FILED
10/14/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0207

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0207

HELEN WEEMS and JANE DOE,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as ATTORNEY GENERAL; AND TRAVIS R. AHNER, in his official capacity as COUNTY ATTORNEY FOR FLATHEAD COUNTY,

Defendants and Appellants.

On Appeal from the First Judicial District Court,
Lewis and Clark County, Cause No. ADV-2018-73
The Hon. Mike Menahan, Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General

MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
david.dewhirst@mt.gov
brent.mead2@mt.gov

DAVID M.S. DEWHIRST
Solicitor General

BRENT MEAD
Assistant Solicitor General

KATHLEEN L. SMITHGALL
Assistant Solicitor General

Attorneys for Defendants and Appellants

(Additional Counsel listed on next page)

ALEX RATE
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806

HILLARY SCHNELLER
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038

Attorneys for Plaintiffs and Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STANDARD OF REVIEW 2

ARGUMENT 4

I. MBN's scope-of-practice rules may not conflict with legislative enactments. 4

II. MBN properly deferred to the Legislature's scope-of-practice statutes 9

III. MCA § 50-20-109(1)(a) doesn't impermissibly infringe the right to privacy 11

A. The State has a clear and compelling interest in protecting the health of Montana women. 15

B. MCA § 50-20-109(1)(a) survives even strict scrutiny. 19

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 22

TABLE OF AUTHORITIES

Cases

Armstrong v. State,
1999 MT 261, 296 Mont. 361, 989 P.2d 364 .... *passim*

Bieber v. Broadwater Cnty.,
232 Mont. 487 (1988) 3

Dobbs v. Jackson Women's Health Org.,
142 S. Ct. 2228 (2022) 15, 16

Ferguson v. Skrupa,
372 U.S. 726 (1963) 15

Gonzales v. Carhart,
550 U.S. 124 (2007) 12

Heller v. Doe,
509 U.S. 312 (1993) 16

Mont. Cannabis Indus. Ass'n v. State,
2016 MT 44, 382 Mont. 256, 368 P.3d 1131 .... 2, 3

Montana Soc'y of Anesthesiologists v. Mont. Bd. of Nursing,
2007 MT 290, 339 Mont. 472, 171 P.3d 704 .... *passim*

Peterson v. Great Falls Sch. Dist. No. I & A,
237 Mont. 376, 773 P.2d 316 (1989) 3

Planned Parenthood of Montana v. State,
2022 MT 157, 409 Mont. 378, 515 P.3d 301 3

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 12

Powder River Cnty. v. State,
2002 MT 259, 312 Mont. 198, 60 P.3d 357 2

Powell v. State Compensation Ins. Fund,
2000 MT 321, 302 Mont. 518, 15 P.3d 877 17–18

State ex rel. Dep't of Health & Env't Scis. *v. Lasorte*,
182 Mont. 267, 596 P.2d 477 (1979) 10

Stenberg v. Carhart,
530 U.S. 914 (2000) 15

Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs
2000 MT 147, 300 Mont. 66, 2 P.3d 825 14

Weems v. State,
2019 MT 98, 395 Mont. 350, 440 P.3d 4 ..... *passim*

Wiser v. State,
2006 MT 20, 331 Mont. 28, 129 P.3d 133 ..... *passim*

OTHER AUTHORITIES

Montana Code Annotated

§ 2-4-305(6) 5, 7
§ 2-4-305(6)(a) 5
§ 37-2-101 4
§ 37-8-103(2)(a) 4, 6, 9
§ 37-8-103(2)(c) 5
§ 37-8-409(1) 6
§ 37-9-101(1)–(2) 4
§ 50-20-109(1)(a) ..... *passim*

