IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0288

PLANNED PARENTHOOD OF MONTANA, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. ADV 2023–231, the Honorable Mike Menahan, Presiding

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** Motion for Pro Hac Vice Admission Forthcoming

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APPENDIX

APPENDIX A

MONTANA FIRST JUDICIAL DISTRICT
COUNTY OF LEWIS AND CLARK
* * * * * * * * * * *

IN RE THE MATTER OF PLANNED PARENTHOOD OF MONTANA; ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; SAMUEL DICKMAN, M.D.; and HELEN WEEKS, APRN-FNP, on Behalf of themselves and their patients Plaintiffs, AND STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in official capacity as the Director of the Department of Public Health and Human Services, Respondents.	)	ADV 2023-231 ADV 2023-299

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Michael Menahan, Judge Presiding

We're talking about up to 11 weeks, and there's no dispute that 575 bans this mode of access, causes irreparable harm and the law should be enjoined during the pendency of this case.

THE COURT: So just on the last point regarding the ultrasound. Much of the focus and attention of today's hearing has been on the impact on the medical providers and what an ultrasound would -- how that would impact the medical providers. I think as a judge my focus is how this would impact the fundamental right of the patient. That is where my focus lies.

Upon considering the testimony, the evidence presented today and the arguments of counsel, I'll grant the petitioner's -- or plaintiff's application for preliminary injunction. Regarding on the Medicaid House Bill 544 and House Bill 862, I'm granting the order.

In the ten years I've been on the bench I don't think I've ever granted a temporary restraining order or preliminary injunction by finding on the ultimate issue of the merits of the case. I think that the Montana legislature enacting the most recent changes to Montana's restraining order injunction, preliminary injunction, final injunction, I think it puts the District Court judges in a difficult position because it

requires us to issue an order making a finding, essentially a legal conclusion on the law and the evidence of the case,when the facts haven't been fully developed during the course of the litigation, nor have all the arguments on the legal matters been presented. But the legislature with its recent enactment to mirror, I think, federal law passed -- has the Court consider that.

I think the purpose of an injunction is to maintain the status quo. That, above all considerations, is the most important one for me. So I'm granting the preliminary injunction on that matter. I'm also granting, again based upon the evidence and testimony presented, the preliminary injunction related to the enforcement of House Bills 575 and 721. And in all the time that I think that I've been on the bench, I've never done this from the bench, but there's a few things at play here.

One is that this law would go into effect and the preliminary injunction was only up until this hearing. The other is my caseload. I have a jury trial Thursday and Friday of this week and I have a homicide trial that starts next week, and that has just been the focus of my attention and time. So I'm not sure how quickly I'll issue an order on each of these cases.

So, with that, thank you all. And despite the difficulty, it was a joy to meet you. Mr. Johnson, I know your former law partner quite well. And welcome for those folks who are in Montana, it's a nice time of year to be here. It's not always this green. Thank you everybody.

(The proceedings adjourned at 5:10 p.m.)

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REPORTER'S CERTIFICATE

I, Laura A. Schmieder, an Official Court Reporter, residing in the State of Montana, hereby certify: That prior to being examined, the witnesses named in the foregoing proceeding were sworn to testify to the truth, the whole truth, and nothing but the truth;

That the said proceeding, taken down by me in stenotype, was thereafter reduced to typewriting by computer-aided transcription under my direction and is a true record of the testimony given.

I further certify that I am not in any way interested in the outcome of this action and that I am not related to any of the parties thereto.

Witness my hand this 1st day of August, 2023.

/s/ Laura A. Schmieder

Laura A. Schmieder

APPENDIX B

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and SAMUEL DICKMAN, M.D., on behalf of themselves and their patients, Plaintiffs, vs. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, the MONTANA DEPARTMENT OF PUBLIC HEALTH & HUMAN SERVICES, and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health & Human Services, Defendants.	Cause No. ADV-2023-231 **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

Before the Court are Plaintiffs Planned Parenthood of Montana (PPMT) and Dr. Samuel Dickman's Motion for Preliminary Injunction on House Bill 575 (HB 575) and Motion for Preliminary Injunction on House Bill 721 (HB 721). Raph Graybill, Michelle Nicole Diamond, Sean C. Chang, Melissa Cohen, Diana O. Salgado, and Dylan Cowit represent Plaintiffs. Attorney General Austin Knudsen, Thane Johnson, Michael Russell, Alwyn Lansing, and Emily Jones represent Defendants State of Montana (State), the Montana Department of Public Health & Human Services (DPHHS), and Charlie Brereton, in his official capacity as Director of DPHHS.

