IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23–0272

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. DDV 2013–407, the Honorable Christopher Abbott, Presiding

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INTRODUCTION

The Montana Constitution, Montana law, and this Court's precedent recognize the basic truth that children are different from adults and require protection. Mont. Const. art. II, Section 15; *see also Steilman v. Michael*, 2017 MT 310, ¶ 14, 389 Mont. 512, 407 P.3d 313 ("children are constitutionally different from adults…"); *Planned Parenthood v. State*, 2015 MT 31, ¶ 20, 378 Mont. 151, 342 P.3d 684 ("*PPMT I*") ("It is axiomatic that the younger a minor is, the more protection she may require."); Mont. Code Ann. § 40-1-213 (requiring judicial and parental consent for a minor to exercise fundamental right to marry); Mont. Code Ann. § 41-1-405 (denying minors the ability to consent to sterilization); Mont. Code Ann. § 45-5-501 (minors under 16 cannot consent to sex). This basic truth is not a vestigial prejudice of a bygone era. It is scientific fact. Minors' brains lack the fully formed decision-making capability adults have. (Op.Br.6–7.)

This scientific reality underscores the need for the State to protect minors faced with significant choices. *In re C.H.*, 210 Mont. 184, 203, 683 P.2d 931, 941 (1984) ("the constitutional rights of children cannot be equated with those of adults … [because of] their inability to make critical decisions in an informed, mature manner…."); (Op.Br.6.). The State detailed the real and significant psychological, medical, and safety risks associated with abortion. (Op.Br.7–13.) The Consent Act ("Act") protects minors by ensuring parents know their child is undergoing a

procedure that carries serious risks. Mont. Code Ann. § 50-20-501 et seq.; (Op.Br.7–11, 33.) Given abortion providers' lack of follow-up care (Op.Br.7–11), parents may be the only ones observing their child for post-procedure complications. The State also showed the tragic reality of sexual violence in Montana. (Op.Br.11–13.) The Act—both through parental involvement and the judicial bypass procedure—helps detect sexual violence to protect Montana girls from repeated exploitation. (Op.Br.12–14.)

This Court must reject Appellees' (hereinafter, "PPMT") illogical retort that because abortion involves a more serious decision than marriage, sexual intercourse, or even sterilization, minors should be more isolated from their caregivers. (PPMT.Br.22.) Rather, it is precisely because abortion is so serious that "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 640–41 (1979) (Powell, J.). The Act protects minors' psychological and physical health, protects them from repeated sexual violence, and protects parents' fundamental right to direct their children's upbringing.

ARGUMENT

I. STRICT SCRUTINY DOES NOT APPLY TO THE ACT.

Montana's Constitution and this Court's precedents treat minors differently from adults. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 941; *Steilman*, ¶ 15 (minors' "lack of maturity and underdeveloped sense of responsibility" set them apart from adults). While minors possess the same right to privacy as adults, the State may limit or preclude its application to protect minors. (*See* Op.Br.18–31.) This case, therefore, is not about the existence or extent of the right to privacy under Article II, Section 10. It is about whether the Act protects minors. The undisputed facts show that it does.

A. THE MONTANA CONSTITUTION ALLOWS FOR LAWS THAT PRECLUDE EXTENDING FUNDAMENTAL RIGHTS TO MINORS WHEN THE LAW PROTECTS MINORS.

Article II, Section 15 guarantees minors the same rights as adults unless "specifically *precluded* by laws which enhance the protection of such persons." Mont. Const. art. II, § 15 (emphasis added); (Op.Br.19–20). PPMT completely ignores the term "precluded." (PPMT.Br.15–22.) But "precluded" gives meaning to the clause. (Op.Br.19–20.) Properly understood, the last clause limits the application of the first. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. "[T]he protection of such persons" refers to the State's ability to enact laws accounting for the "particular

vulnerability" of minors and protecting them from their own immaturity and inability to make fully formed decisions. *Id.* at 203, 683 P.2d at 941.

