IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–288

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 23–231, the Honorable Mike Menahan, Presiding

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INTRODUCTION

The District Court manifestly abused its discretion by issuing a preliminary injunction in contravention of the applicable law and undisputed evidence. The District Court disregarded the presumption of constitutionality to which all duly enacted Montana statutes are entitled. It also did not recognize the State's compelling interests in protecting pregnant women and eliminating gruesome and barbaric procedures under HB 721. Its factual findings were also clearly erroneous and failed to acknowledge the significant evidence establishing that ultrasounds, required under HB 575, are not only the standard of care prior to an abortion—protecting pregnant women and abortion providers by accurately determining gestational age and viability—but also widely available and easy, with results that are transmittable.

The District Court further ignored the fact that Abortion Providers do not provide abortions past viability, undercutting their claim of irreparable harm. The balance of the equities and the public interest also weigh heavily in favor of upholding the abortion standard of care for Montana women, which protects Abortion Providers by ensuring they are accurately determining gestational age and viability. Abortion Providers failed on all prongs of the test for injunctive relief, so the District Court erred in granting the preliminary injunction.

Finally, Abortion Providers—not the District Court—wrote the Order granting the preliminary injunction. This demonstrates a complete lack of independent judgment by the District Court. Asserting that Abortion Providers' evidence was simply more compelling does not save the day—the applicable caselaw establishes that independent judgment would dictate at the very least *de minimis* changes to a party's proposed order. One would expect removing "Proposed" from the Order's title, for example, would be the first such change to give at least the appearance of independent judgment, but that did not occur here. The Order also ignores the undisputed evidence showing the ultrasound requirement to be the standard of care for abortions, cutting directly against Abortion Providers' purported likelihood of success on the merits. The District Court simply adopted Abortion Providers' position, while ignoring the undisputed evidence and the presumption of constitutionality.

The District Court erred in granting the preliminary injunction and this Court should reverse.

ARGUMENT

I. THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION.

A. THE PRELIMINARY INJUNCTION WAS NOT SUPPORTED BY THE EVIDENCE.

A factual finding "is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence or…the district court made a mistake." *In re Marriage of Tummarello*, 2012 MT 18, ¶ 21, 363 Mont. 387, 270 P.3d 28). A district court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Penderson v. Orvis* (*In re G.M.O.)*, 2017 MT 116, ¶ 9, 387 Mont. 390, 394 P.3d 913 (citing *Tubaugh v. Jackson (In re C.J.),* 2016 MT 93, ¶ 12, 383 Mont. 197, 369 P.3d 1028). Such was the case here, where the District Court issued a preliminary injunction despite undisputed evidence that performing an ultrasound is the standard of care prior to an abortion.

Not only the State's witness Dr. Mulcaire-Jones, but also Abortion Providers' witnesses Dr. Dickman and Helen Weems, testified that an ultrasound is *the standard of care* prior to an abortion.[1] When asked what the best method was to determine gestational age, Dr. Mulcaire-Jones testified:

[1] Dr. Dickman is also a Plaintiff in this case. Helen Weems is a Plaintiff in *Planned Parenthood et al. v. State et al.,* Montana First Judicial District Court, Lewis and Clark County, Cause No. ADV 23-299. *See* Op.Br. at 6, n.5.

> It's an ultrasound. It's absolutely the standard of care. It's much more reliable than their last menstrual period. It's much more reliable than the typical things we used to use including a physical exam, a pelvic exam. It's much more accurate than quickening, which is when we used to tell woman [sic] to tell us when the baby moves. Yeah, it really is the gold standard.

(Tr. at 60: 10-16.) Dr. Mulcaire-Jones further explained why he uses ultrasounds:

> It really is the standard of care. It takes all the guesswork out of so many things. So there's several essential things to know. First of all, you know if the fetus is alive or dead. So you determine viability. Second, and very importantly, you determine gestational age because…it determines what kind of procedure could be done. So if it's after 70 days, it should not be a medical-induced miscarriage. If it's later, if it's in, say, the 14th week, it shouldn't be done. 16 weeks, it shouldn't be done in an outpatient clinic. So it really gives you an understanding about whether the procedure should or should not be done.

(Tr. 55: 16-25, 56: 1-6.)

Dr. Mulcaire-Jones went on to testify that the literature:

> …clearly states, the equivalent to the American College of Ob-Gyn in Canada, says that an ultrasound is absolutely indicated before you do a termination for those very reasons. You know the gestational age and the number of fetuses and where the placenta is, and I think it protects the woman. It allows for the best type of care and to be frank, it protects the abortion provider if a woman does decide to have a termination to know the gestational age to know to do the abortion at the appropriate place with the appropriate method.