FACTS

Plaintiffs brought this lawsuit on behalf of themselves and their patients to challenge the constitutionality of two Montana statutes: HB 575 and HB 721. HB 575 requires that prior to every abortion, a determination of viability be "made in writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound." HB 575 § 1. According to Plaintiffs, HB 575 will prevent them from providing direct-to-patient medication abortions (MABs), which are provided prior to fetal viability, via telehealth, and typically without an ultrasound. Plaintiffs also challenge the constitutionality of HB 721, which prohibits performing dilation and evacuation (D&E) procedural abortions except in a medical emergency. HB 721 § 3. HB 721 would effectively ban pre-viability abortions, beginning after approximately 15 weeks from the first day of the patient's last menstrual period (LMP). A violation of HB 721 is a felony punishable by a fine or imprisonment of up to ten years. *Id.* § 3(2).

On May 3, 2023, Governor Greg Gianforte signed HB 575 into law. On May 16, 2023, the Governor signed HB 721 into law. Both laws have immediate effective dates. This Court granted Plaintiffs' motions for temporary restraining orders against HB 575 and HB 721 on May 4 and May 18, respectively.

PPMT is the largest provider of reproductive health care services in Montana, operating five health centers throughout the State. Verified Amend. Compl. ¶¶ 14-15. Dr. Dickman is PPMT's Chief Medical Officer. *Id.* ¶ 17. Plaintiffs offer MABs up to 11 weeks LMP and procedural abortions up to 21 weeks and 6 days LMP, among other services. *Id.* ¶¶ 17-18.

There is no dispute that all MABs provided by Plaintiffs are pre-viability abortions. *Id.* ¶ 32. Plaintiffs provide two forms of MAB using telehealth: site-to-site and direct-to-patient. *Id.*

¶ 34. For site-to-site MABs, a patient visits a PPMT health center and connects through a secure video telehealth platform with an abortion provider at another PPMT health center. *Id.* ¶ 35 n.7. For direct-to-patient MABs, patients connect with a PPMT provider through a secure video telehealth platform from the patient's home or a location of their choice; are screened for eligibility to participate in the direct-to-patient program; and, if the patients are eligible, have their MAB medications mailed to a Montana address. *Id.* ¶ 36. Relying on peer-reviewed medical literature regarding the safety and efficacy of providing MABs through direct-to-patient telehealth, PPMT has provided direct-to-patient MABs without requiring an ultrasound for years. *Id.* ¶¶ 64-67. Providers can typically determine gestational age for eligible MAB patients using the date of their LMP and screen for health risks (e.g., ectopic pregnancy) when discussing the patients' health history during the telehealth visit. *Id.* ¶¶ 36, 67. Direct-to-patient MABs have allowed Plaintiffs to expand access to abortion in Montana, which is a large and rural state where many patients do not live near an abortion provider. *Id.* ¶ 38. Prolonged travel to an abortion provider can pose particular challenges for patients with mobility limitations; those who cannot afford to take time away from work, school, or family care duties; and those who experience intimate partner violence. *Id.* ¶¶ 10, 39.

Plaintiffs also provide procedural abortions, using the method known as D&E beginning at approximately 15 weeks LMP. *Id.* ¶¶ 17-18, 42. A D&E involves a medical provider removing the contents of the uterus using suction and instruments such as forceps. *Id.* ¶ 42. D&E abortions are the most common method of abortion after approximately 15 weeks LMP, and in Montana, they are the only abortion method available in an outpatient setting at that stage in pregnancy. *Id*. Complication rates from procedural abortions are low, with the American College of Obstetrics and Gynecology (ACOG) explaining that the D&E method is "evidence-

based and medically preferred because it results in the fewest complications for women compared to alternative procedures." *Id.* ¶ 44.

PRINCIPLES OF LAW

Pursuant to 2023 Senate Bill 191, as of March 2, 2023, "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." *See* SB 191, 2023 Leg. Reg. Sess. (Mont. 2023) (amending § 27-19-201, MCA). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard" and "closely follow United States supreme court case law." SB 191, § 1. This new standard is conjunctive, not disjunctive, meaning the moving party must establish all four factors to obtain relief. *Id.*; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011) (addressing interaction of four factors in federal standard); SB 191 § 1.

Under the federal preliminary injunction standard, "[a] preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) (citing *Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)); *cf. Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386 (The purpose of a preliminary injunction is to "to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.").

ANALYSIS

Upon consideration of the parties' arguments, the Court determines that Plaintiffs have

standing to challenge HB 575 and HB 721 and that they have met their burden to show that the laws should be preliminarily enjoined.

