IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0308

HELEN WEEMS AND JANE DOE,

Plaintiffs and Appellees,

v.

THE STATE OF MONTANA, by and through Timothy C. Fox, in his official capacity as Attorney General, and ED CORRIGAN, in his official capacity as the County Attorney for Flathead County,

Defendants and Appellants.

BRIEF FOR THE MONTANA PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. INTEREST OF THE AMICUS

Amicus curiae Montana Public Health Association ("MPHA") is a state affiliate of the American Public Health Association, a nationwide organization that works to enhance the health of the public, improve access to care, support public health infrastructure, and achieve equity in health status through policy and advocacy. MPHA promotes inclusive public health practices and policies in Montana and is dedicated to shaping public health policy and ensuring universal access to high-quality, affordable health care for all Montanans. MPHA advances legislation and policies that enhance the health and safety of Montanans through its advocacy, lobbying, and education efforts.

MPHA is interested in this matter because the resolution of the issue before the Court impacts the health and safety of Montanans and the ability of Montana's healthcare providers to provide necessary healthcare services to their patients. Specifically, enforcement of Mont. Code Ann. § 50-20-109(1)(a) (the "APRN Restriction") affects Montanans' access to abortion care and infringes upon Montanans' fundamental right to choose the qualified abortion care provider of their choice. Safety concerns do not warrant restricting abortion providers to physicians and physician assistants. Abortion is an extremely safe form of medical care that can be competently and effectively provided by Advanced Practice Registered Nurses.

II. SUMMARY OF ARGUMENT

The APRN Restriction prohibits Advanced Practice Registered Nurses ("APRNs")—professional nurses with advanced education and training, including certified nurse practitioners and certified nurse midwives[1]—from providing abortion services. Physicians and physician assistants are permitted to provide abortions in Montana.

Plaintiffs-Appellees Weems and Doe (the "Clinicians") sought a preliminary injunction to prevent enforcement of the APRN Restriction, arguing that it imposed irreparable harm on Montanans by depriving them of their fundamental constitutional right to seek abortion services from a healthcare provider of their choice. The Court issued a preliminary injunction. On appeal, Defendants-Appellants State of Montana and County Attorney Corrigan (collectively referred

[1] Certified nurse practitioners ("CNPs") and certified nurse midwives ("CNMs") both have advanced clinical training beyond their initial professional registered nurse education. CNPs are trained to provide a full range of primary, acute and specialty health care services, including ordering and performing diagnostic tests, prescribing medications, managing patients' overall care, counseling, and educating patients on disease prevention and lifestyle choices. *See What's an NP?*, Am. Ass'n of Nurse Practitioners, https://www.aanp.org/all-about-nps/what-is-an-np#services (last visited Nov. 14, 2018). CNMs provide a full range of health care services for women, including primary care, gynecologic and family planning services, preconception care, care during pregnancy, childbirth and the postpartum periods, and treatment of male partners for sexually transmitted infections. *See Our Scope of Practice*, Am. C. of Nurse Midwives, http://www.midwife.org/Our-Scope-of-Practice (last visited Nov. 14, 2018).

to as the "State") argue that the Clinicians lack standing to seek—and the district court lacked jurisdiction to grant—the preliminary injunction because abortions fall outside the Clinicians' scope of practice in Montana.

MPHA files this amicus brief in support of the Clinicians' argument that the APRN Restriction deprives Montanans of their fundamental right to seek abortion services from a qualified healthcare provider of their choice by preventing APRNs, who can safely and effectively perform abortions, from doing so.

Abortion is an extremely safe form of medical care that falls well within APRNs' broad scope of practice, as determined by Montana regulations and national medical professional organizations. Indeed, abortions are safer and less complicated than many procedures that APRNs are authorized to perform in Montana. Further, medical research confirms that APRNs provide abortion care as safely and effectively as licensed physicians. For these reasons, numerous national and global health and medical organizations strongly support the provision of abortion services by APRNs.

