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IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 24-0182

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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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.

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 defends the biblical and traditional framework of the family unit, which includes the defense of the sanctity of life.

As argued in *MSRR v. Knudsen*, 2024 MT 54, ___ Mont. ___, ___ P.3d ___, the full text of Constitutional Initiative 14 ("CI-14") and the Petitioners' proposed ballot statement have been misleadingly packaged to confuse Montana voters. What has been hidden from the Montana electorate is the initiative's primary goal: to allow for practically unlimited abortion, including specifically post-viability abortion procedures—like late-term and partial-birth abortion. The amendment would prohibit virtually any statute, administrative rule, or judicial decision from regulating abortion such that the issue is effectively removed from political debate. To circumvent the unpopularity of this extreme position, the original ballot statement prepared by the Petitioners failed to articulate the true impact of the initiative as required by M.C.A. § 13-27-212. Therefore, voters will be deceived and misled unless the Court upholds the ballot statement prepared by the Attorney General, which provides objective clarity about what CI-14 would accomplish. ACLJ, SBA, and MFF have a significant interest in ensuring the objective accuracy of CI-14's ballot statement because Montana voters should not be misled into approving it. ACLJ, SBA, and MFF urge the Court to uphold the ballot statement prepared by the Attorney General.

ARGUMENT

At the outset, Petitioners complain that "any order from this Court after April 10, 2024" may render CI-14's potential qualification for the ballot "virtually

impossible." M.S.S.R.'s Petition, pp. 2-3. Yet, Petitioners are not entitled to an expedited proceeding that jeopardizes due process for those who might oppose CI-14. While it is true that M.C.A. § 13-27-605 requires that this action "take[] precedence over other cases," there is no statutory requirement for the Court to comply with the Petitioners' requested deadline of April 10, 2024, for a decision. Frankly, Petitioners created their own emergency by failing to submit CI-14 any sooner than November 22, 2023. *M.S.R.R.*, ¶ 3.[1] It would take no special clairvoyance for Petitioners to anticipate that the radical changes to Montana's Constitution proposed by CI-14 would trigger intense debate and scrutiny throughout the initiative process. Petitioners' failure to plan accordingly does not create an emergency for this Court.

On March 25, 2024, the Attorney General determined, in writing, that the Petitioners' "proposed Statement of Purpose and Implication fails to comply with MCA, § 13-27-212." Petitioners' Exhibit 2. When the Attorney General "determines in writing that a ballot statement clearly does not comply with the relevant requirements of [M.C.A. § 13-27-212], the attorney general shall prepare a ballot statement that complies with the relevant requirements." M.C.A. § 13-27-226(3)(c).

[1] According to the Secretary of State's website, there are six ballot issues approved for signature gathering this election cycle. Each of these six ballot issues were approved no later than January 5, 2024. With the exception of CI-127, which was submitted to the Secretary of State on October 5, 2023, the remaining five approved ballot issues were submitted to the Secretary of State as early as May 4, 2023, and no later than August 16, 2023.

The Attorney General's ballot statement provides "fair notice of the content of the proposed amendment" such that voters "will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Citizens Right to Recall v. State*, 2006 MT 192, ¶ 16, 333 Mont. 153, 142 P.3d 764.

I. The Court must reject Petitioners' ballot statement because it fails to comply with M.C.A. § 13-27-212.

The ballot statement proposed by the Petitioners—and properly rejected by the Attorney General—was deceptively crafted to hide the true explanation of CI-14. The initiative "affirms" nothing, yet Petitioners deceptively employ this word to suggest that the initiative is a codification of already existing rights. This, of course, is wrong. While *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, created a pre-viability right to abortion within Article II, Section 10 of Montana's Constitution, the *Armstrong* decision has not been expanded to include partial-birth or late-term abortion based on a "good faith" determination by a health care professional. Petitioners' ballot statement is inaccurate and misleading for claiming that CI-14 merely affirms an existing right.

Additionally, Petitioners' ballot statement references "fetal viability" as the measure for when the government should be prohibited from denying or burdening an abortion. Yet, fetal viability is a poor benchmark for determining when an abortion may be appropriate. The "most obvious problem with any such argument [that viability be determinative] 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 from and willing to be provided by the attending health care professionals.[2] All this to say, Petitioners' reference to "fetal viability" has no concrete, universal meaning such that Montana voters will be able to arrive at a consistent understanding and cast an informed ballot. *Citizens Right to Recall*, ¶ 16.