I. Standing

As an initial matter, Plaintiffs have standing to challenge the constitutionality of HB 575 and HB 721. The Montana Supreme Court has repeatedly held that health care providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong v. State*, 1999 MT 261, ¶¶ 12-13, 296 Mont. 361, 989 P.2d 364; *see also Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 250, 440 P.3d 4 ("*Weems I*") ("[W]hen 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights.") (quoting *Armstrong*, ¶¶ 8–13). Both of the challenged laws "impact the constitutional rights of women patients" and "are regulations "directed at health care providers." HB 575 requires patients to have an ultrasound prior to an abortion, thereby burdening abortion providers' medical practice and prohibiting patients from accessing direct-to-patient MABs. HB 721 prohibits abortion providers from performing a specific medical procedure, thereby burdening their medical practice and preventing patients from accessing abortions after approximately 15 weeks LMP. Applying Montana's well-settled precedent, the Court concludes that Plaintiffs have standing to challenge the constitutionality of HB 575 and HB 721.

Defendants ask this Court to disregard Montana Supreme Court precedent "in light of [the] shifting legal landscape" around abortion cases. The Court is not persuaded there have been any relevant changes in federal standing law, and in any event the Court cannot—and will not—disregard directly applicable precedent on standing from the Montana Supreme Court. *Cf.*

State v. Whitehorn, 2002 MT 54, ¶ 14, 309 Mont. 63, 50 P.3d 121 ("Under the principles of binding authority, the District Court could not overrule our holding …, only this Court could do so."). *Armstrong* and *Weems I* confer third-party standing on abortion providers to challenge laws that "impact the constitutional rights of women patients" or which are "directed at health care providers." Plaintiffs therefore plainly have standing.

II. Likelihood of Success on the Merits

The Montana Supreme Court has repeatedly held that the right to privacy in Article II, Section 10 of the Montana Constitution "protects a woman's right of procreative autonomy — i.e., here, the right to seek and to obtain … a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14; *see also Weems v. State*, 2023 MT 82, ¶ 51 ("*Weems II*").[1] Any law that interferes with a Montanan's right to obtain a pre-viability abortion from a qualified health care provider of their choice therefore implicates the fundamental right to privacy and must be reviewed under strict scrutiny. *Weems II*, ¶ 43; *Armstrong*, ¶ 34. The only interest the Montana Supreme Court has recognized justifying the invasion of the right to obtain a pre-viability abortion is if the government clearly and convincingly demonstrates that the abortion restriction addresses a medically acknowledged, bona fide health risk to Montanans. *See Weems II*, ¶ 37; *Armstrong*, ¶ 62.

At the outset, the Court concludes that HB 575 and 721 implicate the right to privacy enumerated in Article II, Section 10 of the Montana Constitution by banning pre-viability abortions. HB 575 bans direct-to-patient MABs, a form of pre-viability abortion that is provided remotely to eligible patients, by requiring all patients to receive an ultrasound before having an abortion. HB 721 bans D&E procedural abortions, which are performed beginning after

[1] Defendants argue that *Armstrong* was wrongly decided and should be overruled. This Court has no authority to overrule binding precedent. *See Whitehorn*, ¶ 14.

approximately 15 weeks LMP, before fetal viability. As both laws restrict access to pre-viability abortions, they plainly implicate the right to privacy.

Contrary to Defendants' assertions, the right to privacy as recognized in *Armstrong* is not merely a right to a health care provider of a patient's choosing. Instead, as the Montana Supreme Court recently stated, "*Armstrong* unequivocally established that a woman has a fundamental right of privacy *to seek abortion care* from a qualified healthcare provider of her choosing, absent clear demonstration by the State of a 'medically-acknowledged, [bona fide] health risk.'" *Weems II*, ¶ 37 (quoting *Armstrong*, ¶ 62) (emphasis added); *see also Armstrong*, ¶ 14 (Article II, Section 10 "protects a woman's *right of procreative autonomy* — i.e., here, the right to seek and to obtain … *a pre-viability abortion* …." (emphasis added)). Though the State generally possesses "a police power by which it can regulate for the health and safety of its citizens," *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133, any such regulation is still subject to strict scrutiny if it implicates a fundamental right. *See Weems II*, ¶¶ 42-43 (rejecting State's argument that because it only regulates who can provide abortions, § 50-20-109(1)(a), MCA, should be subject to rational basis review).

Because HB 575 and HB 721 implicate the fundamental right to privacy, this Court must evaluate whether HB 575 and HB 721 survive strict scrutiny. To survive strict scrutiny, the State must demonstrate that HB 575 and HB 721 are "justified by a compelling state interest and [are] narrowly tailored to effectuate only that compelling interest." *Weems II*, ¶ 34 (quoting *Armstrong*, ¶ 34). "[W]ithin the framework of *Armstrong*, the State's burden is to show there is a 'medically-acknowledged, [bona fide] health risk, clearly and convincingly demonstrated,' justifying interference with a woman's access to abortion and her choice of a health care provider." *Weems II*, ¶ 45 (quoting *Armstrong*, ¶ 62) (alteration in original).