III. ARGUMENT

A. Abortion Is An Extremely Safe Form Of Medical Care

By preventing APRNs like the Clinicians from providing abortions, the APRN Restriction advances no health or safety interest. Indeed, medication and aspiration abortion are among the safest procedures for women in the United

States. *See* Ushma D. Upadhyay, *Safety of Abortion in the United States*, Advancing New Standards In Reprod. Health, 2 (Dec. 2014), https://www.ansirh.org/sites/default/files/publications/files/safetybrief12-14.pdf (citing studies); Tracy A. Weitz, Diana Taylor, et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Pub. Health 454, 456–57 (2013). The risk of death associated with childbirth is about fourteen times *higher* than that associated with abortion, and pregnancy-related complications are more common among women having live births than those having an abortion. *See* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216 (2012).

In addition, the complication rates for abortion (0.23% for major complications[2] and 1.88% for minor complications) are similar to or lower than

[2] Major complications are defined as serious unexpected adverse events requiring hospital admission, surgery, or blood transfusion. Minor complications are defined as all other expected adverse events. Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 176 (2015).

those associated with many other outpatient procedures. *See* Upadhyay, *Incidence of Emergency Department Visits*, *supra*, at 179.[3]

Abortions may be performed either through medication or by aspiration. Medication abortion typically involves the patient taking the first medication at a healthcare facility, and then a second medication one to two days later at a location of her choosing, where she passes the pregnancy in a process similar to a miscarriage. *See* World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* 3–4 (2d ed. 2012). Aspiration abortion is an on-site procedure utilizing suction to remove the uterine contents. *Id*. at 40–41. The procedure usually takes less than ten minutes to complete. *Id*.

Complications associated with abortion by either method are very rare, and, when they do occur, most can be safely managed by properly trained clinicians in

[3] For instance, the major complication rate for colonoscopy is 0.24%. *See* Georgina Castro, M. Fuad Azrak, et al., *Outpatient Colonoscopy Complications in the CDC's Colorectal Cancer Screening Demonstration Program: A Prospective Analysis*, 119 Cancer 2849, 2853 (2013). The overall complication rate for wisdom tooth extractions is nearly 7%. *See* François Blondeau & Nach G. Daniel, *Extraction of Impacted Mandibular Third Molars: Postoperative Complications and Their Risk Factors*, 73 J. Can. Dental Assoc. 325, 325 (2007). The overall complication rate for tonsillectomy is around 8-9%. *See* Jack L. Paradise, Charles D. Bluestone, et al., *Tonsillectomy and Adenotonsillectomy for Recurrent Throat Infection in Moderately Affected Children*, 110 Pediatrics 7, 7 (2002); Jose Granell, Pilar Gete, et al., *Safety of Outpatient Tonsillectomy in Children: A Review of 6 Years in a Tertiary Hospital Experience*, 134 Otolaryngology – Head & Neck Surgery 383, 383 (2004).

an outpatient setting or by the patient at home. *See* Weitz, *supra*, at 456. Major complications occur at a rate of 0.16% for first-trimester aspiration abortions, and 0.31% for medication abortion. *See* Upadhyay, *Incidence of Emergency Department Visits*, *supra*, at 181.[4] A study analyzing 54,911 abortions found that only 0.03% involved an ambulance transfer to an emergency room on the day of the abortion. *Id.* at 180. Only 0.87% of abortions resulted in an emergency room visit for an abortion-related complication within six weeks of the abortion. *Id.* at 178.

B. APRNs Are Qualified To Safely Provide Abortion Care

Contrary to the State's assertions, an APRN's general scope of practice includes abortion and abortion-related services. The State incorrectly asserts that the fact that abortion and abortion-related services are not specifically mentioned in the American Academy of Nurse Practitioners or the American Academy of Nurse Midwives scope of practice materials means that they are excluded. Furthermore, studies have established APRNs' ability to safely and effectively provide abortion care.