Montana Constitution

Art. II, § 10 ..... 1, 2
Art. III, § 1 11

Administrative Rules of Montana

Rule 24.159.1405(1)(b) 6
Rule 24.159.1469(1) 7

INTRODUCTION

Montana may regulate the qualifications required of abortion providers without infringing on the right to a pre-viability abortion. And here, the State Legislature did just that. To codify this Court's decision in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, and in close consultation with the medical community, it passed HB 737, which expanded the physician assistants' (PAs) scope-of-practice laws to permit them to perform abortions under the supervision of a licensed physician. Weems and Doe (the abortionists) argue that Montana must also allow qualified advanced practice registered nurses (APRNs)—including certified nurse practitioners (CNPs) and certified nurse midwives (CNM)—to provide abortions, even though Montana never allowed APRNs to do so, until this case.

HB 737 codified *Armstrong*, but the district court declared it unconstitutional under *Armstrong*. As long as the so-called "fundamental" abortion rights conjured from Article II, § 10 of the Montana Constitution remain good law, however, the Legislature must be allowed to regulate abortion providers and procedures to protect health and safety. The district court's decision displaces the Legislature's prerogative to establish

medical standards in Montana and declares—in effect if not in form—that abortion is a medical procedure immune from all health and safety regulations. This Court should reverse the district court's order.

STANDARD OF REVIEW

The abortionists bear the burden of persuasion. When a party challenges a duly enacted law, courts apply the presumption of constitutionality. *See Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131; *see also id.* ¶ 29 (explaining that the presumption follows from the fact that "[t]he Legislature is presumed to be cognizant of guiding constitutional principles"). And this presumption asks "not whether it is possible to condemn, but whether it is possible to uphold the legislative action." *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. To overcome the presumption afforded to MCA § 50-20-109(1)(a), the abortionists must show *beyond a reasonable doubt* that Article II, § 10 of the Montana Constitution prevents the Legislature from limiting abortion providers to licensed physicians and PAs.

The district court and the abortionists get the burden wrong. For its part, the district court gave lip service to the presumption of

constitutionality, App.A.005, but then faults the State for its purported "failure to present a compelling argument as to why the legislature is better able to determine qualifications of potential abortion providers that the state-created licensing board," App.A.011—a presumption in name only. And the abortionists incorrectly substitute step two of the equal protection analysis for the general presumption of constitutionality afforded all statutes. Weems Br. 17–18 (citing *Bieber v. Broadwater Cnty.*, 232 Mont. 487, 490–91 (1988) and *Peterson v. Great Falls Sch. Dist. No. I & A*, 237 Mont. 376, 380, 773 P.2d 316, 318 (1989), both equal protection cases). But this isn't an equal protection case. App.A.002. And the presumption holds even in cases where plaintiffs allege a violation of a fundamental right. *Montana Cannabis*, ¶¶ 58–67 (vacating district court injunction because the lower court incorrectly applied strict scrutiny to a commercial free speech challenge); *cf. Planned Parenthood of Montana v. State*, 2022 MT 157, ¶ 33, 409 Mont. 378, 515 P.3d 301 (explaining that at the preliminary injunction stage, while statutes are afforded a presumption of constitutionality, plaintiffs need only demonstrate a prima facie case). If the presumption of constitutionality applies with rigor to all State laws except those that affect—in any way—

abortion, then this Court should say so clearly. The burden remains with the abortionists. *See* State's Br. 17.

ARGUMENT

I. MBN's scope-of-practice rules may not conflict with legislative enactments.

The practice of medicine in Montana is a privilege, not a right, which is subject to legislative oversight. MCA § 37-2-101 (explaining that "the practice of medicine" is "a privilege granted by the legislat[ure]," and "not a natural right of individuals"); *see also Armstrong*, ¶ 79 (Gray, J., specially concurring). So the State possesses authority under its general police powers to regulate for the health and safety of its citizens, including by regulating health care professionals and the scope of APRN practice. *See Wiser v. State*, 2006 MT 20, ¶¶ 18–19, 331 Mont. 28, 129 P.3d 133; *Montana Soc'y of Anesthesiologists v. Mont. Bd. of Nursing*, 2007 MT 290, ¶ 45, 339 Mont. 472, 171 P.3d 704.