A. HB 575

The Court concludes that HB 575 does not further a compelling state interest and is not narrowly tailored to do so. Defendants have presented no evidence that HB 575 is necessary to protect patients from a medically acknowledged, bona fide health risk. *Armstrong*, ¶ 59; *Weems II*, ¶ 47.[2]

Based on the evidence before it, the Court finds that MABs, including direct-to-patient MABs provided without an ultrasound, are safe and effective. Dr. Dickman and Plaintiffs' medical expert, Dr. Steven Ralston, testified that based on their own experience as abortion providers and their review of peer-reviewed literature—including a study conducted in Montana—MABs can be provided safely and effectively without an ultrasound and without increasing the rate of complications resulting from the MAB. The Court credits this testimony. On the other hand, Defendants presented no evidence to contradict the fact that PPMT has been providing MABs safely and effectively without use of ultrasound.[3]

At the hearing, the State proffered two purported rationales for its ultrasound requirement; neither can withstand strict scrutiny. First, Defendants argued that ultrasounds are required to determine gestational age accurately, which in turn advances the State's interest in

[2] In addition, to the extent that HB 575's statement that a determination of viability must be "made in writing by the *physician or physician assistant* performing an abortion" could be interpreted to implicitly prohibit advanced practice registered nurses (APRNs) from providing abortions, HB 575 § 1 (emphasis added), such a prohibition likely directly contravenes the Montana Supreme Court's recent decision in *Weems II*. *See Weems II*, ¶ 1 (holding that "there is no medically acknowledged, bona fide health risk for the State to restrict the availability of abortion care by preventing APRNs from performing abortions").

[3] Plaintiffs note that HB 575 imposes similar requirements to those imposed by HB 171, a statute enacted in 2021 that, among other things, would have similarly banned direct-to-patient MABs by requiring in-person examinations prior to all abortions. In preliminarily enjoining HB 171, the district court in Yellowstone County concluded that "medication abortion by . . . telehealth is just as safe and effective as in person." *Planned Parenthood of Mont. v. State*, No. DV 21-00999, 2021 WL 9038524, at *12 (Mont. Dist. Oct. 07, 2021), *aff'd*, 2022 MT 157. The Montana Supreme Court later affirmed the court's grant of a preliminary injunction against HB 171. *Planned Parenthood of Mont. v. State*, No. DA-21-0521, 2022 MT 157, 515 P.3d 301, 409 Mont. 378. These two decisions corroborate this Court's conclusion that at this stage of the litigation, Plaintiffs have shown that direct-to-patient MABs can be provided safely without the need for an ultrasound.

preventing post-viability abortions. The Court is not persuaded that HB 575's ultrasound requirement furthers that interest. Dr. Dickman confirmed that PPMT does not provide MABs without an ultrasound to patients who cannot accurately recall the date of their LMP. The Court also notes that PPMT provides direct-to-patient MABs up to 11 weeks LMP, nearly 13 weeks—or three months—before the 24-week point of fetal viability presumed by the text of HB 575. Based on the testimony of Dr. Ralston and Dr. Dickman, the Court also finds that in many circumstances, it is medically unnecessary to perform an ultrasound to determine gestational age accurately. The Court credits the testimony of Dr. Ralston and Dr. Dickman, both of whom explained that a provider can accurately determine gestational age using the date of the patient's LMP when a patient has regular menstrual periods and can accurately recall the date of their LMP.

Although Defendants' medical expert, Dr. George Mulcaire-Jones, opined that ultrasounds are the standard of care for direct-to-patient MABs, the Court concludes that Dr. Mulcaire-Jones's opinion carries little weight because he has never provided any type of abortion, including a direct-to-patient MAB. Dr. Ralston and Dr. Dickman, by contrast, have extensive experience providing abortion care, including MABs, and testified that the standard of care does not require the use of an ultrasound for all MABs. And peer-reviewed medical literature, which Plaintiffs cite in their Verified Amended Complaint, only buttresses their testimony that it is not the standard of care to require ultrasounds prior to eligible direct-to-patient MABs. The Court therefore credits their testimony over Dr. Mulcaire-Jones' contrary opinion.

Second, the Court finds that at this initial stage, Defendants have not shown that HB 575's ultrasound requirement is medically necessary to screen for ectopic pregnancies, the

State's second rationale. Plaintiffs' witnesses testified that they are able to screen for ectopic pregnancies without an ultrasound, by asking a series of evidence-based screening questions designed to assess the risk that a patient may have an ectopic pregnancy. The Court credits that testimony. Although Dr. Mulcaire-Jones testified that ultrasounds can help screen for ectopic pregnancies, Defendants presented no evidence suggesting that Plaintiffs' methods for screening for ectopic pregnancies without an ultrasound are inadequate or unsafe in the context of an eligible, direct-to-patient MAB.