(Tr. at 57: 25, 58: 1-11.)

But it was not only the State's expert witness who opined that the performance of an ultrasound is the standard of care. Dr. Mulcaire-Jones, Dr. Dickman, and Helen Weems all testified that an ultrasound is the standard of care. Dr. Dickman, chief

medical officer of Planned Parenthood Montana, admitted that Planned Parenthood Montana generally performs ultrasounds for procedural abortions after 11 weeks. (Tr. at 129: 4-6.) And when asked, "So based upon your nine-month experience in Montana, your primary experience in Texas, you've developed a standard of care for ultrasounds in Montana?" Dr. Dickman replied, "Yes." (Tr. at 106: 17-20.) And when asked, "Would you agree that the ultrasound provides exoneration to the abortion provider with regard to the presumption of viability?" Dr. Dickman responded, "Yes. An ultrasound's one method to ensure that we're not doing abortions at viability." (Tr. at 121: 11-15.) When further asked, "And it's a good, solid one to put on your record so that you are exonerated if you are ever accused of it, isn't it?" Dr. Dickman replied, " Certainly. It's, you know, something that we would rely on." (Tr. at 121: 16-20.)

Helen Weems, also Abortion Providers' witness, testified at a prior deposition that providing an ultrasound was part of her standard of care prior to providing an aspiration abortion. The State submitted excerpts from the deposition transcript as an offer of proof. (*See* Op.Br. at n.5.) Weems said: "When she signs the informed consent, I would confirm that she is pregnant, that she has a pregnancy within her uterus, and determine the gestational age of that pregnancy. So that's done with both taking a medical history, doing a physical exam, which is called a pelvic exam, and doing an ultrasound." (Doc. 70, Exhibit A at 29: 2-8.) Dr. Mulcaire-Jones, Dr.

Dickman, and Helen Weems—all of whom practice in Montana—testified that performance of an ultrasound is the standard of care prior to an abortion.

The undisputed evidence further showed the ease with which a pregnant woman in Montana—anywhere in Montana—can obtain an ultrasound. Dr. Dickman stated, "I'm familiar with the general accessibility of ultrasounds within medical practices, including hospitals and outpatient clinics." (Tr. at 118: 6-8.) Dr. Mulcaire-Jones testified that 51 hospitals in Montana conduct ultrasounds, as do the Indian Health Service hospitals in Montana. (Tr. at 61: 16-21.) And he testified that it was common practice for an ultrasound to be conducted in one facility and have the results transferred to another facility, and that this is done frequently. (Tr. at 60: 17-22.) For example, a patient in Chester, Montana, could get an ultrasound locally and have the result transferred to a Great Falls Planned Parenthood. (Tr. at 61: 22-25, 62:1.)

The District Court's injunction of HB 575's ultrasound requirement was a manifest abuse of discretion because it plainly contradicts all relevant evidence—evidence provided by both Abortion Providers' witnesses and the State's witnesses established that performance of an ultrasound prior to an abortion is the *standard of care.* Abortion Providers cannot seriously claim that a practice constituting the standard of care is a burden on the right to privacy or on the right to a pre-viability abortion. The evidence clearly demonstrated that this is a common practice, that it is

easy for women all over Montana to obtain an ultrasound, and to have the results transferred to any abortion provider. Multiple medical care providers testified that the ultrasound is the standard of care in the state of Montana to determine gestational age and viability prior to an abortion. It is clear, then, that the District Court's finding that HB 575 burdened the right to privacy was clearly erroneous and not supported by the evidence.

Nor can Abortion Providers claim that the District Court simply found their evidence more persuasive than the State's—it was both Abortion Providers' witnesses and the State's witnesses who testified that the ultrasound was the standard of care.[2] Abortion Providers' own witness, Dr. Dickman, testified that Planned Parenthood Montana does not provide abortions past the point of viability. Abortion Providers are not injured by HB 575's restriction on post-viability abortions. The relevant evidence is undisputed, and the District Court erred in issuing an injunction that was not supported by the evidence.

[2] Abortion Providers gloss over the fact that the Order cites testimony that was subject to a sustained hearsay objection, even disagreeing that the Order relied on the hearsay. *See* Ans.Br. at 38. The Order wrongly refers to this hearsay (Doc. 84 at 8)—an inadmissible study cited by Dr. Dickman—and Abortion Providers refuse to grapple with this glaring issue. Such reference to inadmissible testimony further demonstrates a lack of independent judgment by the District Court as well as a lack of evidentiary support.