And that is precisely what the Framers intended. Delegate Dahood urged the Convention to "[p]ay close attention to the fact that the last phrase [of the section] reads, 'except where specifically precluded by laws which enhance the protection for such person.'" 5 Conv. Tr. at 1751 (Del. Dahood); 2 Mont. Const. Conv. Proceedings at 635–36 (provision guarantees minors' fundamental rights except "in cases in which rights are infringed by laws designed and operating to enhance the protection for such persons"). PPMT ignores both the plain text of the Constitution and the Framers' intent. Instead, they would have this Court make it *harder* for the State to justify a law restricting minors' rights than a law restricting adults' rights. (*See* PPMT.Br.21 (arguing the State must (1) satisfy strict scrutiny *and* (2) demonstrate the statute *enhances* the rights of minors).) That strict scrutiny-plus test finds no support in the Constitution's text or the Framers' intent.

Well-settled laws protecting minors demonstrate the absurdity of PPMT's construction. For instance, Montana denies minors under sixteen their privacy right under *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997) to consent to sexual activity. Mont. Code Ann. § 45-5-501. That law does not enhance the rights of minors. It abrogates them. Article II, Section 15 does not require the result proffered by PPMT, and the delegates did not intend that result. (Op.Br.19–26.) Instead, it

grants minors the same rights as adults *unless* a law specifically precludes application of those rights for the minors' protection. That is the case here.

B. MONTANA LAW ROUTINELY LIMITS MINORS' FUNDAMENTAL PRIVACY RIGHTS TO PROTECT THEM.

The State highlighted several instances of long-standing laws that protect minors by limiting their fundamental rights. (Op.Br.23.) PPMT evades any serious consideration of the issue. (PPMT.Br.22.) But PPMT's and the District Court's constitutional logic would invalidate these important civil and criminal statutes that protect minors from exploitation.

Montana's limitations on the right of minors to marry illustrates the point. Like the right to abortion, the right to marry sounds in a fundamental right to personal autonomy. *See Wash. v. Glucksberg*, 521 U.S. 702, 726 (1997) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992)). This Court likewise grounded the right to a pre-viability abortion in the personal autonomy component of the right to privacy—the same constitutional source of the right to marry. *Armstrong v. State*, 1999 MT 261, ¶ 45, 296 Mont. 361, 989 P.2d 364. In other words, the personal autonomy right adopted by *Armstrong* covers "intimate and personal choices" like marriage *and* abortion. *Armstrong*, ¶ 37 (quoting *Casey*, 505 U.S. at 851).

Montana law subjects a minor's right to marry to both parental and judicial consent. Mont. Code Ann. § 40-1-213. The statute categorically bars minors under

16 from marrying and allows 16- and 17-year-olds to marry only if they complete marriage counseling and receive judicial and parental consent. Mont. Code Ann. §§ 40-1-203, -213(1)–(2). The State thus limits minors' fundamental right to marry by categorically barring some minors from exercising that "intimate and personal choice" (*Armstrong*, ¶ 45) and allowing others to exercise that choice only with parental and judicial consent and the guidance of a marriage counselor. §§ 40-1-203, -213. These guardrails ensure that a minor's "personal and intimate choice" is in their best interest. *Armstrong*, ¶ 45. This statutory scheme plainly does not enhance minors' right to marry—so, under PPMT's misreading of Article II, Section 15, this scheme would be unconstitutional. That is not what the Framers intended.

Like the right to marry, the right to abortion may be lawfully curtailed, and that is what the Act does. It protects minors who don't have the capacity to make life-altering decisions, ensures parents can protect their children from exploitation and abuse, and ensures the "personal and intimate" choice to obtain an abortion is in their best interest. Like the marriage statutory scheme, the Act is constitutional.

C. THE ACT PROTECTS PARENTS' FUNDAMENTAL RIGHT TO DIRECT THEIR CHILD'S CARE AND UPBRINGING.

PPMT's misreading of the constitutional text also would eradicate parents' fundamental liberty interests. It is "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31,

393 Mont. 9, 427 P.3d 59. The Fourteenth Amendment of the United States Constitution protects the same interest. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). The delegates did not intend to erase this fundamental interest by adopting Article II, Section 15. (*See* Op.Br.27–28.) Indeed, "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti*, 443 U.S. at 640–41 (Powell, J.).

