Plaintiffs repeatedly remind the Court—they've alleged violations of other fundamental rights, too.[3]

[3] Plaintiffs contend the State "accepted[ed] [*Armstrong*] as controlling authority, citing Supp.App.B, at 12. PPMT.Br., 38 n.18. If they read but one sentence more, the State expressly preserved the argument for appeal. Supp.App.B, at 13. Moreover, the district court's decision itself exhibited the inherent problems with *Armstrong*, a point the State could only raise on appeal.

And stare decisis shouldn't convince the Court to tolerate *Armstrong*'s blight on its jurisprudence one day longer. Stare decisis tends to protect reliance interests in longstanding, reasonable interpretations of textually extant rights—not those conceived entirely in the judicial imagination. State.Br. 16–23. And though Plaintiffs deem it irrelevant (without explanation), federal law still protects the ability to obtain pre-viability abortions in Montana. As Plaintiffs admit, the Court need not abide a manifestly wrong decision—whether it's been the law for 20 years or 20 minutes. PPMT.Br 38.

2. Amici Delegates attempt the remarkable: transforming their silence on abortion in 1972 into positive evidence that they intended to include the right to abortion within Article II, section 10. Delegates Br., at 16–17. First, they argue that the Bill of Rights Committee, which dealt with Article II, intended to leave the scope and meaning of the right to privacy to virtually unfettered judicial interpretation. *Id.* at 16. Next, they argue that when Delegate Dahood stated abortion "has no part at this time within the Bill of Rights of the Constitution of the State of Montana," he really meant that abortion has a part within Article II, § 10 but not Article II, § 3. *Id.* at 18–19; *but see* App.C.003, 007, 010, 012,

041 (showing that all of Article II was considered the "Bill of Rights"). These arguments fail to convince.

This Court derives intent from the constitutional text "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution …." *Nelson*, 2018 MT 35, ¶ 14. The 1972 Constitution "is not the beginning of law for the state" but instead "assumes the existence of a well understood system of law which is still to remain in force and to be administered …." *Id.*, ¶ 15. In 1972, during the constitutional convention, Montana law prohibited virtually all abortions. MCA §§ 94-401, -402 (1947); *see also* 35 Op. Att'y Gen. 9 (1973). During the convention, the *only* time abortion was mentioned was to remark that it was not a right protected by the new Bill of Rights. *See* App.C.001.[4] Post-ratification, Montana continued to enforce its laws regarding abortion. *See Doe v. Woodahl*, 360 F. Supp. 20, 22 (D. Mont. 1973). The unambiguous 'historical' context surrounding abortion in

[4] Plaintiffs argue that because the amendment Delegate Dahood was speaking against failed, this debate is "notoriously disreputable … non-enactment history." PPMT.Br., 41. But Dahood's argument prevailed. The proposal he spoke against failed because the majority of delegates agreed with him that abortion was a legislative—not constitutional—issue.

1972 Montana was this: the new constitution retained prior state abortion laws and affirmatively excluded abortion from the Bill of Rights in Article II. Amici Delegates' creative arguments simply cannot account for these realities.

One of *Armstrong*'s remarkable achievements was that it breezed past this unambiguous historical evidence and used *federal* caselaw interpreting *federal* rights to change the settled meaning of the *Montana* Constitution. *See Armstrong*, ¶¶ 42, 48. No canon of interpretation accounts for this peculiar brand of constitutional reasoning, so—like the right to abortion, itself—Justice Nelson simply made it up. The *Armstrong* majority read *Roe v. Wade's* "jurisprudential recognition, following the close of the Constitutional Convention, of a woman's right to seek and obtain a pre-viability abortion" into Article II, § 10. *Armstrong*, ¶ 48. But *Roe* was decided six months *after* Montana ratified the new right to privacy. 410 U.S. 113 (1973). And Justice Nelson's *post hoc* rationale—decades later—altered the meaning of the Montana Constitution to conform to subsequent federal caselaw in contradiction of the clear intent of the Convention and the laws in existence in 1972.