B. HB 721

The Court concludes that HB 721 does not further a compelling state interest, nor is it narrowly tailored to do so. As with HB 575, Defendants present no evidence that HB 721 addresses a medically acknowledged, bona fide health risk. *Armstrong*, ¶ 59; *Weems II*, ¶ 47. Plaintiffs are thus likely to succeed on the merits of their challenge to HB 721.

The Court finds that D&E abortions are safe and effective, as Dr. Dickman testified. Dr. Ralston likewise testified that at the gestational ages at which PPMT performs D&E abortions (between approximately 15 and 21.6 weeks LMP), D&E abortions are safer than childbirth. Dr. Ralston also testified that the State's proposed alternative of an induction abortion is less safe than a D&E, and that the State's other proposed alternatives of inducing fetal demise with an injection of digoxin or potassium chloride (KCl) prior to a D&E add risk to the patient. Plaintiffs also presented evidence from well-regarded medical organizations to support Dr. Dickman and Dr. Ralston's testimony that D&E abortions are safe and effective. *See* The National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 63 (2018); Cassing Hammond & Stephen Chasen, *Dilation and Evacuation*, in MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY: COMPREHENSIVE ABORTION CARE

158 (Maureen Paul et al. eds., 2009); ACOG, Practice Bulletin No. 135: *Second Trimester Abortion*, 121(6) Obstetrics & Gynecology 1394, 1394, 1406 (2013). Defendants presented no contrary evidence. The State cites one study in the text of HB 721, but that study shows only that the mortality rate for abortions performed between 13 to 20 weeks LMP is very low. *See* Linda A. Bartlett, et. al., *Risk Factors for Legal Induced Abortion–Related Mortality in the United States*, 103(4) Obstetrics & Gynecology 729, 733 (2004). Moreover, Defendants' own medical expert acknowledged that the instruments and techniques used for D&E abortions are virtually identical to those he used in his own practice for the surgical management of miscarriages. For those reasons, the Court concludes that Defendants failed to demonstrate that HB 721's ban on D&E abortions protects patients from a bona fide health risk.

Defendants argue that HB 721 is justified by the State's interest in prohibiting what it describes as an "inhumane" procedure that carries increased health risks compared to abortions performed in the first trimester. The Court finds that Defendants have not provided any evidence to support this claim. While the risks associated with abortions incrementally increase with gestational age, the evidence before the Court indicates that D&E procedures are extremely safe.

III. Irreparable Harm

The Court finds that Plaintiffs and their patients will suffer irreparable harm if HB 575 and HB 721 are not preliminarily enjoined.

It is well-established that the deprivation of constitutional rights—including the right to privacy—is itself irreparable harm. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161 ("[T]he loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."); *Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify

a preliminary injunction."). As discussed above, this Court has concluded that these laws likely violate the right to privacy. HB 575 and HB 721 would immediately take effect absent a preliminary injunction. Plaintiffs' patients would therefore be immediately deprived of their fundamental constitutional right to privacy absent a preliminary injunction.

Plaintiffs' patients also face irreparable harm to their health if HB 575 and 721 are not preliminarily enjoined. With respect to HB 575, Dr. Dickman testified that direct-to-patient MABs are an important way of providing access to abortion for patients who do not live close to a provider or who have work or caretaking responsibilities, mobility limitations, or particular privacy concerns, such as patients who are the victims of intimate partner violence. Defendants argue that HB 575 will not cause irreparable harm because patients can obtain an ultrasound from another ultrasound provider and send the results to their abortion provider. However, Plaintiffs presented evidence that for some patients, the ultrasound requirement may cut off access to an abortion altogether. For example, Dr. Dickman testified about one recent patient who lives on a Native American reservation who he believes likely would not have been able to obtain an abortion but for the direct-to-patient MAB program.[4] Defendants also ignore that HB 575's ultrasound requirement forces Montanans to undergo additional stress, expense, and unnecessary travel to a health center capable of performing a first-trimester ultrasound—all of which subject Plaintiffs' patients to health risks by delaying critical abortion care, for no corresponding medical benefit. *See Weems II*, ¶ 50 (delays in abortion care "result in comparatively higher risk, greater expenses, and even ineligibility for medication abortion as pregnancy advances"). Based on the foregoing, this Court concludes that HB 575's prohibition

[4] Defendants point out that in the event a patient experiences complications after a MAB provided via telehealth, PPMT allows patients to follow up with a PPMT provider in person at a PPMT health center. This does not undermine Plaintiffs' argument. An in-person appointment is just one method of follow-up that PPMT offers its patients, and the services available *after* a MAB do not speak to the benefits or necessity of a certain method of providing the MAB itself.

of direct-to-patient MABs will likely cause irreparable harm.

