IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 24-0052

MONTANANS SECURING REPRODUCTIVE RIGHTS and SAMUEL DICKMAN, M.D.,

Petitioners

v.

AUSTIN MILES KNUDSEN, in his official capacity as MONTANA ATTORNEY GENERAL; and CHRISTI JACOBSEN, in her official capacity as MONTANA SECRETARY OF STATE,

Respondents

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, SUSAN B. ANTHONY PRO-LIFE AMERICA, AND MONTANA FAMILY FOUNDATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

CASES **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have appeared frequently before various state and federal courts as counsel for parties, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amicus, *e.g.*, *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020), addressing a variety of issues, including political speech and the right to life.

Susan B. Anthony Pro-Life America ("SBA") is a network of more than one million pro-life Americans nationwide, dedicated to ending abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders. SBA believes the legal precedents and principles governing abortion should be informed by the most current medical and scientific knowledge on human development.

The Montana Family Foundation ("MFF") is a nonprofit organization engaged in research and education dedicated to supporting, protecting, and strengthening Montana families. MFF regularly participates as an *amicus* in litigation involving issues of importance to Montana families. *See e.g., Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246 (2020). MFF uplifts and defends the biblical and traditional framework of the family unit, which includes the defense of the sanctity of life.

The initiative at issue in the present action is misleadingly packaged as a single constitutional amendment, but actually contains at least three distinct amendments. The effect of lumping them in a single initiative—an effect hidden from voters—is to prohibit virtually any statute, administrative rule, or judicial

decision regulating abortion such that the topic is removed from political debate. ACLJ, SBA, and MFF have a significant interest in opposing the initiative because if the Court allows it on the ballot and voters are misled to approve it, the lives and safety of unborn children and their mothers will be left unprotected in the regime of unregulated abortion the initiative will establish.

ARGUMENT

The Court should uphold the Attorney General's determination that Constitutional Initiative 14 (CI-14) is legally insufficient. The Attorney General's legal sufficiency review "is limited by law to determining whether the petition for a ballot issue complies with the statutory and constitutional requirements 'governing submission of the proposed issue to the electors,'" *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, ¶ 6, 365 Mont. 520, 285 P.3d 435 (citing MCA § 13-27-312(7) (2011)); *Mont. Mining Ass'n v. State*, 2018 MT 151, ¶ 7, 391 Mont. 529, 420 P.3d 523 ("[T]he Attorney General's review is meant to identify non-substantive statutory and constitutional deficiencies regarding submission of the initiative to the voters"). Here, CI-14 is legally and constitutionally deficient and the Attorney General's determination should be upheld.

I. CI-14 violates the constitution's separate-vote requirement

Article XIV, Section 11 of the Montana Constitution states: "[i]f more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately." The dual purposes behind this longstanding requirement are 1) "to avoid voter confusion and deceit of the public," and 2) "to avoid 'logrolling' or combining unrelated amendments into a single measure which might not otherwise command majority support." *Mont. Ass'n of Ctys. v. State*, 2017 MT 267, ¶ 15, 389 Mont. 183, 404 P.3d 733 (*MACo*) (citations omitted). If multiple unrelated amendments were permitted, "approval of the

measure may be secured by different groups, each of which will support the entire proposal in order to secure some part, even though not approving all parts of a multifarious amendment." *Id*.

To evaluate compliance with the separate-vote provision of Article XIV, Section 11, "the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related." *MACo*, ¶ 28. This Court has defined "substantive" as being "[a]n essential part [or] constituent or relating to what is essential." *Id*., ¶ 29 (citing Black's Law Dictionary 1429 (Henry C. Black ed., 6th ed. 1990.. Next, a multitude of factors may be examined to evaluate whether the provisions of a proposed constitutional amendment are "closely related," including:

> [W]hether various provisions are facially related, whether all the matters addressed by [the proposition] concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

MACo, ¶ 29 (citations omitted). When a proposed constitutional amendment "would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement … because it would prevent the voters from expressing their opinions as to each proposed change separately." *Id*., ¶ 27 (citations omitted).