PPMT incorrectly uses negative legislative history to contradict the meaning of the United States and Montana Constitutions. *See Gryczan*, 283 Mont. at 451, 942 P.2d at 123 (rejecting use of negative legislative history to demonstrate delegates' intent); (PPMT.Br.21–22; *but see* Op.Br.26–29). The delegates clearly intended that Article II, Section 15 would not "affect[] in any way the relationship of parent and child or of guardian and ward with respect to someone under the age of majority." 5 Conv. Tr. at 1751 (Del. Dahood); *see also id.* at 1750 (Del. Monroe) (explaining that the provision would "enhance the proper parent-child relationships in Montana families and help strengthen the family unit."). The delegates uniformly expressed Article II, Section 15's intent to preserve the rights of parents.

Many laws affecting a minor's privacy rights recognize the important role parents play in guiding children in making life-altering choices. Parents must consent to their minor's marriage. § 40-1-213. Children cannot waive their right to

privacy and consent to a search of their home without parental consent. *See State v. Schwarz*, 2006 MT 120, ¶ 14, 332 Mont. 243, 136 P.3d 989. Parents must, generally, consent to medical care for their child. Mont. Code Ann. § 41-1-402.

Moreover, the Anglo-American tradition affirms the "primary role of the parents in the upbringing of their children[.]" *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19, 357 Mont. 34, 235 P.3d 578 (parents have a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their] child"). When it comes to abortion, however, the District Court and PPMT view this sacred relationship to be nothing but a "conflict of interest." (Doc. 301 at 22.) That unsupported view undercuts centuries of foundational natural law tenets and violates the text and intent of the Montana Constitution.

The District Court's dismissal of parental rights as a mere "conflict of interest" threatens to place Article II, Section 15 at odds with the Fourteenth Amendment of the United States Constitution. *See Troxel*, 530 U.S. at 65. The Court must correct this. (Op.Br.28–29.)[1]

[1] The District Court and PPMT presume—contrary to the record—that pregnant minors reside in abusive or unsupportive households. (Doc. 301 at 43–44; PPMT.Br.7, 33–34; *but see* Doc. 146 ¶¶ 46–47 (PPMT's expert Pinto could not recall, even anecdotally, a single instance where a pregnant minor telling her parents her intention to obtain an abortion led to abuse. And Pinto relied on a single study that (thankfully) less than .5% of pregnant minors reside in a household with familial abuse.).) This false presumption preemptively denies parents their fundamental

II. THE ACT SATISFIES THE CORRECT CONSTITUTIONAL TEST.

The State explained the Act serves compelling interests and protects minors seeking an abortion. (Op.Br.6–13, 31–37.) The identity proof requirements further these objectives. As PPMT argued below, without such requirements, individuals can falsely pose as parents. (Op.Br.33–34, 40–41; Doc. 253 at 28).) And the Act narrowly targets a specific flaw in the Notice Act—a flaw acknowledged by PPMT. The Act is narrowly tailored to remedy that flaw. (Op.Br.40–41.)

PPMT's argument that other states fail to impose a parental identity requirement makes little sense considering its arguments below. (PPMT.Br.35 (collecting statutes).) And in any event, the Act's identification requirements respond to deficiencies in other states' laws. (Op.Br.41; App.566–569.) PPMT fails to assert any undisputed facts that Montana's proof of identity regime poses an unconstitutional burden. (PPMT.Br.34–36 (instead arguing that parental notification laws are less restrictive than consent laws).) Moreover, most other states impose a similar notary or informed written consent requirement. (PPMT.Br.35 (collecting statutes).)[2] The District Court, therefore, erred by finding Montana's notary

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rights. For those rare cases when abuse exists, the Act's judicial bypass provision protects minors. (Op.Br.37–39.)