In Montana, all nurses, including APRNs, must "submit evidence" that they are licensed and qualified to practice. MCA § 37-9-101(1)–(2). But a Montana nursing license confers no "authority to practice medicine, surgery, or any combination of medicine or surgery." MCA § 37-8-103(2)(a). Nor does it permit a licensed nurse to treat a patient using

methods from the "healing arts" unless the nurse has been qualified under "applicable law" or under the "laws licensing the practices of those professions." MCA § 37-8-103(2)(c). The applicable law in Montana allows physicians and PAs to perform abortions, but not nurses or APRNs. MCA § 50-20-109(1)(a).

While the Montana Legislature has delegated certain functions to the Montana Board of Nursing (MBN), *see* State's Br.22 (collecting statutory delegations), MBN cannot adopt rules that are contrary to law. *See* MCA § 2-4-305(6)(a); *see also e.g.*, *Montana Society*, ¶ 43. So MBN's scope-of-practice determinations for APRNs must be (i) consistent and not in conflict with the applicable statute(s); and (ii) reasonably necessary to effectuate the purposes of the statute. *See* MCA § 2-4-305(6).

The Montana Legislature has not given MBN any "authority to redefine or expand the scope of practice established by the [nurse]'s enabling legislation." *Montana Society*, ¶ 48. To sidestep this clear requirement, the abortionists argue that MBN would allow them to perform abortions but for the statutory prohibition on doing so. *See* Weems Br. 13–15. But that misses the point. Administrative agencies, like MBN, may only act in accordance with statutory law. *Montana Society*, ¶ 43.

And two statutes preclude MBN from authorizing APRNs to perform abortions. First, MCA § 50-20-109(1)(a) authorizes *only* physicians or PAs to perform abortions, which excludes APRNs. Second, MCA § 37-8-103(2)(a) precludes nurses from "practic[ing] medicine, surgery, or any combination of medicine or surgery." As detailed in the State's opening brief (at 23–25), both aspiration and chemical abortions—which the abortionists seek to perform—involve the practice of medicine or surgery or some combination of the two, so § 37-8-103(2)(a) also precludes MBN from allowing APRNs to perform abortions.

The district court failed to account for the statutory limits on MBN's authority and for the Legislature's interest in ensuring that women in Montana obtain safe abortions from qualified providers. App.A.007. And the court got it precisely backward when it found that MBN's general licensing authority in MCA § 37-8-409(1) overrides the specific prohibitions in MCA § 50-20-109(1)(a) and § 37-8-103(2)(a). *See* App.A.008 (citing Admin. R. Mont. 24.159.1405(1)(b)). Rather than searching for a conflict, the district should have harmonized MBN's rule—Admin. R. Mont. 24.159.1469(1)(c)—with its organic statutes. *See Montana Society*, ¶ 45. Had it done that, a simple rule would emerge: self-certification of

competency is generally allowed unless it conflicts with statute, as it does here. *Compare* MCA § 50-20-109(1)(a) (excluding APRNs from list of approved abortion providers), *with* Admin. R. Mont. 24.159.1469(1) (allowing APRNs to self-certify competence in specific fields).

The district court's inverted reasoning—requiring the State to justify "why the legislature is better able to determine qualifications for abortion providers than the *state-created medical licensing board*," App.A.011 (emphasis added)—bears an unsettling resemblance to HAL 9000, the spaceship's computer system that turned against the astronauts, in Stanley Kubrick's *2001: A Space Odyssey*. MBN, as a creature of statute, must yield to the enabling statute that created it and to any later statute modifying its authority. At bottom, the district court erred by elevating administrative rules above their authorizing statutes. *See* MCA § 2-4-305(6); *Montana Society*, ¶ 48. This Court should not repeat that mistake.