Here, CI-14 includes at least three separate amendments to constitutional requirements – on protection of minors, limits on late-term abortions, regulation of abortion practice, exceptions, etc., elaborated below – which are not closely related and have not been historically treated as a single subject. Montana voters will not know what they are voting for should this proposal be allowed to move forward.

A. CI-14 is misleading, confusing, and not readily understandable.

The complete text of the proposed constitutional amendment is riddled with legally deficient and confusing language. The vague and misleading language contained within CI-14 fails the non-substantive test under Article XIV, Section 11.

1. Parental Involvement

Section 1 of the proposed amendment provides:

> (1)There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion. This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means.

It is "deeply rooted in [our] Nation's history and tradition" that parents have a right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In Montana, 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. These parental rights encompass "a fundamental right to make decisions concerning the medical care of their children." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19 (recognizing that parents have a "constitutional right to make decisions concerning the care, custody, and control of [their] child"). "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

The proposed amendment refers to "one's" rights with no mention of age likmits. In the context of pregnant minor girls, the proposed constitutional amendment thus fails to account for the superior right of parents to provide consent to, or withhold consent from, medical procedures like abortions. Without some limitation on the proposed constitutional amendment as it relates to minors, the language of CI-14 is legally deficient on this basis alone. More importantly, CI-14's language does not adequately inform voters that support for the initiative could invalidate the voters' decision to overwhelmingly enact a parental notice statute in 2012 and otherwise be interpreted to abrogate parental rights in the context of abortions for minor girls.[1]

2. "Viability"

Section 2 of the proposed constitutional amendment suffers from similar legal deficiencies. The section provides:

> (2) The government may regulate the provision of abortion care after fetal viability provided that in no circumstance shall the government deny or burden access to an abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life and health of the pregnant patient.

Although Section 4 of the proposal contains an attempted definition of "fetal viability," the proposal utilizes the term as a reference point for which the government would be prohibited from "denying or burdening" an abortion. Yet, fetal viability has been determined to be a poor benchmark for determining when

[1] On Nov. 6, 2012, Montana voters overwhelmingly enacted a statutory requirement that parents receive notice before a minor girl obtains an abortion (70.55% Yes vs. 29.45% No). Montana LR-20, Parental Notification of Abortion Measure (2012), BALLOTPEDIA, https://ballotpedia.org/Montana_LR-120,_Parental_Notification_of_Abortion_Measure_(2012) (last visited Feb. 5, 2024).

abortions may be appropriate. As the *Dobbs* decision found, the "most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus." *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2269 (2022). Modern advances in neonatal care have changed the "viability line" over the years. *Id*. Similarly, geographical constraints can impact viability, as women in remote or rural locations may not have access to the same neonatal equipment and care as women in more urban settings. In 2021, neonatologist Dr. Robin Pierucci submitted a declaration to the Montana Thirteenth Judicial District Court that in her experience, "viability" was highly dependent on the quality of care available and willing to be provided by the attending healthcare professionals. Decl. of Robin Pierucci, M.D., M.A., FAAP, at 3, *Planned Parenthood of Montana v. State,* Mont. 13th Jud. Dist. Ct. Yellowstone County (2021) (DV-21-00999), https://apps.montanafreepress.org/montana-legislature-lawsuit-tracker/filings/13-DV-21-0999/2021-09-07-declaration-robin-pierucci.pdf.

Although Dr. Pierucci has successfully treated infants at 22 weeks of gestation, other healthcare professionals refuse to resuscitate an infant whose age falls below 24-25 weeks of gestation. *Id.* at 8. Furthermore, the initiative purports to allow the state to "regulate" late-term abortions, *i.e.*, after viability. But this "exception" appears to be quite deceptive. The text creates a massive loophole: abortions done "in the good faith judgment of a treating health care professional" – *i.e.*, the abortionist – "to protect the . . . health of the pregnant patient." For the abortion lobby, health is a universal justification for abortion. *E.g.*, Jennifer Wright, "Every Abortion Is A Medically Essential Abortion," *Refinery29* (Mar. 25, 2020); Ana Cristina González Vélez, "'The health exception': a means of expanding access to legal abortion," 20 *Repro. Health Matters* 22 (2012). Thus, a restriction with a "health" exception is really no restriction at all.