With respect to HB 721, the Court finds that contrary to Defendants' assertions, there are no feasible alternatives to D&Es in Montana. Defendants argue that Plaintiffs can continue to provide abortions after 15 weeks LMP using induction abortions or by performing a D&E after first inducing fetal demise with an injection of digoxin or KCl. However, Dr. Ralston testified that inducing fetal demise prior to a D&E requires special training that few abortion providers possess, and that injections of digoxin or KCl actually *increase* the risk to the pregnant patient. Dr. Dickman also testified that neither fetal demise procedures nor induction abortions are available in outpatient settings in Montana, and thus are not a feasible alternative for patients seeking a second trimester abortion. The Court therefore concludes that absent a preliminary injunction, HB 721's prohibition of D&E abortions will cause irreparable harm to Plaintiffs and their patients.

IV. The Balance of Equities and the Public Interest

Finally, the Court concludes that the balance of equities and the public interest also weigh in favor of preserving the status quo. The balance of the equities and the public interest "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The equities weigh strongly in favor of preserving the status quo while this case proceeds. Were these laws to go into effect during the pendency of the litigation, they would restrict Montanans' fundamental constitutional right to seek a pre-viability abortion. Defendants, by contrast, have no legitimate interest in enforcing laws that, as here, likely infringe Montanans' constitutional rights. *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) ("The 'government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented.'") (citation omitted);

Zepeda v. I.N.S., 753 F.2d 719, 727 (9th Cir. 1983) (the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations"). And "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted). Preliminarily enjoining the laws also serves the public interest because it allows Plaintiffs to continue providing—and their patients to continue accessing—constitutionally protected pre-viability abortions in the form of direct-to-patient MABs and D&Es. Accordingly, this Court determines that preservation of the status quo through issuance of a preliminary injunction will serve the public interest.

V. Conclusion

Upon consideration of the parties' arguments, the Court determines the following:

1. Plaintiffs have established that they are likely to succeed on the merits of their claims that HB 721 and HB 575 violate the Montana Constitution's guarantee of the right to privacy;
2. Plaintiffs and their patients will suffer irreparable harm if enforcement of HB 721 and HB 575 is not preliminarily enjoined;
3. The balance of the equities weighs in favor of granting preliminary relief; and
4. Granting a preliminary injunction would serve the public interest.

ORDER

IT IS HEREBY ORDERED that Plaintiffs' Motions for Preliminary Injunctions on HB 575 and HB 721 are **GRANTED** and Defendants are enjoined from enforcing HB 575 and HB 721 with respect to any abortions provided while this order is in effect, pending a final disposition of this litigation.

Pursuant to Montana Code Annotated § 27-19-306(1)(b)(ii), no bond is required.

DATED this _____ day of June, 2023.

_____
MIKE MENAHAN
District Court Judge

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Electronically Signed By:
Hon. Judge Mike Menahan
Tue, Jul 11 2023 03:19:23 PM

APPENDIX C

AN ACT PROHIBITING AN ABORTION OF AN UNBORN VIABLE CHILD UNLESS NECESSARY TO PRESERVE THE LIFE OF THE MOTHER; CLARIFYING THE DEFINITION OF VIABILITY; AMENDING SECTIONS 50-20-104 AND 50-20-109, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 50-20-104, MCA, is amended to read:

"**50-20-104. Definitions.** As used in this chapter, the following definitions apply:

(1) "Abortion" means the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(2) "Attempted abortion" or "attempted" means an act or an omission of a statutorily required act that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in violation of this chapter.

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "Facility" means a hospital, health care facility, physician's office, or other place in which an abortion is performed.

(5) "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to the woman by:

(a) the physician who is to perform the abortion of the following information:

(i) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent

pregnancies, and infertility;

(ii) the probable gestational age of the unborn child at the time the abortion is to be performed; and

(iii) the medical risks of carrying the child to term;

(b) the physician or an agent of the physician:

(i) that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(ii) that the father is liable to assist in the support of the child, even in instances in which the father has offered to pay for the abortion; and

(iii) that the woman has the right to review the printed materials described in 50-20-304; and

(c) the physician or the agent that the printed materials described in 50-20-304 have been provided by the department and that the materials describe the unborn child and list agencies that offer alternatives to abortion.

(6) (a) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

(b) A determination of viability must be:

(i) made in writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound; and

(ii) based on the best available science and survival data, with viability presumed at 24 weeks gestational age and any period of time after that. A calculation of gestational age must take into account a margin of error and, if uncertainty exists regarding viability, there is a presumption of viability."