Montana's enhanced right to privacy should apply to those areas expressly referenced by the Framers in 1972: search and seizure, electronic surveillance, marital privacy, and even "snooping." *See* App.C.042. But not abortion. *All* the evidence at and around the convention points unequivocally in one direction—that abortion was not constitutionalized. *See* App.C.001–002. Plaintiffs and amici make much of Delegate Campbell's passing reference to *Griswold*, but the only time the issue of *abortion* came squarely before the Convention, the Delegates emphatically declined to constitutionalize the issue. *Id.* Subsequent federal decisions do not alter the meaning of Montana's constitutional provisions. *Armstrong* stands athwart the expressed constitutional will of the People of Montana. It is manifestly wrong and manifestly unjust. It lacks any legitimate legal basis and violates the Framers' "unmistakable intent." *Armstrong*, ¶ 48. Neither Plaintiffs nor amici have provided any serious arguments to the contrary. This Court should overrule *Armstrong*.

III. The district court improperly subjected each challenged law to strict scrutiny.

"[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v.*

Casey, 505 U.S. 833, 873 (1992). That means courts shouldn't automatically subject laws implicating abortion to strict scrutiny. *Weems*, ¶ 19; *see also* State.Br. 23–28. The court below did. Plaintiffs don't dispute this; they instead argue that the court's missed step was harmless because these laws do, in fact, impermissibly intrude upon abortion (and other) rights and therefore merit strict scrutiny review. PPMT.Br 17–22. In other words, they dodged the State's arguments. This Court, however, can't.

As a threshold matter, courts must determine (1) if a law implicates a fundamental and (2) whether the law impermissibly intrudes upon that right. Only then can it select and apply the correct tier of scrutiny. *See* State.Br. 21–24; *see also Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133 (2006). That's also how virtually all constitutional rights claims are analyzed. Yet the district court dismissed this argument, merely concluding that it "disagree[d] with the State's interpretation of *Wiser*," that fundamental rights were implicated, and that strict scrutiny therefore applied. App.A. 21 n.3.

When this Court drew the abortion right from the Article II hat twenty years ago, the State didn't understand it to be creating an

absolute right insulated from any government regulation by strict scrutiny. If the State got that wrong, the Court should say so.

IV. The district court abused its discretion by enjoining HB 136, HB 171, and HB 140.

The district court's order reads much like a Planned Parenthood brief. Rather than engage with the State's arguments and extensive rebuttal evidence (totaling nearly 200 pages, including 5 expert declarations), the district court fully adopted Plaintiffs' arguments and evidence (from their employees or affiliates), declaring the three duly enacted laws unconstitutional. But the constitutional minimum is not synonymous with Planned Parenthood's business practices. What happened below wasn't serious legal analysis. This Court must reverse.

A. HB 136 doesn't prohibit pre-viability abortions, but even if it did, it would survive any tier of scrutiny.

It's undisputed that viability has and can occur at 21 weeks gestational age (LMP),[5] and that ultrasound gestational age determinations carry a 1–2 week LMP error rate. State 32; App.E 17,

[5] Plaintiffs quibble that viability at 21 weeks LMP remains rare, Supp.App.G, at 12, but that's unsurprising given the ever-advancing progress of medical science. Since *Roe*, the viability line has steadily and continually moved up in gestational age. State.Br, at 30–32.

¶ 34.[6] This means that an unborn child determined to be 20 weeks LMP may actually be over 21 weeks LMP, and therefore viable. HB 136's 20-week restriction recognizes this error rate, accounts for the best medical science, and is narrowly tailored to advance a compelling government interest—to prevent the destruction of viable babies.

Plaintiffs respond by arguing that HB 136 nevertheless bans "pre-viability abortions where gestational age has been accurately determined, as it is in the majority of cases." PPMT.Br 23.[7] But unless Plaintiffs do, in fact, contend that abortion is an absolute right, that right may still be impinged by laws narrowly tailored to advance compelling interests. The best, undisputed medical evidence supports HB 136's 20-week restriction as the only available method to prevent the abortion of

[6] Plaintiffs agree the error rate can extend to 10 days. App.L 13, ¶ 24.