B. ABORTION PROVIDERS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

The District Court also erred in issuing a preliminary injunction both because it ignored the presumptive constitutionality of the challenged statutes, and because Abortion Providers failed to show a likelihood of success on the merits. "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Powder River Cnty. v. State*, 2002 MT 259, ¶¶ 73–74, 312 Mont. 198, 60 P.3d 357. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statute. *Satterlee v. Lumberman's Mut. Cas. Co.,* 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Abortion Providers bear the burden to prove unconstitutionality beyond a reasonable doubt, and if any doubt exists, it must be resolved in favor of the constitutionality of HB 575 and HB 721. *Id.*; *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

The State's compelling interests include "respect for and preservation of prenatal life at all stages of development, … the elimination of particularly gruesome or barbaric medical procedures[,] the preservation of the integrity of the medical profession[, and] the mitigation of fetal pain[.]" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (S. Ct. 2022). *See also* Mont. Code Ann. §§ 45-5-102 and -

116(3) (including, as a "deliberate homicide," the purposeful or knowing causation of the death of "the fetus of another"); Mont. Code Ann. § 45-5-103 ("mitigated deliberate homicide" includes "purposely or knowingly caus[ing] the death of a fetus of another [while] under the influence of extreme mental or emotional stress"); Mont. Code Ann. § 72-38-303(6), ("a parent may represent and bind the parent's minor *or unborn child* if a conservator or guardian for the child has not been appointed") (emphasis added); Mont. Code Ann. § 41-1-103 ("A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."). And this Court has not acceded to the notion that the right to privacy encompasses an affirmative right to access a particular drug or treatment. *Mont. Cannabis Indus. Ass'n v. State,* 2012 MT 201, ¶ 28, 366 Mont. 224, 286 P.3d 1161 (citing *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2006)).

In adopting Abortion Providers' argument, the District Court effectively took the position that any regulation of drugs or medical procedures in this context amounts to a violation of the right to privacy. For example, one could argue that a pharmacy's storage of drugs containing pseudoephedrine, found in certain cold medicine, such as Sudafed, behind the counter, requiring the assistance of a clerk and an identification check for purchase, violates one's right to privacy because one cannot simply buy such Sudafed off the shelf without regulation. But these

regulations are in place as a result of the Combat Methamphetamine Epidemic Act of 2005,[3] passed to assist law enforcement in stopping clandestine methamphetamine labs that use ingredients found in Sudafed to produce their illegal drugs. But such regulations clearly further a compelling government interest in stopping illegal drug labs. Similarly here, HB 721 furthers the State's compelling interests identified above.

And HB 575 comports with *Armstrong* and does not burden the right to privacy. As established above, the relevant evidence showed that performance of an ultrasound is the standard of care prior to an abortion. *Armstrong* explicitly limits a woman's right to obtain an abortion to pre-viability abortions. *Armstrong v. State*, 1999 MT 261, ¶ 49, 296 Mont. 361, 989 P.2d 264 ("Implicit in this right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation.") (emphasis added). HB 575 does not burden pre-viability abortions. Rather, it uses the ultrasound—a widely available and simple procedure—as the best means to determine viability, protecting both the woman and the abortion provider by accurately determining gestational age prior to an abortion.

[3] The Combat Methamphetamine Epidemic Act of 2005 is available at https://www.justice.gov/archive/olp/pdf/cmea.pdf at 120 STAT 256.

Indeed, the evidence supports that ultrasounds address a bona fide health risk by determining the gestational age—which helps both pregnant women as well as the abortion providers in this case—and by ensuring that dangerous conditions, such as ectopic pregnancy, do not exist prior to any abortion. This protects pregnant women from bona fide health risks of proceeding with abortion past viability—which Abortion Providers do not claim they seek to provide—or when there is an ectopic pregnancy or other complication. Obtaining an ultrasound is the standard of care, and Abortion Providers cannot credibly argue that the requirement to provide an ultrasound is an infringement on the right to privacy. Abortion Providers are not likely to succeed on the merits, and the District Court erred in issuing a preliminary injunction.

C. ABORTION PROVIDERS DID NOT SHOW THAT THEY WOULD SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

Abortion Providers' failure to demonstrate irreparable harm absent an injunction further demonstrates the District Court's error. Abortion Providers and the District Court essentially presumed that the statutes at issue are unconstitutional and asserted that the deprivation of constitutional rights is the irreparable harm. However, this was incorrect considering their failure to show a likelihood of success on the merits (*see supra,* Section B), coupled with the presumption of constitutionality that should have been afforded to the challenged laws.

HB 575's ultrasound requirement finds robust support in the evidence as the standard of care prior to abortion, including the testimony of Abortion Providers' own witnesses. HB 575 does not prohibit pre-viability abortion, and Abortion Providers themselves admit that they do not perform abortions post-viability, so they will not suffer irreparable harm from HB 575's regulation of post-viability abortions. Dr. Dickman was asked, "Up until what gestational age do you and PPMT provide D&Es?" and he replied, "It's 21 weeks and 6 days is a sufficient period." (Tr. at 115: 18-20). He confirmed that this was pre-viability. (Tr. at 115: 21-22).