[4] These statistics, already low, may be overestimations of the complication rates because, compared to the general population, the Upadhyay study's sample pool consisted of low-income Medi-Cal beneficiaries, who may have more health problems than the general population. *Id*. at 182.

1. APRNs Are Authorized to Provide Medical Care That Is Similar to or More Complex than Early Abortion Care

An APRN licensed by the Board of Nursing in Montana can provide a broad range of medical care, including care that is similar to or significantly more complex than early abortion. To obtain an APRN license in Montana, an applicant must complete a graduate-level education program, hold an active registered nurse license, and receive certification from a national professional organization. *See* Mont. Admin. R. 24.159.1412. Once licensed, an APRN may do the following:

> [P]rovid[e] initial, ongoing, and comprehensive care, including: (i) physical examinations, health assessments, and/or other screening activities; . . . (iii) ordering durable medical equipment, diagnostic treatments and therapeutic modalities, laboratory imaging and diagnostic tests, and supportive services, including, but not limited to, home healthcare, hospice, and physical and occupational therapy; (iv) receiving and interpreting results of laboratory, imaging, and/or diagnostic studies; [and] (v) working with clients to promote their understanding of and compliance with therapeutic regimens.

Mont. Admin. R. 24.159.1406(1)(b). The Montana Board of Nursing also grants APRNs prescriptive authority (*i.e.*, the ability to prescribe medications) after they meet certain additional educational requirements, *see* Mont. Code Ann. § 37-8-202(1)(h); Mont. Admin. R. 24.159.1463(2)–(3), permitting them to "prescribe, procure, administer, and dispense . . . controlled substances pursuant to applicable state and federal laws and within the APRN's role and population focus," Mont. Admin. R. 24.159.1461(1). The broad list of permissible practices for APRNs is

inclusionary rather than exclusionary. Thus, so long as an APRN practices "in the role and population focus in which the APRN has current national certification," Mont. Admin. R. 24.159.1406(1), state regulations do not *limit* the type of medical care an APRN may provide, let alone impose any explicit prohibitions on APRNs providing abortion care.

The Montana Board of Nursing recognizes a number of national professional organizations that outline the scope and standards of practice for APRNs, including the American Association of Nurse Practitioners ("AANP") and the American College of Nurse-Midwives ("ACNM"). *See Montana Board of Nursing Recognized National Professional Organizations (NPO) for APRN Scope and Standards of Practice*, Mont. Dep't of Lab. & Industry (Aug. 2018), http://boards.bsd.dli.mt.gov/Portals/133/Documents/nur/aprn_sop_documents.pdf. Like the Montana Board of Nursing, none of these organizations provide a comprehensive or exhaustive list of medical care that an APRN is authorized to provide.

The AANP, for example, defines a nurse practitioner's professional role in broad terms – "nurse practitioners assess, diagnose, treat, and manage acute episodic and chronic illnesses." *Scope of Practice for Nurse Practitioners*, Am. Ass'n of Nurse Practitioners (2015), https://www.aanp.org/images/documents/publications/scopeofpractice.pdf.

Moreover, nurse practitioners may "order, conduct, supervise, and interpret diagnostic and laboratory tests, prescribe pharmacological agents and non-pharmacologic therapies, as well as teach and counsel patients, among other services." *Id.* Similarly, the ACNM articulates the scope of practice for certified nurse midwives as "encompass[ing] a full range of primary health care services for women." *Definition of Midwifery and Scope of Practice of Certified Nurse-Midwives and Certified Midwives*, Am. C. of Nurse-Midwives (Feb. 6, 2012), http://www.midwife.org/acnm/files/ccLibraryFiles/Filename/000000007043/Definition-of-Midwifery-and-Scope-of-Practice-of-CNMs-and-CMs-Feb-2012.pdf. Nurse midwives may "conduct physical examinations; prescribe medications including controlled substances and contraceptive methods; admit, manage and discharge patients; order and interpret laboratory and diagnostic tests and order the use of medical devices." *Id.* Based on the standards of practice defined by the AANP and ACNM, nurse practitioners and nurse midwives are given considerable latitude regarding the medical services and care they are permitted to provide and are not prohibited from providing abortion care.