[7] Plaintiffs provide no evidence that gestational age is accurately determined "in a majority of cases."

viable babies. *See* State.Br. 30.[8] HB 136 doesn't merit strict scrutiny, but it would survive on this basis alone.

HB 136 serves another compelling interest: protecting the dignity of unborn babies from the barbaric infliction of pain. *See* State.Br. 33–36. Plaintiffs deflect by retreating to their abortion-absolutist interpretation of *Armstrong*: "the State does not have a compelling interest in banning pre-viability abortions." PPMT.Br 24. But even if HB 136 banned pre-viability abortions (it doesn't), *Armstrong* didn't create an absolute right. *Armstrong* concluded that the State had failed to demonstrate a compelling interest in that case to infringe upon the right to obtain a pre-viability abortion. *Armstrong*, ¶ 62. *Armstrong* doesn't rule out that government interests can be sufficiently compelling. And here, those interests are exceedingly compelling. The district court simply ignored them. *See, e.g.*, State.Br. 35–36; App.F 10–16, 20; App.E 5.

[8] Plaintiffs claim that Montana law already prohibits post-viability abortions, but that's no longer the case. PPMT.Br, at 23; *see* MCA § 50-20-109(1)(b). Yet even if it continued to do so, HB 136 would alter and strengthen Montana's former ban on post-viability abortions; for, as even Plaintiffs admit, the pre-HB 136 regime would have allowed for the abortion of at least some viable babies. *See* Supp.App.G, at 12–13.

Finally, HB 136 serves the additional compelling interest of better safeguarding women from the hazards of late-term, post-viability abortions. These interests are neither "purported" nor "irrelevant," as Plaintiffs claim. *See* PPMT.Br 24. The State provided substantial evidence about the risks of late-term abortions. *See* State.Br. 34–35. Plaintiffs, however—who perform abortions for a living—promise that "[a]bortion is very safe at all points in pregnancy and is safer than childbirth." *See* PPMT.Br 24–25. The district court failed to consider any of the State's strong evidence, simply concluding that HB 136 triggers and fails strict scrutiny because it *implicates* a fundamental right. *See* App.A. 19– 22.[9]

B. HB 136 doesn't violate due process.

HB 136's language is not unconstitutionally vague. It requires abortion providers to provide "reasonable medical judgment" when deciding whether a procedure may fall under one of the medical

[9] ACOG's brief merely second-guesses the Legislature's factfinding and opposes the State's well-established interests. *See* ACOG *Amicus Curiae* Br., at 4–19. But the Legislature—not ACOG—undertakes legislative factfinding and passes health and safety laws. Courts can't "second-guess the legislature and substitute their judgment" on matters of policy. *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 18, 354 Mont. 133, 138, 227 P.3d 42, 47 (2009).

exceptions. "Reasonable medical judgment" is a common medical requirement that doctors understand. App.D 17, ¶¶ 63–64. Plaintiffs attempt to meet their burden by arguing that doctors *might* disagree about the medical exceptions contained in HB 136. PPMT.Br. 33. But merely identifying an in-house practitioner with a self-serving, contrary view of that phrase can't satisfy Plaintiffs' "high burden of proof in showing that the statute specifies no standard of conduct at all." *See State v. Allen*, 2009 MT 90N, ¶ 13, 2009 Mont. LEXIS 101; *see* State 36–37. Interestingly, Plaintiffs don't set forth any alternative definition of "reasonable medical judgment." They simply assert—disconcertingly—that their doctors don't know what "reasonable medical judgment" means. As silly as their vagueness argument is, the district court once again uncritically adopted Plaintiffs' position. App.A. 30.[10]

C. HB 171 doesn't violate *Armstrong*.

[10] Although *Casey* didn't consider a vagueness challenge, per se, it adopted an interpretation of the statutory text that rendered it constitutional. *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992). Montana courts must also similarly apply saving constructions to laws under review. *See Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638.