Yet it is also possible to interpret the "viability" exception as meaningful. The Missouri Court of Appeals, facing an interpretive question involving similar language in a ballot initiative, held as follows:

> The argument that the life-and-health exception would swallow the rule . . . ignores the rules of statutory construction and is not an accurate reading of the initiatives. It would render meaningless the rest of the subsection permitting the General Assembly to regulate abortion after fetal viability . . . . Furthermore, … the initiatives require that abortion be "needed" to protect the life or health of the pregnant person. "Needed" means to "be necessary." . . . It also ignores that the health care professional's assessment of need must be made in good faith. Indeed, the good-faith-judgment requirement in the life-and-health exception of the initiatives is a comparable safeguard to the existing standard for determining whether a *medical emergency* necessitates an immediate abortion . . . .

Fitz-James v. Ashcroft, 2023 Mo. App. LEXIS 814, 2023 WL 7141416 at *23-*24 (Oct. 31, 2023) (emphasis added).[2]

The uncertainty about the scope and significance of the "viability" exception leaves the voters in a quandary generated by a lack of clarity. Would the initiative allow for immensely popular limits on late-term abortions, or is it just a feint with no real substance? Moreover, the term "fetal viability," has no concrete, universal

[2] The U.S. Supreme Court, in a pre-*Dobbs* legal world, upheld a virtually identical exception:

> "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (joint opinion) (quoting Pennsylvania statute). Hence, such a reading of the initiative is consistent with the existence of a "right to abortion."

meaning such that the Montana electorate will be able to arrive at a consistent understanding.

3. "Health" and "health care professional"

The proposed amendment contemplates an "abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life or health of the pregnant patient" – which would include post-viability abortions. The terms "protect," "health," and "health care professional" are undefined. The term "health care professional" undoubtedly reaches past licensed physicians to nurse practitioners, physician assistants, and perhaps midwives, doulas, psychologists, social workers, and physical therapists. And "health" itself could reach any aspect of physical or mental health and has been interpreted by the U.S. Supreme Court to include emotional and familial health. *See, e.g.*, "Health," *The American Heritage Dictionary of the English Language* (5th ed. 2022) (defining "health" as "soundness, especially of body or mind"); *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *abrogated by Dobbs*, 142 S. Ct. 2228 ("medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the women's age—relevant to the well-being of the patient. All these factors may relate to health"). These wide-open definitions do not align with the common understanding of the Montana electorate to whom "health" means physical health and "health care professional" means a doctor who can care for a patient's complications. This straightforward understanding of commonly used words would actually be *prohibited* by CI-14.

4. Penalties

Section 3 of the proposed amendment is similarly vague and confusing for voters. The section provides:

(3) The government shall not penalize, prosecute, or otherwise take adverse action against a person based on the person's actual, potential, perceived, or alleged pregnancy outcomes. The government shall not penalize, prosecute, or otherwise take adverse action against a person for aiding or assisting another person in exercising their right to make and carry out decisions about their pregnancy with their voluntary consent.

Section 3 of the proposed constitutional amendment is perhaps the most confusing and troubling section within CI-14, as it seemingly prohibits the government from penalizing, prosecuting, or taking adverse action against anyone who might intentionally seek to terminate an unborn baby in the womb. CI-14 does not use the phrase "blanket immunity," but the voters might have a better understanding if it did. At a minimum Section 3 would cover at least the entire staff of any abortion facility. The initiative also does not impose any conditions, and hence the exemption would seem to apply no matter how well, or how incompetently – or maliciously – the providers and staff discharge their duties, so long as they have the express or implicit consent of the woman getting the abortion. Such considerations would presumably matter to many voters, yet all is left unsaid.