APRNs specializing in family practice may provide a broad range of medical services that require similar skills and are as or more complex than early abortion care. These services include inserting and removing intrauterine contraceptive devices ("IUDs") and other contraceptive implants, performing endometrial

biopsies, and providing care for women suffering from miscarriages. *See, e.g.*, *Family Nurse Practitioner & Adult-Gerontology Primary Care Nurse Practitioner Certification Candidate Handbook*, Am. Acad. of Nurse Prac. Nat'l Certification Bd., 26–27 (Mar. 2018), http://www.aanpcert.org/resource/documents/AGNP%20FNP%20Candidate%20Handbook.pdf. Similar to aspiration abortion procedures, inserting and removing an IUD involves placing an instrument through the cervix, and difficult removals may necessitate cervical dilation. *See* Sujatha Prabhakaran & Alice Chuang, *In Office Retrieval of Intrauterine Contraceptive Devices with Missing Strings*, 83 Contraception 102, 103 (2011).

Managing miscarriages, which is within APRNs' scope of practice, entails essentially the same medical care as early abortion. For instance, miscarriages can be managed with medication, specifically Misoprostol, one of the medications used in medication abortion. *See* Amy J. Levi and Tara Cardinal, *Early Pregnancy Loss Management for Nurse Practitioners and Midwives*, Women's Healthcare: A Clinical Journal for NPs (2016), https://npwomenshealthcare.com/early-pregnancy-loss-management-nurse-practitioners-midwives/. APRNs treating miscarriages may also perform an aspiration procedure—in which the cervix is dilated and a curette is used to remove the uterine contents through suction—which is essentially the same procedure required for early abortion. *Id*.

2. APRNs Provide Both Medication and Aspiration Abortions Safely and Effectively

Recent peer-reviewed studies demonstrate that APRNs perform both medication and aspiration abortions as safely and effectively as physicians and physician assistants. In one study, researchers compared 5,812 aspiration procedures performed by physicians with 5,675 aspiration procedures performed by APRNs and physician assistants over a span of four years. *See* Weitz, *supra*, at 457. The APRNs and physician assistants participating in the study were newly trained to perform aspiration abortions, with an average of one and a half years' experience providing abortion care compared to the physicians' average of fourteen years' experience. *Id*. at 455. The study found that "care provided by newly trained NPs [Nurse Practitioners], CNMs [Certified Nurse Midwives], and PAs [Physician Assistants] was not inferior to that provided by experienced physicians." *Id*. at 458. With regard to major complications, the study found that there was no significant difference in terms of risk between provider groups. *Id.* at 459 ("Both provider groups had extremely low numbers of complications, less than 2% overall—well below published rates—and only 6 complications out of 11,487 procedures required hospital-based care . . . . [W]e conclude that the difference between the 2 groups of providers is not clinically significant."). The results "confirm[ed] existing evidence from smaller studies that the provision of abortion[s] by [nurse practitioners, certified nurse midwives, and physician

assistants] is safe and from larger international and national reviews that have found these clinicians to be safe and qualified health experts." *Id.*

Another recent study similarly found no significant difference in outcomes between provider types for first-trimester aspiration abortion followed by immediate IUD insertion. *See* Eva Patil, Blair Darney et al., *Aspiration Abortion with Immediate Intrauterine Device Insertion: Comparing Outcomes of Advanced Practice Clinicians and Physicians*, 61 J. Midwifery & Women's Health 325, 329 (2016). The study compared the outcomes of 445 procedures performed by physicians to 224 procedures performed by Advanced Practice Clinicians (*i.e.*, nurse practitioners, certified nurse midwives, and physician assistants) over the course of two years in Oregon.[5] *Id.* at 326. Researchers determined that there were no clinically significant differences between physicians and APRNs and physician assistants as providers of first-trimester aspiration abortion followed by immediate IUD insertion.[6] *Id*. at 329.