Petitioners' attempt to define "fetal viability" does nothing to resolve this constitutional infirmity, as it depends solely on the "good faith judgment of a treating health care professional." This definition fails to provide fair notice to Montana's electorate. In Petitioner Samuel Dickman's challenge to, *inter alia,* House Bill 136 (2021), *Planned Parenthood of Montana v. State*, Mont. 13th Jud. Dist., DV-21-999, a lower court recently concluded that the objective reasonable medical judgment standard is insufficient in Montana because "reasonable variation in medical

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[2] 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.

judgment routinely occurs, such that 'reasonably prudent' judgment would be an impossible standard to predict with certainty." Order Granting Summary Judgment, p. 9, *Planned Parenthood of Montana v. State*, Mont. 13th Jud. Dist., DV-21-999 (Feb. 29, 2024) (Exhibit 1). Petitioners' counsel argued in that case that the phrase "reasonable medical judgment" is unconstitutionally vague and will "always be a question of judgment at the time based on the conditions at the time."[3] Plaintiffs' Brief in Support of Rule 56 Motion for Summary Judgment, pp. 13-14, *Planned Parenthood of Montana v. State*, Mont. 13th Jud. Dist., DV-21-999 (April 21, 2023) (Exhibit 2) (citing *State v. Stanko*, 1998 MT 321, ¶ 26, 292 Mont. 192, 974 P.2d 1132). Despite Petitioner Dickman's prior arguments and the ruling from the lower court described above, federal courts have upheld the objective reasonable medical judgment standard because it is the medical version of the "reasonable man" standard from tort law. *See Rogers v. U.S.*, 334 F.2d 931, 935 (6th Cir. 1964) and *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999). In practice, an objective standard compares a physician's actions to his peers; by comparison, the subjective "good faith judgment" standard Petitioners seek to apply relies solely on an individuals

[3] A group of plaintiffs, including physicians who performed elective abortions in Texas prior to the overturn of *Roe v. Wade* are making similar claims regarding the appropriate use of objective and subjective standards to evaluate the lawfulness of abortion under Texas law in *Texas v. Zurawski*, Tex. No. 23-0629. In February of this year, *Amici* SBA's 501(c)(3) research and education arm, the Charlotte Lozier Institute, filed an amicus brief in that case outlining the common usage of the objective "reasonable medical judgment standard across the practice of medicine in both Texas and nationally since at least the 1960s. *See* Brief of the Charlotte Lozier Institute and Alliance for Hippocratic Medicine as Amicus Curiae, *Texas v. Zurawski*, Tex. No. 23-0629, available at https://lozierinstitute.org/filed-brief-zurawski-v-texas-and-reasonable-medical-judgment/.

purportedly "good" intent, even if the outcome falls outside what a reasonable person might expect from our health care professionals. Nonetheless, if the objective notion of reasonable medical judgment is an impossibly vague standard—as Planned Parenthood and Petitioner Dickman have previously argued—then the subjective "good faith judgment" standard proposed by CI-14 must also impossibly vague. It is beyond question that voters will be uninformed about the standard of care they might subject themselves to if the only measurement of harm is based on what their practitioner *intended to occur* at the time of care.

The definition of "fetal viability" continues to unravel when considering that the term "health care professional" is undefined. Do Petitioners consider only licensed physicians to be "health care professionals," or does this term include nurses, chiropractors, physical therapists, and dentists?[4] Are there temporal limits to when a treating "health care professional" may render a decision about the life and health of a pregnant woman, or can a "fetal viability" determination be made to allow for the abortion of a partially born baby? The language of CI-14 can clearly be read to allow for such a controversial late-term abortion procedure, yet Petitioners'

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[4] The Montana Code Annotated defines "health care professional" and "health care provider" in various ways. How are voters to discern whether this would follow the Montana Abortion Control Act, M.C.A. § 50-20-109, which limits performance of abortion to licensed physicians and physician assistants, or if future courts will apply a different broader definition? For instance, "health care professional" is defined at M.C.A. § 50-4-1003(4) as "a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of the practice of the person's profession." By comparison, the Attorney General's ballot statement provides clarity by informing voters that the Initiative applies to "abortion providers."

proposed ballot statement does nothing to inform Montana voters about these implications of CI-14.