Neither *Armstrong* nor *Wiser* require the district court's result. To comply with *Armstrong*, the Legislature amended MCA § 50-20-109(1)(a) to include PAs as approved abortion providers, and it did so only after close consultation with the medical community—including the Academy

of Physicians Assistants, the Montana Hospital Association, hospitals, nurses, PAs, and more. *See* State's Br. 26–27. And the bill's sponsor informed the committee that the statute codified *Armstrong*, stating that statute's language "reads as the law is today." *See* App.C.045.

This Court should instead apply the framework from *Montana Society*, which addressed an analogous issue. There, a group of doctors challenged MBN's rule authorizing a subspeciality of APRNs to administer anesthesia without physician supervision. *Montana Society*, ¶¶ 40–58. The doctors argued that MBN acted outside its authority by authorizing independent practice by Certified Registered Nurse Anesthetists (CRNA), *id.* ¶ 41, but the Legislature itself authorized that practice, *id.* ¶¶ 35, 38. MBN's rule merely reflected the Legislature's intentional scope-of-practice choice. *Id.* ¶¶ 42, 48. *Montana Society* makes it exceedingly clear that the Legislature—not MBN—sets the general scope of practice authority. *Id.* ¶ 45.

Montana Society's framework aligns with this Court's decisions involving the regulation of medical professionals. *See id.* ¶¶ 40–48. In *Wiser*, this Court recognized that the Legislature—through its police powers—may enact licensing and qualifications requirements for medical

professionals without triggering strict scrutiny. *See* 2006 MT 20, ¶¶ 18–19; *see also Montana Society*, ¶¶ 43–45. That includes scope of practice regulations. *Montana Society*, ¶ 45. MBN possesses general licensure authority but cannot act outside the scope of practice rules set by the Legislature. *Id.* ¶ 43. Because MCA § 50-20-109(1)(a) and § 37-8-103(2)(a) limit who may provide abortions, MBN may only license those professionals authorized by law to perform the procedure. *Id.* ¶¶ 44–45. And that excludes the abortionists.

II. MBN properly deferred to the Legislature's scope-of-practice statutes.

In 2005, to align with this Court's decision in *Armstrong*, the Montana Legislature passed HB 737, which amended MCA § 50-20-109(1)(a) to expand the pool of authorized abortion providers to include PAs. *See* App.C.045–47. *Armstrong* involved a PA who had performed abortions in Montana for roughly twenty years before the law changed to bar non-physicians from performing abortions. *Armstrong*, ¶¶ 22; *Weems*, 2019 MT 98, ¶ 29, 395 Mont. 350, 440 P.3d 4 (Rice, J., dissenting).

For the next thirteen years, PAs were authorized under Montana law to perform abortions. Before this case, and even before the passage of HB 737, MBN never considered whether APRNs could be licensed to

perform abortions contrary to MCA § 50-20-109(1)(a). *See* State's Br. 28. Given that history, MBN's failure to explicitly exclude abortion from the APRN's scope of practice should not—as the district court found and the abortionists now argue—create an inference that abortion is included in their scope of practice.

When MBN met in 2019 to consider whether APRNs needed to obtain specific authorization from MBN to perform aspiration and chemical abortions, its minutes showed that it elected to "leave the rules and statutes as they are." App.C.073. And rightly so—administrative agencies like MBN have no authority to redefine APRNs' scope of practice in a manner that conflicts with a statute. *See State ex rel. Dep't of Health & Env't Scis. v. Lasorte*, 182 Mont. 267, 596 P.2d 477 (1979). But the district court decided this meant that MBN *would* include the performance of aspiration and chemical abortions in APRNs' self-certified scope of practice but for MCA § 50-20-109(1)(a). From that 'silent affirmation,' the district court found that the statute must yield to an individual APRN's self-certification as to their scope of practice. And the court's conclusion relied on the faulty premise that APRNs would remain subject

to private national nursing organizations' scope-of-practice standards, which finds no support in the record. *See* State's Br. 29–30.