[5] APRNs in Oregon are authorized to provide abortion care and practice under a regulatory structure similar to Montana's. *See* Or. Admin. R. § 851-050-0000(24).

[6] The results of both studies align with research from multiple countries confirming that APRNs can safely provide abortion care. *See, e.g.*, Shireen J. Jejeebhoy et al., *Can Nurses Perform Manual Vacuum Aspiration (MVA) As Safely and Effectively As Physicians? Evidence From India*, 84 Contraception 615, 620 (2011); Ina Warriner et al., *Rates of Complication in First-trimester Manual Vacuum Aspiration Abortion Done by Doctors and Mid-level Providers in South Africa and*

Similarly, studies have shown that APRNs perform medication abortions with the same safety, efficacy, and patient acceptability as physicians. In fact, some research shows that APRNs may provide medication abortions with *greater* efficacy and patient acceptability than physicians. *See* H. Kopp Kallner, et al, *The Efficacy, Safety and Acceptability of Medical Termination of Pregnancy Provided by Standard Care by Doctors or by Nurse-midwives: A Randomised Controlled Equivalence Trial*, 122 BJOG: An Int'l J. of Obstetrics and Gynaecology 510, 515 (2014). The study found that 99% of the women treated by nurse midwives did not require further intervention (*i.e.*, follow-up aspiration to complete the abortion), and 95.8% experienced no complications following the medication abortion (compared to 97.4% and 93.5%, respectively, for women treated by physicians). *Id*. at 514. Moreover, women that met with nurse midwives were significantly more likely to express a preference for nurse midwives if they ever required another medication abortion. *Id*.

Medical research therefore confirms that APRNs can competently and effectively administer abortion care.

Vietnam: A Randomised Controlled Equivalence Trial, 368 Lancet 1965, 1971 (2006).

C. Medical And Public Health Groups Support The Performance Of Abortions By APRNs

Major medical and public health groups support the performance of abortions by APRNs as a means of providing greater access to qualified healthcare providers. The American Public Health Association ("APHA") recommends the provision of medication and aspiration abortion by appropriately trained and competent nurse practitioners, certified nurse midwives, and physician assistants. *See Provision of Abortion Care by Advanced Practice Nurses and Physician Assistants*, Am. Pub. Health Ass'n (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/16/00/provision-of-abortion-care-by-advanced-practice-nurses-and-physician-assistants. The APHA notes that the Institute of Medicine Committee on the Future of Primary Care and the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act (known together as the Affordable Care Act of 2010) have defined NPs, CNMs, and PAs, along with generalist physicians, as primary care clinicians—indicating that these clinicians "are well positioned within the health care system to address women's needs for comprehensive primary care and preventive reproductive health services that include abortion care." *Id.*

The American College of Obstetricians and Gynecologists ("ACOG") is a professional organization of physicians specializing in obstetrics and gynecology,

which supports women's health care through advocacy in federal and state legislatures. ACOG "supports . . . clinical training for residents and advanced practice clinicians in abortion care in order to increase the availability of trained abortion providers." *ACOG Opinion No. 612*, Am. C. of Obstetricians and Gynecologists (Nov. 2014), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Abortion-Training-and-Education.

The American Medical Women's Association ("AMWA") is an organization that functions at the local, national, and international level to advance women in medicine and improve women's health, by providing and developing leadership, advocacy, education, expertise, mentoring, and strategic alliances. AMWA has pledged to "work to increase the number of abortion providers by supporting initiatives to improve and increase training for medical students, residents and physicians in the full range of abortion procedures, and to add adequately trained Nurse-Midwives, Nurse Practitioners and Physician Assistants to the pool of potential abortion providers." *Position Paper on Principals of Abortion & Access to Comprehensive Reproductive Health Services*, Am. Med. Women's Ass'n, https://www.amwa-doc.org/wp-content/uploads/2018/05/Abortion-and-Access-to-Comprehensive-Reproductive-Health-Services.pdf.