[2] Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, and Wisconsin all require notarized or written parental consent.

requirement impermissible. (Doc. 301 at 40.) At bottom, the Act's requirements present a minimal hurdle given the important issues at stake. (Doc. 146 at ¶ 90.)[3]

A. THE ACT PROTECTS MINORS FROM THEIR IMMATURE DECISION-MAKING ABILITY.

As explained, the Montana Constitution recognizes that minors suffer from immaturity and a lack of fully formed decision-making capacity. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941. So, Article II, Section 15 allows the State to enact laws that protect minors. (Op.Br.35–36.) The State and PPMT seem to agree that abortion is a uniquely important choice. (Op.Br.7–11; PPMT.Br.12–13.) But that justifies *more* protection for minors making the choice, not less. *L. v. Matheson*, 450 U.S. 398, 422 (1981) (Stevens, J., concurring) ("[t]he abortion decision is, of course, more important than" other decisions in which the law restricts minors' choices).

PPMT's insistence that the State cannot protect minors from their own immaturity (PPMT.Br.32–34) is wrong as a matter of law and fact. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941; (Op.Br.6–7 (citing *undisputed* facts that adolescents lack fully informed decision-making).) The profoundness of the abortion decision supports the Act's parental involvement. (Op.Br.35–36.) Supporting and developing

[3] Indeed, PPMT acknowledged these documents could be obtained at a minimal cost and in less than a day.

a minor's informed decision-making serves a constitutionally permissible end. *Bellotti*, 443 U.S. at 640–41 (Powell, J.).

B. THE ACT PROTECTS MINORS FROM RECOGNIZED RISKS AND SEXUAL EXPLOITATION.

The Act serves valid interests in protecting minors and promoting parents' fundamental rights to the custody, care, and supervision of their children. (Doc. 301 at 33, 37, 39, 43.) The State backed each of these interests with substantial and undisputed evidence. (Op.Br.7–15; 31–37.) In response, PPMT injects disputed facts about the relative safety of abortion compared to childbirth (PPMT.Br.26–27), ignoring the *undisputed* facts that abortion carries psychological and medical risks. (Op.Br.7–11,34–35; *see also* PPMT.Br.6 (citing State's expert on risks associated with abortion).) The State constitutionally protects minors from these risks by involving parents to improve informed decision-making and ensure someone observes the minor post-procedure. That benefits both minor patients and abortion providers. (Op.Br.7–11, 33–35 (parental involvement helps provide accurate medical history and ensures post-operation safety because PPMT does not provide that care).)

PPMT also ignores that abusive partners use abortion as a tool to exploit minors. (Op.Br.11–15, 32–34; PPMT.Br.29–32.) PPMT and the District Court ignored the State's interest in preventing *repeated* abuse. (PPMT.Br.31 (quoting Doc. 301 at 35).) That sexual abuse occurred once does not remove the State's

interest in enacting measures aimed at detecting and preventing repeated sexual violence. (*E.g.* Op.Br.14–15 (citing cases when abortion providers' failure to report cases of likely abuse led to repeated incidences of sexual violence against minors).) Unfortunately, statistics show most adolescent pregnancies result from statutory rape. (Op.Br.11–15.) Improving parental involvement increases the likelihood that these cases will emerge and repeat offenses will decrease.[4]

C. JUDICIAL BYPASS ADDRESSES CASES WHERE PARENTAL INVOLVEMENT IS INAPPROPRIATE.

PPMT argues repeatedly that the Act will expose minors to parental abuse. (PPMT.Br.7–9, 28–30, 38.) But the Act's judicial bypass provision guarantees that minors can obtain an abortion without parental consent when necessary. (Op.Br.37–39); Mont. Code Ann. §§ 50-20-503(3); -507; -509. "A minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired abortion would be in her best interests.'" *In re Meghan Rae*, Cause No. DA 14–005, ¶ 10 (quoting *Belotti,* 443 U.S. at 643–44). The Act's judicial bypass provision meets every jurisprudential requirement. *See id.* at ¶¶ 12–13

[4] Judicial bypass waivers also increase the likelihood sexual abuse comes to light. (*See* Op.Br.13–14; *infra* at II.C.) *In re Meghan Rae* shows that judicial officers can and do take their responsibility to the community seriously.