HB 171 enhances protections to Montana women seeking abortions. Although *Armstrong* created the right to an abortion in Montana, there is no right to obtain an abortion immediately; no right to obtain an abortion without a physical examination; and no right to obtain an abortion after hearing Planned Parenthood's preferred script. *Wiser*, ¶ 27.

Plaintiffs argue that HB 171's 24-hour informed consent waiting period can't survive strict scrutiny because it isn't narrowly tailored. PPMT.Br 26. But that assumes—incorrectly—that strict scrutiny is the appropriate level of review here. *Casey* itself upheld a 24-hour informed-consent period. *Casey*, 505 U.S. at 881–83. And, again, most States have similar informed consent periods. State 39 n.8. Plaintiffs' only defense is that the 24-period is "unjustified" and "their already-robust informed consent protocols" are good enough. PPMT.Br 26–27. But Planned Parenthood doesn't regulate the medical profession or establish standards of medical care in Montana—the government does. The district court overlooked that critical fact.

Next, Plaintiffs merely recite the district court's conclusion that HB 171's physical examination requirement is unjustified under *Armstrong*.

PPMT.Br 29. But the State routinely requires physical examinations, particularly before prescribing medication with potentially severe complications. *See* State.Br. 40. And as the State demonstrated, abortions can cause severe complications. *See* App.E 30, ¶ 55; App.D 21, ¶¶ 10, 76; App.N 10, ¶ 24. Abortion medication forces what is tantamount to a miscarriage. It's reasonable to protect women by ensuring they get more than a few minutes on Zoom with their provider. Yet the district court disregarded this evidence, concluding without analysis that telehealth is easier for rural Montanans and therefore any physical examination violates *Armstrong*'s abortion right. App.A 27.[11] Here, the district court erred again.

Finally, HB 171 requires chemical abortion providers to be able to manage complications during and immediately following a chemical abortion. State.Br. 40–41. Plaintiffs again adopt an unnatural reading of the statute and conclude that it "effectively bar[s] qualified clinicians" from providing abortion pills. PPMT.Br 28. Even if Plaintiffs'

[11] Abortionists' recruitment and coverage failures in rural Montana can't be a legitimate reason why raising the standard of care for all Montana women must be deemed unconstitutional. *See* State.Br. 42–43.

interpretation of the statute is possible, the district court must resolve any doubt in the statute's favor. *Hernandez v. Bd. of Cnty Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638. The district court bears the "duty … to avoid an unconstitutional interpretation if possible." *Id.* Instead, the district court adopted the Plaintiffs' interpretation, ignoring the State's contrary arguments. App.A 25. Under any reasonable reading of HB 171, qualified providers can continue to provide chemical abortions.

HB 171 doesn't violate a woman's right to obtain an abortion. It sets forth heightened standards of care for women by requiring fulsome informed consent, a physical examination, and a provider with the competencies to manage complications.[12] And the State provided compelling evidentiary justifications for these requirements, which the district court ignored entirely. That, again, was an abuse of discretion.

[12] In any event, HB 171 contains a severability clause, so to the extent this Court found any part invalid, it must sever that provision rather than strike down the entire law. *See Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 399–400, 636 P.2d 300, 311–12 (1981).

D. HB 171 doesn't violate providers' free speech rights.

Plaintiffs simply reassert on appeal that HB 171 unconstitutionally compels providers' speech. PPMT.Br 30. But as the State noted, *Casey* explicitly held that requiring fulsome informed consent does not violate abortion providers' free-speech rights. *Casey*, 505 U.S. at 884. The State also provided strong evidence about the need to provide women with information about possible abortion pill reversal, breast cancer risks, and the potential need for RH immunoglobulin. State.Br. 43–44. The strength of that evidence easily overcomes Plaintiffs' objections, which amount to little more than abortion providers' insistence that *they* should get to decide what their patients know—not their patients. Yet the district court fully adopted Plaintiffs' unsupported claims and ignored the State's evidence. Another abuse of discretion.