Section 2. Section 50-20-109, MCA, is amended to read:

"**50-20-109. Control of practice of abortion.** (1) Except as provided in 50-20-401, an abortion may not be performed within the state of Montana:

(a) except by a licensed physician or physician assistant; and

(b) on an unborn child:

(i) who is capable of feeling pain, except as provided in 50-20-603; or

(ii) who is viable, unless necessary to preserve the life of the mother.

(2) The supervision agreement of a physician assistant may provide for performing abortions.

(3) Violation of subsection (1) is a felony."

Section 3. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,

HB 575, originated in the House.

_____

Chief Clerk of the House

_____

Speaker of the House

Signed this _____day

of_____, 2023.

_____

President of the Senate

Signed this _____day

of_____, 2023.

HOUSE BILL NO. 575

INTRODUCED BY L. SHELDON-GALLOWAY

AN ACT PROHIBITING AN ABORTION OF AN UNBORN VIABLE CHILD UNLESS NECESSARY TO PRESERVE THE LIFE OF THE MOTHER; CLARIFYING THE DEFINITION OF VIABILITY; AMENDING SECTIONS 50-20-104 AND 50-20-109, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

APPENDIX D

AN ACT CREATING THE DISMEMBERMENT ABORTION PROHIBITION ACT; PROVIDING DEFINITIONS; PROHIBITING DISMEMBERMENT ABORTION PROCEDURES; REQUIRING REPORTS; PROVIDING PENALTIES AND PROFESSIONAL SANCTIONS; AND PROVIDING EFFECTIVE DATES.

WHEREAS, at 12 weeks' gestation, an unborn human being can open and close fingers, starts to make sucking motions, senses stimulation from the world outside the womb, and can likely experience pain, and, as the Supreme Court in Gonzales v. Carhart, 550 U.S. 124 (2007), recognized, the unborn human being has taken on "the human form" in all relevant aspects; and

WHEREAS, many abortion procedures performed after 12 weeks' gestation are dismemberment abortion procedures, which involve "tearing apart and extracting piece-by-piece from the uterus what was until then a living child.. [and which are] usually done during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating", West Alabama Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018); and

WHEREAS, the dismemberment abortion procedure involves the use of clamps, grasping forceps, tongs, scissors, and similar instruments that through the convergence of two rigid levers slide, crush, or grasp a portion of an unborn human being's body in order to cut it, rip it off, or crush it; and

WHEREAS, the Legislature find that the intentional commission of such acts for nontherapeutic or elective reasons is a barbaric practice, is dangerous for the pregnant woman, and is demeaning to the medical profession; and

WHEREAS, a law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity, and it must be sustained if there is a rational basis on which the Legislature could have thought that it would serve legitimate state interests; and

WHEREAS, Montana's legitimate interest in regulating abortion generally and the performance of the dismemberment abortion procedure specifically includes "respect for and preservation of prenatal life at all

stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability", Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); and

WHEREAS, an article published in Obstetrics and Gynecology in 2004 reported that abortion carries significant physical and psychological risks to the pregnant woman that increase with gestational age, and, in abortions performed after 8 weeks' gestation, the relative physical and psychological risks escalate exponentially as gestational age increases; and

WHEREAS, as the second trimester progresses, in the vast majority of uncomplicated pregnancies, the maternal health risks of undergoing an abortion are greater than the risks of carrying a pregnancy to term; and

WHEREAS, dismemberment abortion procedures carry inherent risks of infection, bleeding, damage to other genitourinary and gastrointestinal organs, incomplete emptying of the uterus, cervical laceration, and uterine perforation; and

WHEREAS, the Charlotte Lozier Institute reports that dismemberment abortion procedures and other abortion procedures performed after the first trimester account for "a disproportionate amount of abortion-related morbidity and mortality".

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 7] may be cited as the "Dismemberment Abortion Prohibition Act".

Section 2. Definitions. As used in [sections 1 through 7], the following definitions apply:

(1) (a) "Abortion" means the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn human being.

(b) The term does not include:

(i) an act to remove an ectopic pregnancy; or

(ii) a separation procedure performed because of a medical emergency and prior to the ability of the unborn child to survive outside of the womb with or without artificial support.

(2) "Attempt to perform or induce an abortion" means to do or omit anything that, under the circumstances as a person believes them to be, is an act or omission that constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in violation of [sections 1 through 7].

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "Dismemberment abortion" or "dismemberment abortion procedure" means a procedure that involves:

(a) the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn human being; and

(b) dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts from a living unborn human being.

(5) "Gestational age" or "probable gestation age" means the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman.

(6) "Human being" means an individual member of the species Homo sapiens, from and after the point of conception.

(7) "Knowingly" has the meaning provided in 45-2-101.