PPMT's response muddies the facts. (PPMT.Br.36–38.)[5] First, PPMT acknowledges that it helps minors use judicial bypass in appropriate cases by connecting them to attorneys. (Doc. 146 ¶ 85; *contra* PPMT.Br.37.) Second, PPMT ignores that Montana's bypass provisions remove alleged procedural burdens because minors need not attend the hearings. (Op.Br.5; *contra* PPMT.Br.37–38.) Third, PPMT relies on disputed facts to establish that the waiver process imposes a burden. (PPMT.Br.8–9; 37–38; *infra* at IV.C.) Fourth, this Court already distinguished the case used by the District Court and PPMT on the appropriate evidentiary burden to be used. *PPMT I*, ¶ 22; *see also Alaska v. Planned Parenthood*, 171 P.3d 577, n.42 (Alaska 2007) (invalidating a parental involvement law that applied the higher "clear and convincing evidence" burden of proof). By ensuring minors can access abortion without parental consent in those rare cases when parental involvement is inappropriate, the Act's judicial bypass provision sufficiently protects minors' abortion rights. The District Court was wrong to find otherwise. This Court should reverse.

[5] PPMT eventually distills its arguments against the judicial bypass procedure to the point that because the Notice Act exists, the Act's bypass provision does not matter for tailoring. (PPMT.Br.38–39.) That fallacy ignores the loophole the Act is designed to close. (Op.Br.33–34.)

III. PPMT'S EQUAL PROTECTION ARGUMENT FAILS.

The District Court declined to consider PPMT's equal protection challenge to the Act while reserving consideration of the same legal claim against the Notice Act. (Doc. 301 at 48–49; PPMT.Br.22–24.) The District Court identified factual disputes about whether minors carrying pregnancies to term are similarly situated to minors seeking abortions. (Doc. 301 at 45.) PPMT now raises those same disputed facts on appeal in support of an equal protection argument the District Court did not analyze. (PPMT.Br.3–5; 22–24.)[6]

PPMT's citations to unpublished cases do not overcome the District Court's determination that factual issues remain. (PPMT.Br.24 (citing *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Mont. Feb. 11, 1999); *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (1st Jud. Dist. Mont. May 19, 1995)). First, *Wicklund* concluded—without analysis—the proposed classes were similarly situated. 1999 Mont. Dist. LEXIS 1116, at *5. Second, *Ellery* expressly limited its analysis to taxpayer-funded, medically necessary benefits. 1994 Mont. Dist. LEXIS 795, at * 4 ("Not at issue are nontherapeutic elective abortions."). Neither case analyzed the identified factual disputes here. (Doc. 301 at 45.)

[6] The State disputed each fact in question. (*Compare* PPMT.Br.3–6 to Doc. 146 ¶¶ 2–3, 5–6, 8–11, 14–15, 17–18, 24, 26–33, 35–36, 38–40, 56, 63–64, 67–69) (disputing PPMT's claims related to the relative safety of abortion).)

PPMT also incorrectly states that Article II, Section 4 provides an independent basis to subject the law to strict scrutiny. (PPMT.Br.22.) Strict scrutiny applies only if the law infringes on a fundamental right or implicates a suspect class. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. Because the Act protects minors, the right to privacy does not attach under Article II, Section 15. *See supra* I.A and I.B; (Op.Br.18–26.) Without a fundamental right at issue, Article II, Section 4, cannot independently subject the Act to strict scrutiny. *Snetsinger*, ¶ 17. Moreover, PPMT did not argue below that pregnant minors constitute a suspect class (Doc. 253 at 15), and this Court does "not consider arguments that were not presented to the district court but raised for the first time on appeal." *Estate of Mandich v. French*, 2022 MT 88, ¶ 30, 408 Mont. 296, 509 P.3d 6.