Petitioners' ballot statement also fails to inform voters that the government will be prohibited from enforcing medical malpractice standards or taking "adverse action" against anyone based on a pregnancy outcome. As with many terms utilized in CI-14, the phrase "adverse action" is undefined. CI-14 does not use the phrase "blanket immunity," but Montana voters might have a better understanding if it did. At minimum, Section 3 of CI-14 would provide immunity for at least the entire staff of any abortion facility. The initiative does not impose any conditions, and hence the exemption from penalization, prosecution, or other adverse action applies no matter how well, or how incompetently—or maliciously—the providers and staff discharge their duties. Montana voters would be left in the dark about these staggering constitutional changes if the Petitioners' ballot statement is adopted.

Each of these considerations matter to the voters of Montana, yet Petitioners would rather mislead and deceive voters about the true nature of CI-14 by leaving these important matters undefined and unaddressed. The Attorney General correctly determined that Petitioners' ballot statement failed to comply with M.C.A. § 13-27-212, and as such the Attorney General was required to prepare a ballot statement that addressed these glaring deficiencies.

II. The Court should uphold the Attorney General's ballot statement because it complies with M.C.A. § 13-27-212.

Contrary to Petitioners' assertions, the Attorney General's ballot statement is a true and impartial explanation of CI-14. A sentence-by-sentence evaluation of the statement demonstrates compliance with M.C.A. § 13-27-212.

> *CI-*** amends the Montana Constitution to allow post-viability abortions up to birth and prohibits any State requirement for parental notice for a minor's [sic] girl's abortion.*

Petitioners do not deny that this sentence accurately describes the true implication of CI-14. M.S.R.R.'s Petition, p. 9. Petitioners, by their silence on the matter, accept that CI-14 will allow post-viability abortions, including partial-birth abortions. Meanwhile, Petitioners assert that "the *intent* of the Initiative" does not relate to parental notice or minors' rights," M.S.R.R.'s Petition, p. 9 (emphasis added), but the question is not subjective *intent* but real-world legal *impact*. CI-14 will strip parents of any notice that their minor daughter has had an abortion, not because that is the primary intent, but rather because it is a consequence of the language of the amendment. The first sentence of the Attorney General's ballot statement is therefore objectively true. The problem for Petitioners is that they would rather hide this objective truth from Montana voters, but such deception would not meet the "true and impartial" requirements of M.C.A. § 13-27-212.

> *CI-*** leaves "fetal viability" and "extraordinary medical measures" to the subjective judgment of an abortion provider rather than objective legal or medical standards.*

Petitioners argue that CI-14 has nothing to do with "subjective judgments" or "legal or medical standards," but such an argument ignores the "good faith judgment" standard that CI-14 seeks to establish with respect to determining "fetal viability." M.S.R.R.'s Petition, p. 9. There is, at least, some recognition by this Court that CI-14's definition of "fetal viability" is not based on objective criteria. *M.S.R.R.*, ¶ 53 (J. Rice dissenting) (recognizing "'fetal viability' is not a concept that can be legally determined by the government on the basis of an objective criteria such as a medical metric, but rather must be determined by a treating healthcare professional on a case-by-case basis, and further … the government may not burden access to a post fetal viability abortion that is medically indicated, in the judgment of the treating healthcare professional, to protect the life or health of the pregnant patient.").

Petitioners' confusing definition of "fetal viability" is of paramount importance to a true understanding of CI-14, such that failing to objectively describe this definition will leave Montana voters unequipped to cast an informed ballot. The truth for the abortion lobby is that every abortion can be justified by the "good faith" judgment of an abortion provider if that judgment is couched as protecting the "health" of a pregnant woman. *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). The Attorney General's ballot statement provides voters with the true and impartial reality of Petitioners' "fetal viability" definition by informing the Montana electorate that the definition is completely reliant on the subjective determination of an abortion provider.

> *CI-*** prohibits the State, or the people by referendum, from enacting health and safety regulations related to pregnancy care, except upon a narrow set of compelling interests.*

Again, Petitioners take issue with this true and impartial statement regarding CI-14. It is true that the people, by initiative or popular vote, can further amend Montana's Constitution. It is equally true that the State and the people will be prevented from enacting health and safety regulations unless those regulations meet a narrow set of compelling interests. Furthermore, any referendum or bill that amends the Montana law is subject to constitutional review. Petitioners obfuscate that should CI-14 pass, any future vote to change Montana abortion policy would have to comply with it or be struck down. Voters should be informed that future efforts to regulate healthcare (as it pertains to pregnancy) or abortion will be next to impossible absent another change to the Montana Constitution.