But the statute clearly states who may provide abortions and nothing in the record—including MBN's statement that existing law covers the issue—contradicts that statement as a matter of fact or law. *See id.* Even if this Court finds that MBN did mean that abortion was included in APRNs' scope of practice, State law controls and this Court should so hold. *See Montana Society*, ¶ 45. To do otherwise would impermissibly transform this Court into a de facto medical licensing board, even though the authority to regulate for Montanans' "health and safety" rests with the Legislature, not this Court. *See Weems I*, ¶ 33 (Rice, J., specially concurring); *see also* Mont. Const., Art. III, § 1 ("No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.").

III. MCA § 50-20-109(1)(a) doesn't impermissibly infringe the right to privacy.

Armstrong doesn't, as the district court found and the abortionists argue, demand strict scrutiny review of any law that merely *affects* abortion. *See* App.A.012. Laws may touch on abortion with infringing the

right to obtain one. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873–74 (1992) (not every regulation is an infringement); *Weems I*, ¶ 19 ("not every restriction on medical care impermissibly infringes [the right to privacy]"). And the State has authority, pursuant to its "legitimate interest in regulating the medical profession," to regulate abortion and abortion providers. *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (citing *Casey*, 505 U.S. at 873–74). Even *Armstrong* recognized that strict scrutiny was only required when "legislation infring[ed] *the exercise of the right*." ¶ 34 (emphasis added).

This case does not concern women's ability to obtain abortions, it concerns the State's ability to regulate who is qualified to provide them. Despite the abortionists claim that abortions are "exceedingly safe," *see* Weems Br. 9–10, 18, the record shows that all abortion procedures involve known risks to a women's health and wellbeing, *see* State's Br. 11–15. Even if patients have a "fundamental right" to seek healthcare (including abortions), they have no such right to obtain medical care from unlicensed providers. *See Montana Cannabis*, ¶ 22; *Wiser*, ¶¶ 16–17; *see also* State's Br. 32–33, 41–42. And the authority to determine licensing

requirements rests with the State first and then its licensing boards. *See* State's Br. 32–33.

The distinction between laws affecting the ability to obtain an abortion and those affecting to ability to provide one, is a distinction with an important difference. *See* State's Br. 42 (collecting cases). Subjecting licensure requirements to strict scrutiny would, as this Court warned in *Wiser*, "force the State and its licensing boards to demonstrate a compelling state interest in order to license and regulate health care professionals," with the predictable result of rendering any regulation of health care professionals "very difficult, if not impossible, for the State." *Wiser*, ¶ 18. And because the right to privacy is not implicated here, this Court should evaluate MCA § 50-20-109(1)(a) under rational basis, which it clearly satisfies.

The abortionists claim that this case is "on all-fours" with *Weems I*. Weems Br. 34; *see also id.* 20–22, 26, 36–37 (arguing that *Weems I* controls here). It isn't. *Weems I* involved an appeal from the district court's grant of a preliminary injunction, which sought only to preserve the status quo ex ante and did not constitute a decision on the merits. *See Weems I*, ¶ 16, 18. And here in Montana, it is easy to see why that is so—

the applicant need only meet one of several enumerated factors for the preliminary injunction to issue. *See id.* ¶ 17; *see also Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825. This Court entered the preliminary injunction based on its finding that the abortionists may suffer irreparable harm absent an injunction, not based on a finding that the abortionists were likely to succeed on the merits. *See id.* ¶¶ 17–19, 20–25. That injunction *changed* the status quo by allowing APRNs to perform abortions in Montana for the first time. And the dissent rightly observed that the majority, in effect, entered an advisory declaratory judgment on "minimal proceedings and record." *See Weems I*, ¶ 36 (Rice, J., dissenting). To find *Weems I* controlling here, even though this Court never opined on the merits of the abortionists' claim, would be improper.