IV. AT A MINIMUM, THIS COURT SHOULD REMAND BECAUSE MATERIAL FACTS ARE DISPUTED.

Many material allegations relied on by PPMT on appeal are disputed below. The State submitted undisputed evidence that abortion poses serious psychological, medical, and safety risks for minors.[7] (Op.Br.7–13.) The State, for example, showed the stark psychological harm to minors who obtain abortions. (Op.Br.7–9 (minors who obtain abortions are more likely to suffer from depression, anxiety, and suicide).) The State also identified the physical risks inherent in surgical abortions:

[7] Dr. Anderson testified the medical risks associated with abortion increase week by week. (PPMT.Br.6 (citing Doc. 254, Ex. D 166:19–21); Doc. 146 at ¶ 16.)

perforated internal organs, excessive bleeding, hemorrhage, and post-surgery complications that may cause severe long-term damage. (Op.Br.9–11.) And the State showed the tragic, but real, fact that statutory rape is the leading cause of adolescent pregnancy, and abortion can be a powerful tool for abusive men to conceal and continue sexual exploitation. (Op.Br.11–13.) PPMT responded almost exclusively with disputed facts (PPMT.Br.2–12) on which the District Court reserved resolution pending trial on the Notice Act. (Doc. 301 at 45–46.)

A. THE STATE HAS REQUESTED EXCLUSION OF SOME DISPUTED FACTS.

The State has two relevant pending motions to exclude the opinions of PPMT's non-experts. (Doc. 150; Doc. 152.) First, the State moved to exclude Rebecca Howell. (Doc. 150.) Howell lacks any training or academic qualifications in the areas to which she testified. She espouses views on judicial bypass without any qualifying experience—in fact, she has never seen a judicial bypass hearing. (*Id.* at 4.) Howell's complete lack of scientific, technical, or other specialized knowledge disqualifies her as an expert. (Doc. 150.) PPMT, however, continues to rely on her unsupported opinions and statements. (PPMT.Br.6–9 (citing Doc. 254 Ex. I-1 at 1–2, 4–5; Ex. I 31:2–9, 33:6–20, 239:18–240:7, 244:20–245:17, 247:23–249:24, 250:6–9).)[8] Howell is not a trained child psychologist, nor does she have any training on the competency or cognitive ability of minors. (Doc. 150 at 3.)

[8] The State disputes these opinions as conjecture, anecdotal, or misstatements of the

The State also moved to exclude Ashley Novakovich because she possesses no relevant experience related to adolescents in crisis, families dealing with teen pregnancy issues, or Montana's judicial system. (Doc. 152.) Her opinions are inherently unreliable, and her research consists of a single article procured by a Google search. (Doc. 152 at 3.) This Court should disregard her unfounded opinions. (*See* PPMT.Br.7 (citing Doc. 254 Ex. L-1 at 4; Doc. 146 ¶¶ 46, 56, 63, 71) (disputing same); *see also generally* Doc. 152).)

B. THE STATE DISPUTES PPMT'S CLAIMS ABOUT ITS OWN BUSINESS PRACTICES.

The State accurately described PPMT's patient intake process, patient consultations, and mandatory reporting practices. (Op.Br.7–11, 13–15; *see also* Doc. 132 ¶¶ 21–35 (detailing PPMT's patient intake, informed consent, pre-operation, and post-operation procedures); Doc. 132 ¶¶ 46–48 (detailing case when PPMT failed to appropriately report child sex abuse); Doc. 132 ¶ 50 (detailing PPMT's mandatory reporter practices); Doc. 132 ¶ 93 (PPMT's witness testified she has failed to report abuse even though required to do so by Texas statute).) By the time a minor sees one of PPMT's two doctors, she has already signed the consent forms. (Doc. 132 ¶ 30.) And, unbeknownst to the minor, that doctor has a contractual requirement to perform four abortions per hour, which limits any meaningful patient-

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law. (Doc. 146 ¶¶ 20, 82–85, 90, 93, 95.)

physician consultation. (Doc. 132 ¶ 30.) PPMT's response relies on Howell's unreliable, disputed testimony. (PPMT.Br.10–11; *supra* at IV.A; Doc. 146 ¶¶ 58–60.) The State disputes PPMT effectively provides for informed consent, either as a matter of informing patients or training its staff. (Doc. 132 ¶ 29; Doc. 146 ¶ 58.)