The positions of these groups reflect and support what organizations representing APRNs have long asserted in terms of APRNs' ability to provide abortion care. In 1991, for example, the National Association of Nurse Practitioners in Women's Health (formerly National Association of Nurse Practitioners in Reproductive Health, or "NANPRH")—an association of women's health-focused nurse practitioners advocating for improved access and quality of health care for women—adopted a policy resolution acknowledging the provision of abortion care as within nurse practitioners' scope of practice: "Let it be resolved that NANPRH believes that nurse practitioners, with appropriate preparation and medical collaboration, are qualified to provide abortions." National Association of Nurse Practitioners in Women's Health, *Resolution on Nurse Practitioners as Abortion Providers*, 3 (October 1991), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/CNM_NP_PA_org_statements.pdf.

The ACNM is a professional association that represents certified nurse midwives and certified midwives in the United States. ACNM works with state and federal agencies, and members of Congress, to advance the well-being of women and infants, with a special emphasis on pregnancy, childbirth, and gynecologic and reproductive health. In 1991, ACNM released a position statement on "Access to Comprehensive Sexual and Reproductive Health Care Services" that affirmed that "midwives may provide medication or aspiration

abortion as part of expanded scope of practice." *Access to Comprehensive Sexual and Reproductive Health Care Services*, Am. C. of Nurse-Midwives, 2 (1991), http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000087/Access-to-Comprehensive-Sexual-and-Reproductive-Health-Care-Services-FINAL-04-12-17.pdf.

The view of the professional medical organizations above is shared by global health organizations. Since at least 2012, the World Health Organization ("WHO"), an agency of the United Nations tasked with promoting the health of people internationally, has been emphasizing the importance of having non-physician medical professionals (like the Clinicians) provide abortion care. In a policy guidance paper citing heavily to medical studies, the WHO noted that "[a]bortion care can be safely provided by any properly trained health-care provider, including midlevel[7] (i.e. non-physician) providers." World Health Organization, *supra*, at 65, 67. The WHO also noted that "[c]omparative studies have shown no difference in complication rates between women who had first-

[7] The term "midlevel providers" in this context "refers to a range of non-physician clinicians (e.g. midwives, nurse practitioners, clinical officers, physician assistants, family welfare visitors, and others) who are trained to provide basic clinical procedures related to reproductive health, including bimanual pelvic examination to determine age of pregnancy and positioning of the uterus, uterine sounding and other transcervical procedures, and who can be trained to provide safe abortion care." World Health Organization, *supra*, at 65.

trimester abortions with MVA [manual vacuum aspiration] performed by midlevel health-care providers and those who had the procedure performed by a physician." *Id*. at 72.

The message of these organizations is clear: the provision of abortion services falls well within the scope of practice of APRNs, and APRNs are competent to provide abortion care. These professional and public health organizations recommend, as a matter of promoting women's health, that APRNs be allowed to provide abortion care. This support stands in stark contrast to the supposed safety concerns underlying the APRN Restriction.

IV. CONCLUSION

Qualified APRNs, including certified nurse practitioners and certified nurse midwives such as the Clinicians, should not be restricted from providing abortion care in Montana. Like physician assistants, APRNs are able to provide abortion care safely and effectively. As such, the APRN Restriction unnecessarily restricts Montanans' access to abortion care and qualified healthcare providers' professional right to provide this care.

Dated: November 16, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *BRIEF FOR THE MONTANA PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE* is proportionately spaced in 14-point roman, non-script text and contains 3,741words excluding brief's cover, table of contents, table of authorities, certificate of compliance and certificate of service.

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