Even under strict scrutiny, MCA § 50-20-109(1)(a) should survive: it is narrowly tailored to advance Montana's compelling interest in regulating healthcare professions and in protecting the health and safety of its citizens. *See* State's Br. 8–13, 33. This Court should reverse the district court.

A. The State has a clear and compelling interest in protecting the health of Montana women.

The Legislature passed MCA § 50-20-109(1)(a) under its inherent power to provide for the general health and safety of Montanans. *See Wiser*, ¶ 19. This Court has recognized that the Legislature may exercise this authority, even when it "implicates individual rights." *Id.* Because the practice of medicine in Montana is a privilege, not a right, it is "subject to legislative oversight in order to protect the health, safety, and welfare of the people of Montana." *See Armstrong*, ¶ 79 (Gray, J., specially concurring). And States' authority to regulate is not limited to "what various medical organizations have to say about the physical safety of a particular procedure." *Stenberg v. Carhart*, 530 U.S. 914, 967 (2000) (Kennedy, J., dissenting) (quotation marks omitted).

The Legislature's authority encompasses legitimate abortion regulations, and, when challenged, courts may not "'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283–84 (2022) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963)). Among other things, legitimate State interests include protecting the health of the mother, minimizing fetal pain, and eliminating gruesome or barbaric medical

procedures. *Id.* at 2284. Montana considers these interests legitimate and compelling.

Health and welfare laws, including laws that regulate abortion, are "entitled to a 'strong presumption of validity.'" *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Montana Code Annotated § 50-20-109(1)(a) aims to protect the health and safety of Montanans by regulating abortion providers, so it merits the same strong presumption of validity in Montana courts. But beyond that, Montana and MBN have a duty to protect the health and safety of patients and healthcare provers. *See* State's Br. 35–36.

After all, abortion—both chemical and surgical—carries inherent risks such as infection, hemorrhage, and uterine perforation. *See id.* at 36–37 (collecting record cites showing bleeding risks from chemical and surgical abortions, increased risks as gestational age increases, and American College of Obstetrics and Gynecology's recommendation that clinicians be trained in surgical abortions or able to refer to such clinicians). And all parties agree that risks become unacceptable when the service provider lacks the necessary training and experience to safely perform an abortion. *See id.* at 37. Even *Armstrong* limits authorized

abortion providers to those deemed competent by "education, training, or experience" to provide that service. *Armstrong*, ¶ 2 n.1.

Montana Code Annotated § 50-20-109(1)(a) addresses these risks by ensuring that abortions will only be performed by those providers equipped to address the complications and risks associated with the procedure. App.C.130 (testimony from State's expert that abortion risks exceed APRNs' education, training, and experience). The statute limited abortion procedures to licensed physicians and PAs based on the medical community's recommendations, App.C.122, including the Montana Board of Medical Examiners, Montana Academy of Physician Assistants, Montana Medical Association, and more. App.C.030–34; App.C.045. And the district court completely ignored this evidence. *See* App.C.029–034; App.C.045–047.

Rather than presume the constitutionality of the State's law, as it must, the district court shifted the burden to the State to defend the constitutionality of its law. App.A.014. But that's entirely backward. Montana Code Annotated § 50-20-109(1)(a) is presumptively valid, and the plaintiffs must prove otherwise. *See Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 ("The party

challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute."). This error of law alone justifies reversal.