It's also important to note what PPMT does not dispute: that it pressures minors by warning them that delaying an abortion may require them to go out-of-state for services. (Doc. 146 ¶ 58.) PPMT relies on the minor's (often incomplete) self-reported medical history. (Doc. 132 ¶¶ 25–27, 30.) And PPMT does not require or perform follow-up evaluations of minors. (Op.Br.10.)

Finally, PPMT's recitation of disputed facts doubles down on the same theory of their mandatory reporting obligations that the District Court rejected. (PPMT.Br.11 n. 4; Doc. 301 at 38 n. 8.) PPMT also asserts the police never contacted the minor in question or her lawyer. (PPMT.Br.11 n. 6.) This assertion conveniently ignores that PPMT represented that the minor's lawyer would facilitate an interview with the police, but that lawyer failed to do so. (Doc. 169 Ex. 4 37:12–21.) These disputed facts mandate remand.

C. OTHER MATERIAL FACT DISPUTES FAVOR REMAND.

Moreover, PPMT continues to misrepresent the effects of judicial bypass on minors. (PPMT.Br.8–9 (citing Doc. 254 M-1 ¶¶ 18–20).) PPMT's expert Suzanne Pinto acknowledged that minors may obtain a judicial waiver without personally

testifying to abuse they suffered. (Doc. 146 ¶ 78.) The very point of judicial bypass is to allow minors in abusive situations to obtain an abortion if a judge determines it's in their best interest.

The State likewise disputes the opinions of PPMT's rebuttal expert Rita Lucido. (*Compare* PPMT.Br.7, 9 (citing Doc. 254 Ex. J-1 ¶¶ 13, 15–16, 20–24) *with* Doc. 146 ¶¶ 48, 51–53, 82–83, 85, 98 (disputing same).) PPMT never explains why if "school, work, or caretaker commitments" do not hinder obtaining an abortion, they nevertheless impose a burden on getting a *judicial waiver* to obtain that abortion. (*E.g.* Doc. 146 ¶¶ 84–85 (disputing that these commitments are anything but a common unavoidable part of accessing courts or medical services).)

Additionally, the State disputes the opinions of Pinto regarding parental involvement. (*Compare* PPMT.Br.6–10 (citing Doc. 254 Ex. M-1 ¶¶ 9–12, 13, 15–17, 18–20; Ex. M 21:21–24, 71:25–73:16) *with* Doc. 146 ¶¶ 38, 46–47, 49–50, 52, 54, 56, 71, 74, 76, 78, 82, 98–99 (disputing same).) PPMT misleadingly states that minors "fear, with reason" parental involvement including potential abuse. (PPMT.Br.7 (citing Doc. 254 Ex. M-1 ¶¶ 9–12).) Yet Pinto testified that in her 30-year career she could only recall four or five such instances of parental abuse. (Doc. 146 ¶ 46.) Rather, she testified the most likely source of abuse would be the minor girl's *boyfriend*. (Doc. 158 Ex. 17 20:1–19.) This bolsters the State's point that the

Act *protects* minors by alerting parents that their child is in an abusive situation. (Op.Br.11–12, 32–34.)

Finally, PPMT's remaining allegations are either disputed or contradicted by the record. (*Compare* PPMT.Br.6–9 (citing Doc. 254 Ex. D 97:25–98:7, 166:19–21; Ex. E 60:9–61:1; Ex. F-1 ¶¶ 5–19, 28, 38; Ex. F-2 ¶¶ 27, 47; Ex. G-1 ¶ 40; Ex. K 96:24–97:14) *with* Doc. 146 ¶¶ 2, 12, 16, 45, 74, 96, 99 (disputing same).) Many of PPMT's disputed allegations do not stand up even to cursory review. (*E.g.* Doc. 254 Ex. G-1 ¶ 40 (claiming minors will engage in self-induced abortions because of parental involvement laws); *but see* Doc. 146 ¶ 99 (PPMT's witness speculated about this allegation and could not recall the sources she relied on to make the statements in her expert report).) Therefore, this Court should remand for trial to resolve these material factual disputes.

CONCLUSION

For all these reasons, this Court should reverse the District Court with instructions to enter summary judgment for the State, or, alternatively, remand for trial.

DATED this 16th day of January, 2024.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,685 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

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