Considering the circumstances, it strains credulity to argue that providing an ultrasound, the standard of care according to Abortion Providers' own witnesses, is an unconstitutional requirement. And Abortion Providers, who do not provide post-viability abortions, lack standing to challenge HB 575's restriction on post-viability abortions. (*See* Op.Br. at 21-24.) Abortion Providers will not suffer irreparable harm absent an injunction. The injunction was issued in error.

D. Abortion Providers Did Not Show That the Balance of the Equities and the Public Interest Weigh in Favor of Injunctive Relief.

In asserting that the balance of the equities and public interest tip in their favor, Abortion Providers merely repeat their flawed argument that the subject laws are unconstitutional. But Abortion Providers did not show likelihood of success on the merits, which alone precludes a preliminary injunction. Performing an ultrasound

is the standard of care—it is widely available, easily transmitted, and accurate. It is a safe and reliable method for determining gestational age and viability and, therefore, protects the pregnant woman by accurately determining gestational age and ruling out other related and potentially dangerous conditions, such as ectopic pregnancy. It further reduces an abortion provider's exposure to legal liability by ensuring accurate assessment of viability prior to any abortion procedures. The balance of the equities and public interest weigh heavily in favor of the State and preserving the ultrasound requirement, which protects the pregnant woman's health and facilitates certainty in the abortion provider's assessment of gestational age and viability. The ultrasound requirement hurts no one and helps both pregnant women and abortion providers. This factor tips heavily in favor of the State, and the District Court erred in issuing a preliminary injunction.

II. THE DISTRICT COURT DEMONSTRATED A LACK OF INDEPENDENT JUDGMENT BY ADOPTING ABORTION PROVIDERS' PROPOSED ORDER VERBATIM.

It was Abortion Providers, not the District Court, who wrote the Order granting the preliminary injunction in this case. They insist that, because their evidence was more persuasive, it was not error for the District Court to rely on it nearly exclusively. But as demonstrated above, the undisputed evidence directly undercuts Abortion Providers' position. Not only was their proposed order unsolicited and entirely one-sided, but it also contains not a single alteration by the

District Court. It also fails to reflect what the evidence showed—performing an ultrasound prior to an abortion is indisputably the standard of care. It reads more like a brief written by Abortion Providers to persuade the District Court than an order written by a neutral fact finder considering all of the evidence before it. It reads that way because that's what it is. That no changes were made to the proposed order before the District Court signed it alone demonstrates a lack of independent judgment.

In other cases where a party challenged a district court's order based on an alleged lack of independent judgment, but this Court ultimately affirmed, those district courts typically made at least *some* changes to a party's proposed order. While not error *per se*, this Court has cautioned district courts against adopting, verbatim, the findings of fact and conclusions of law of the prevailing party. *In re A.R.,* 2005 MT 23, ¶ 29, 326 Mont. 7, 107 P.3d 457 (citing *In re Marriage of Nikolaisen,* 257 Mont 1, 5, 847 P.2d 287, 289 (1993)). The reason is that "error occurs when the court accepts one party's proposed findings of fact without proper consideration of the facts and where there is a lack of independent judgment by the court." *In re A.R* ¶ 29 (quoting *In re Marriage of Kukes*, 258 Mont. 324, 328, 852 P.2d 655, 657 (1993)).

In stark contrast to this case, the district court in *In re A.R.* "did not fail to exercise independent judgment, nor did it adopt the [proposed] findings verbatim."

In re A.R., ¶ 30. There, this Court found that "[t]he District Court's findings of March 12, 2003, differ substantially from those originally proposed…on February 12, 2002" and that "[t]he District Court further exercised its independent judgment by making numerous other changes to the [party's] findings as originally proposed[.]" *Id.* Such changes included removing a proposed reference to a deposition, "which the District Court did not consider in making its determination." *Id.* The Court also cited the district court's substantial expansion of a proposed finding to include evidence presented by the other party. *Id.*

Here, the District Court changed absolutely *nothing* in Abortion Providers' unsolicited proposed order. It did not even remove "[Proposed]" from the Order's title, among other errors, inconsistencies, and contradictions. (*See* Op.Br. at 17-20.) These circumstances demonstrate the District Court's complete failure to exercise independent judgment, warranting reversal for this reason as well.

CONCLUSION

For all the reasons set forth in the State's Opening Brief and herein, this Court should reverse the District Court's grant of a preliminary injunction of HB 575 and HB 721.

DATED this 13th day of March, 2024.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 3,571 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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