5. Compelling government interest

The initiative forbids "deny[ing] or burden[ing]" an abortion absent a "compelling government interest achieved by the least restrictive means," i.e., the classic "strict scrutiny" standard, the highest legal standard reserved for protecting fundamental rights. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) ("it is the rare case" where a government restriction will satisfy strict scrutiny) (internal quotation marks and citation omitted). Here, the possibility of a regulation surviving strict scrutiny is even less likely, for at least two reasons.

Artificially limiting the interests: While the initiative refers to "a compelling government interest," it disallows every compelling interest but one: "a government

interest is 'compelling' only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to the pregnant patient." There is no compelling interest available after all, other than making the abortion safer for the woman.[3] And even that narrow concession is a smokescreen, as demonstrated below.

By limiting the government's interests, CI-14 could forbid Montana from taking *any* interest in protecting, defending, or valuing unborn human life. As the U.S. Supreme Court has recognized, many view abortion as "nothing short of an act of violence against innocent human life." *Planned Parenthood v. Casey*, 505 U.S. at 852. Indeed, if abortion did not entail the destruction of the tiny human dwelling in the womb, it is fair to conclude there would be no abortion controversy in this nation. Instead, the matter would be regarded as birth control is – primarily a matter of moral and religious difference. Yet the initiative leaves the unborn child almost completely out of the discussion. At most, the initiative refers, in the context of defining "fetal viability," to a "fetus" (a medical term for a child before birth, much like "gravida" is a medical term for a pregnant woman). At worst, it implies that the government can never take an interest in the child's life beyond a health risk shared by mother and child. The initiative here does not even begin to address the bounds of permissible state regulation in this area.

Obviously, there is a huge difference between using a coat hanger to abort "one's own pregnancy"[4] (which presumably the electorate would overwhelmingly oppose enshrining in the state constitution) and premature induction to save both

[3] And, of course, this initiative completely disallows the invocation of merely "legitimate" interests such as those the U.S. Supreme Court enumerated in *Dobbs*.

[4] Daniela Silva, "Anna Yocca, Tennessee Woman in Coat-Hanger Attempted Abortion Case, Released From Jail a Year Later," *NBC News* (Jan. 10, 2017).

mother and child[5] (which presumably the electorate would overwhelmingly support). What about requiring a second physician to be present for late-term abortions where the child might survive (as upheld in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983))? Requiring the pregnant woman contemplating abortion be *offered* the chance to see her baby on ultrasound? Requiring that steps be taken to minimize the pain and suffering of the aborted baby?[6] If the initiative answers these questions, the answers are all kept secret. And more relevant here, the electorate would presumably divide in different directions on the specific questions, yet the initiative presents no opportunity to vote separately on measures with quite different levels of popular support.

Adding an exception that swallows what little rule there is: Even the sole permitted purpose of furthering maternal health is illusory because it is subject to a catch: that it "does not infringe on that patient's autonomous decision making." At a minimum, this means the state can do nothing to *stop* the abortion, even if it is being done for the vilest of eugenic or racist reasons, is being done in a horrific manner that is particularly painful to the child, or is being done at any time up to birth.

Again, the initiative sweeps a large number of legal issues, with differing popular support, into one single up-or-down vote. This provision could frustrate the

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[5] Jutta Pretscher *et al*., "Influence of Preeclampsia on Induction of Labor at Term: A Cohort Study, 34 in vivo 1195 (2020) ("The only curative treatment for preeclampsia is induced delivery, which is indicated at 37 weeks of gestation at the earliest").

[6] Stuart W.G. Derbyshire & John C. Bockmann, "Reconsidering fetal pain," 46 J. Med. Ethics 3 (2020) ("The two authors of this paper have very different views on the morality of abortion. . . . Regardless, . . . we no longer view fetal pain (as a core, immediate, sensation) in a gestational window of 12–24 weeks as impossible based on the neuroscience").

government from taking genuine health-related measures such as facility licensing, sanitary disposal of biologic remains, requiring adequate malpractice insurance coverage, and so forth, if the abortion provider claims that such measures would force the facility to close and thus impair "autonomous decision making."