And this Court stated in *Wiser* that statutes regulating the licensing of healthcare professions is subject to rational basis review, not strict scrutiny. *See Wiser*, ¶ 18. A contrary rule would impose an unacceptable burden on the State, essentially requiring it to show "that no less restrictive set of qualifications for a license could serve the state's interest in protecting the health of its citizens." *Id.* (quotation marks omitted). And would significantly undermine—perhaps even eviscerate—the State's ability to regulate the healthcare profession at all. *See id.* However far it extends, *Armstrong* doesn't extend that far. *See id.*

Even so, the district court compounded its error by concluding, contrary to the record, that the "medical community clearly considers APRNs competent" to self-certify their abortion practice. *See* State's Br. 38–39 (collecting record cites). But aspiration abortion is undoubtedly surgical, which the American College of Surgeons says must only be performed by licensed physicians. App.C.122; App.C.139–150. And nothing in the record affirmatively authorizes APRNs to self-certify that their

scope of practice includes abortion. *See* App.C.076–099; App.C.100–114 (national certification organizations don't specifically authorize such practices). The record falls far short of showing that the medical community views APRNs as clearly competent to perform abortions.[1]

B. MCA § 50-20-109(1)(a) survives even strict scrutiny.

The State's interest in safeguarding maternal health is compelling. *See* State's Br. 34–40, 43–44 (collecting cases). *Armstrong* itself recognized that the State has a compelling interest in ensuring that pre-viability abortions are performed only by qualified medical professionals.

[1] The district court declined to consider the impact of MCA § 50-20-109(1)(a) on provider availability, App.A.002, and the abortionists failed to demonstrate that it had any such impact on provider availability, App.C.124. But the record shows that, as of August 2021, Montana had 1,033 active licensed PAs and 6,960 licensed physicians. *Id.* But the abortionists failed to marshal any evidence suggesting that the failure to expand that group to include nurses has impeded Montanans' ability to obtain abortion services. The State similarly can't be punished because some licensed providers choose not to perform abortions. The contrast is palpable: the State expanded the pool of authorized abortion providers in MCA § 50-20-109(1)(a); the abortionists have simply failed to persuade some providers to perform those services. App.C.030–31; *see also* App.C.124. That's not a legal problem. It's a recruitment problem. *Armstrong* and its progeny can't apply if a law doesn't *infringe* anyone's right to obtain pre-viability abortion. So at a minimum, this Court should remand with clear instructions for further fact finding.

Armstrong, ¶¶ 63–66. And the record demonstrates that MCA § 50-20-109(1)(a) advances those compelling interests.

It is also narrowly tailored to those interests for several reasons. As explained in the State's opening brief, the Legislature passed HB 737 to bring its statutes into alignment with *Armstrong*, it engaged in significant consultations with the medical community, and the law's limitations incorporated the medical community's views of risks associated with abortions and the training and qualifications necessary to address those risks. State's Br. 44–45. The Legislature could have acted on its own, but its decision to consult with the medical community—and its decision to implement its recommendations—provides evidence that the State's selected means were narrowly tailored to achieve its compelling interests.

CONCLUSION

For these reasons, this Court should reverse. And given the importance of the constitutional issues raised in this litigation, the Court should grant oral argument and permit the parties their day in court.

DATED this 14th day of October, 2022.

AUSTIN KNUDSEN
Montana Attorney General

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

BRENT MEAD
KATHLEEN L. SMITHGALL
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
brent.mead2@mt.gov
kathleen.smithgall@mt.gov

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 3,981 words, excluding certificate of service and certificate of compliance.

/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 10-14-2022:

Hillary Anne Schneller (Attorney)
Center for Reproductive Rights
199 Water Street
22nd Floor
New York NY 10038
Representing: Helen Weems
Service Method: eService

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

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Travis R. Ahner (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: State of Montana
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Helen Weems
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B

Helena MT 59601
Representing: Helen Weems
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Legal Voice and Women's Law Project
Service Method: eService

Lindsay Beck (Attorney)
2000 S. 3rd Ave., Unit A
Bozeman MT 59715
Representing: National Association of Nurse Practitioners in Women's Health, American College of Nurse-Midwives
Service Method: eService

Electronically signed by Buffy Ekola on behalf of David M.S. Dewhirst
Dated: 10-14-2022