E. HB 171 doesn't violate due process.

HB 171 isn't unconstitutionally vague. Plaintiffs—like with HB 136—manufacture confusion about HB 171's plain language requirements. But, again, the district court must interpret a statute in a way that renders it constitutional. *Hernandez*, ¶ 15. And Plaintiffs' vagueness burden is high. State.Br. 36–37. HB 171's plain text doesn't

require the same practitioner who obtains informed consent to *also* provide the abortion medication. *Id.* at 46. The plain text doesn't *require* an ultrasound. *Id.* at 47. Nor does it require a provider to be personally competent to handle *all* possible complications that may arise for the rest of the patient's life. *Id.* at 40–41. Plaintiffs may disagree with this interpretation, but the district court's role isn't to choose sides; it's to interpret the statute in a manner that upholds its constitutionality. *Hernandez*, ¶ 15; *see also Casey*, 505 U.S. at 880.

F. HB 140 doesn't violate *Armstrong*.

HB 140 is, again, a basic informed consent law. It requires providers to *offer* an expectant mother the chance to view an ultrasound or hear her child's fetal heartbeat.

Plaintiffs claim that this requirement "precludes providers from making decisions according to their best medical judgment." PPMT.Br 31. Of course, coming from doctors who don't know what "reasonable medical judgment" means, the concern rings hollow. At bottom though, Plaintiffs' position rests on the premise that pregnant women would be harmed by the offer of additional information before making a life-

altering decision. That's as insulting as it is baseless. Montana thinks better of its female residents than Planned Parenthood does.

Plaintiffs next claim that these women already make informed decisions based on their own deliberative processes and Planned Parenthood's patient education process. PPMT.Br 32. They insist that any additional information would somehow undermine that decision-making. But the State seeks to amplify those "deliberative processes" by offering women additional, salient information. More information should be a positive contribution to such consequential medical decisions. *See* State.Br. 49.

Plaintiffs tout the professional integrity of their abortion providers, yet these providers want to restrict the information available to women seeking to obtain abortions. PPMT.Br 31–32. That should alarm all Montana women. Luckily, Planned Parenthood doesn't set Montana's medical care standards for women. Montana does.

The district court—at Plaintiffs' urging—scrubbed HB 140's modest informed consent augmentations based on the evidence-free conclusion that offering additional information could "stigmatize" abortion. *See*

App.A 31; PPMT.Br 31–32. In so doing, the district court, again, abused its discretion.

CONCLUSION

The State respectfully requests that this Court vacate the district court's preliminary injunction. The State also renews its request for oral argument. These questions of exceptional public importance deserve their day in court.

DATED this 15th day of April, 2022.

AUSTIN KNUDSEN
Montana Attorney General

/S/ DAVID M.S. DEWHIRST
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
BRENT MEAD
Assistant Solicitors General
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
brent.mead2@mt.gov

KEVIN H. THERIOT
(AZ Bar No. 030446)*

DENISE M. HARLE
(FL Bar No. 81977)*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
dharle@ADFlegal.org

*Admitted Pro Hac Vice

Counsel for the State of Montana

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook 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 4,938 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST

CERTIFICATE OF SERVICE

I, David M.S. Dewhirst, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-15-2022:

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

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: Montana Constitutional Convention Delegates
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B
Helena MT 59601
Representing: ACLU of Montana Foundation, Inc., National Women's Law Center, Center for Reproductive Rights
Service Method: eService

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

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Montana Constitutional Convention 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, National Network to End Domestic Violence, Richland County Coalition Against Domestic Violence, Safe in the Bitterroot, Safe Space, Sanders County Coalition for Families, Sexual Assault Counseling Center, UJIMA, Inc., Victim-Witness Assistance Services, YWCA Great Falls, YWCA Missoula
Service Method: eService

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 Nicole 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 Dia Lang on behalf of David M.S. Dewhirst
Dated: 04-15-2022