(8) "Major bodily function" includes but is not limited to functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(9) (a) "Medical emergency" means a condition that, on the basis of a physician's good faith clinical judgment, makes a separation procedure performed prior to the ability of the unborn human being to survive outside of the womb with or without artificial support necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering

physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.

(b) The term does not include mental or psychological conditions.

(10) "Physician" means a person licensed to practice medicine in Montana.

(11) "Physician assistant" means a person licensed under Title 37, chapter 20.

(12) "Pregnant" means the human female reproductive condition of having a living unborn human being within the female's body throughout the entire embryonic and fetal stages of the unborn human being from fertilization to full gestation and childbirth.

(13) "Purposely" has the meaning provided in 45-2-101.

Section 3. Dismemberment abortion procedures prohibited -- penalty. (1) Except in a medical emergency, a person may not purposely or knowingly perform, induce, or attempt to perform or induce a dismemberment abortion procedure.

(2) A person who violates this section is guilty of a felony and on conviction shall be punished by a fine in an amount not to exceed $50,000, imprisonment for a term of not less than 5 years and not more than 10 years, or both.

(3) A woman on whom an abortion is performed, induced, or attempted in violation of [sections 1 through 7] may not be prosecuted for conspiracy to commit a violation of [sections 1 through 7].

Section 4. Reporting -- forms. (1) If a physician or physician assistant performs a dismemberment abortion procedure because of a medical emergency, the physician or the physician assistant shall, within 15 days, file with the department on a form supplied by the department a report containing the following information:

(a) the date the procedure was performed;

(b) the probable gestational age of the unborn human being and the method used to calculate gestational age;

(c) a statement declaring that the procedure was necessary because of a medical emergency;

(d) the specific medical indications supporting the determination that a medical emergency existed;

and

(e) the physician's or the physician assistant's attestation under oath that the information stated on the form is true and correct to the best of the person's knowledge.

(2) Reports required by and submitted pursuant to this section may not contain the name of the pregnant woman on whom the dismemberment abortion procedure was performed or any other information or identifiers that would make it possible to identify, in any manner or under any circumstances, the woman who underwent the procedure.

Section 5. Professional sanctions -- civil fines -- enforcement. (1) A physician or physician assistant who purposely or knowingly violates [section 3] commits unprofessional conduct, and the person's license to practice medicine in Montana must be suspended for a minimum of 1 year pursuant to Title 37.

(2) A physician or physician assistant who purposely or knowingly delivers to the department a report required under [section 4] that is known by the person to contain false information shall be subject to a fine of $2,000 imposed by the department.

(3) A physician or physician assistant who purposely or knowingly fails to file with the department a report required under [section 4] shall be subject to a fine of $1,000 imposed by the department.

(4) The attorney general may enforce the provisions of [sections 1 through 7] on behalf of the department. The department also has the authority to bring an action.

Section 6. Construction. (1) [Sections 1 through 7] may not be construed to:

(a) create or recognize a right to abortion or a right to government funding of abortion;

(b) alter generally accepted medical standards; or

(c) make lawful an abortion that is otherwise unlawful.

(2) The right of individual privacy as referenced in the Montana constitution, the Montana Code Annotated, or the Administrative Rules of Montana does not create, and may not be construed as creating or recognizing, a right to abortion or to governmental funding of abortion.

Section 7. Right of intervention. The legislature may, by joint resolution, appoint one or more of its

members to intervene as a matter of right in any case in which the constitutionality or enforceability of [sections 1 through 7] is challenged.

Section 8. Direction to department. The department of public health and human services is directed to create the form required by [section 4] within 30 days after [the effective date of this act].

Section 9. Codification instruction. [Sections 1 through 7] are intended to be codified as a new part in Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections 1 through 7].

Section 10. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective dates. (1) Except as provided in subsection (2), [this act] is effective on passage and approval.

(2) [Section 4] and [section 5(2) and (3)] are effective on the later of:

(a) passage and approval; or

(b) the date the department of public health and human services certifies in writing to the code commissioner that the form required under [section 4] has been created.

- END -

I hereby certify that the within bill,

HB 721, originated in the House.

_____

Chief Clerk of the House

_____

Speaker of the House

Signed this _____day

of_____, 2023.

_____

President of the Senate

Signed this _____day

of_____, 2023.

HOUSE BILL NO. 721

INTRODUCED BY M. REGIER, B. USHER, S. VINTON, R. KNUDSEN, L. DEMING

AN ACT CREATING THE DISMEMBERMENT ABORTION PROHIBITION ACT; PROVIDING DEFINITIONS; PROHIBITING DISMEMBERMENT ABORTION PROCEDURES; REQUIRING REPORTS; PROVIDING PENALTIES AND PROFESSIONAL SANCTIONS; AND PROVIDING EFFECTIVE DATES.