> *CI-*** eliminates the State's compelling interest in preserving prenatal life.*

Petitioners take exception to yet another objectively true and impartial statement concerning the impact of CI-14. Because CI-14 does not identify preservation of prenatal life as one of the few, narrow compelling interests sufficient

to justify State regulation of pregnancy care and abortion, Montana voters deserve to be informed that the State will no longer have a recognized interest in preserving the lives of unborn babies, even late in pregnancy.

The State or the people may not enforce post-viability abortion regulations if an abortion provider subjectively deems the procedure necessary.

CI-14 is clear that any attempt to regulate post-viability abortions will be dependent upon the subjective, "good faith" judgment of a "health care professional." Petitioners again feign ignorance about the true implications of CI-14 by claiming that the initiative does not "contain any language related to 'subjectively' deeming a procedure necessary. M.S.R.R.'s Petition, p. 10. Petitioners may be ignorant of the true effect of CI-14, but Montana voters should not be.

*CI-*** prohibits the State and the people from enforcing medical malpractice standards against providers for harms caused in providing pregnancy/abortion care.*

Petitioners complain that CI-14 "makes no mention of 'medical malpractice standards'" and suggest that the Initiative does not shield providers from medical malpractice proceedings. M.S.R.R.'s Petition, p. 11. This complaint ignores CI-14's utilization of the phrase "adverse action" in Section 3, which might as well be read as "blanket immunity" for negligent, incompetent, or intentional medical malpractice. The Attorney General's ballot statement accurately reflects that the initiative language applies to "pregnancy outcomes," including abortion, whereas

the Petitioners' proposed statement uses the overly broad term "reproductive care, including abortion care." What are voters to make of this discrepancy? "Reproductive care" covers a far broader spectrum of issues than "pregnancy outcomes." Montana State University's Mark and Robyn Jones College of Nursing offers a course called "Nursing Concepts in Reproductive Health and Pediatrics" which lists in its description the goal that students "gain a foundational knowledge of reproductive care…"[5]. The course covers everything from infertility and contraception, to high-risk pregnancy conditions, hormones, and even "disorders of the male reproductive system."[6] Petitioners' utilization of the broad phrase "reproductive care" would leave Montana voters justifiably wondering if CI-14 reaches beyond the scope of pregnancy decisions, or whether the Initiative is also designed to override meaningful enforcement of laws like Senate Bill 99 (2023), which seeks to protect children from irreversible consequences to the human reproductive system. The Petitioners' proposed statement creates confusion regarding the scope of CI-14, while the Attorney General's statement provides Montana voters with an objective evaluation of the true implications of CI-14.

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[5] Nursing Concepts in Reproductive Health and Pediatrics, *Master Resource Outline*, https://www.montana.edu/nursing/facstaff/nrsg_358_nursing_reproductive_pediatric.html (last visited Mar. 28, 2024)

[6] *Id*.

*CI-*** may increase the number of taxpayer-funded abortions.*

Literature reviews by pro-life and pro-choice scholars alike conclude that the availability of taxpayer-funding increases the number of elective abortions. Michael J. New, Ph.D., *Hyde @ 40: Analyzing the Impact of the Hyde Amendment with July 2020 and June 2023 Addenda*, Charlotte Lozier Institute, June 27, 2023, https://lozierinstitute.org/hyde-40-analyzing-the-impact-of-the-hyde-amendment-with-july-2020-and-june-2023-addenda/. Voters must be informed that voting "yes" on CI-14 will not only result in substantial changes to Montana's Constitution but may also lead to an increase in taxpayer-funded abortions, including controversial abortion procedures like late-term, partial-birth, and dismemberment abortion.

CONCLUSION

The Attorney General appropriately rejected Petitioners' ballot statement, which omits the truth about the sweeping changes proposed by CI-14. The Court should uphold the Attorney General's statement and certify it as compliant with M.C.A. § 13-27-212. While the Court may be unable to address the impossibly vague language in CI-14 at this time, the Attorney General's ballot statement provides Montana voters with fair warning about the true nature of CI-14.

DATED this 29th day of March, 2024.

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

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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 3,356 words excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

DATED this 29th day of March, 2024.

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