With such undefined and ambiguous terminology throughout the proposal, CI-14 conceals the true meaning of the initiative from Montana voters such that the separate-vote requirement of Article XIV Section 11 is violated.

B. CI-14 combines multiple unrelated amendments into a single measure which might not otherwise command majority support.

There is no dispute that CI-14 seeks to amend Article II of the Montana Constitution with a new Section 36. However, to say that CI-14's proposed amendments "concern only one section of the Constitution is correct only in the sense that all of them are parked there." *Monforton v. Knudsen*, 2023 MT 179, ¶ 14, 413 Mont. 367, 539. Despite parking all proposed changes under one new section, CI-14 makes several changes to the Montana Constitution "that are substantive and not closely related." *Id*., ¶ 12. This Court has repeatedly held that a proposed constitutional amendment violates the separate-vote requirement when it engages in "logrolling," which combines unrelated amendments into a single measure which might not otherwise enjoy majority support. *Id*., ¶ 10.

Plainly, voters have multifaceted and strong views about categories of abortion laws the proposed amendment would ban. To start, take CI-14's prohibition on laws that prohibit abortion before viability and prohibit abortion to protect the health of the mother. It is entirely predictable that many voters simultaneously hold the views (1) that abortion should be prohibited at some point before viability, and thus that they do not support an amendment categorically banning laws that prohibit

pre-viability abortions and (2) that abortion should be permitted to protect the life and health of the mother, and thus that they do support an amendment banning laws that prohibit abortion in those circumstances. Yet, by cramming both subjects in a single amendment, the initiative forces those voters to accept part of a proposal which they might oppose in order to obtain a change which they support.

The logrolling problems are even more specific to other provisions in the Montana Constitution. As the Attorney General found, CI-14 fundamentally changes the status quo for the right to privacy, incorporating a woman's right to a pre-viability abortion, under Article II Section 10 of the Montana Constitution. While CI-14 contains a definition of "fetal viability," the determination of viability is made by a treating "health care professional"—which as noted above, could include psychologists, social workers, or physical therapists. Consequently, the definition of "fetal viability" is hollow and meaningless, as a treating "health care professional" would be permitted to determine that viability occurs only *after* a child is born. In other words, the breadth with which CI-14 was drafted would permit the practice of partial birth abortion in Montana. Yet, Montana voters would be misled by the text of CI-14 to believe that "fetal viability" has some importance to this newly proposed abortion scheme.

Next, CI-14 effectively prohibits any regulation of abortion if a treating "health care professional" deems an abortion necessary to protect the life or health of the pregnant mother. As the Attorney General notes, the "in no circumstance" language from Section 2 of CI-14 has the effect of elevating abortion to a higher status than any other medical procedure, such that abortion alone cannot be regulated. Americans break in a multitude of directions on the various issues that

fall under the umbrella of "abortion" and Montanans are no different.[7] CI-14 would force voters to accept the policy outcomes and constitutional requirements they do not support in exchange for voting in favor of those that they do.

CONCLUSION

In sum, CI-14 encompasses multiple subjects and at least three separate amendments to constitutional requirements. As written, Montana voters will not know what they are voting for. For the reasons stated herein, this Court should uphold the Attorney General's determination that CI-14 is legally insufficient.

DATED this 9th day of February 2024.

American Center for Law & Justice, Susan B. Anthony Pro-Life America, and Montana Family Foundation

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[7]Marist/KOCJan2024https://www.kofc.org/en/resources/communications/polls/marist-poll-results2024.pdf

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Montana Family Foundation *Amicus Curiae* Brief is proportionately spaced, printed with the typeface Times New Roman, 14 point font, is double-spaced, is not longer than 14 pages, and contains 3,958 words excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

DATED this 9th day of February 2024.

American Center for Law & Justice, Susan B. Anthony Pro-Life America, and Montana Family Foundation

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