

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24–147

PLANNED PARENTHOOD OF MONTANA, and SAMUEL DICKMAN, M.D.,
on behalf of themselves and their patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official
capacity as Attorney General,

Defendant and Appellant.

APPELLANT’S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County Cause No. DV 21–999, The Hon. Kurt Krueger, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting summary judgment to Appellees and permanently enjoining 2021 House Bills (“HB”) 136, 140, and 171.

STATEMENT OF THE CASE

This case concerns the constitutionality of three bills passed in 2021. (*See* HB 136, **attached as Appendix A**; HB 140, **attached as Appendix B**; and HB 171, **attached as Appendix C**.) Appellant is the State of Montana and Austin Knudsen, in his official capacity as Attorney General (the “State”). Appellees are Planned Parenthood of Montana and Samuel Dickman, M.D. (“Plaintiffs”).

On August 16, 2021, Plaintiffs filed their Verified Complaint and Motion for Preliminary Injunction. (Docs. 1, 5–9.) Defendants opposed, and briefing was complete on September 17, 2021. (Docs. 20–26, 32.) The District Court held a preliminary injunction hearing on September 23, 2021. (Doc. 33.) Following the hearing, Judge Gregory R. Todd disqualified himself and Judge Michael G. Moses assumed jurisdiction. (Docs. 37–38, 46.) The District Court issued a Temporary Restraining Order on September 30, 2021, followed by a Preliminary Injunction on October 7, 2021. (Docs. 47, 49.) Defendants appealed on October 19, 2021. (Doc. 51.) This Court affirmed the injunction on August 29, 2022. (Docs. 77.01–77.02.)

Following discovery, Plaintiffs moved for summary judgment on April 21, 2023. (Docs. 110–112.) Defendants filed their Response Brief and Cross-Motion for

Summary Judgment on May 12, 2023. (Docs. 116–118.) Briefing on both motions was complete on June 9, 2023. (Doc. 121.) Judge Moses retired on or about June 30, 2023, and Judge Kurt D. Kruger ultimately assumed jurisdiction. (Doc. 144.) Oral argument was held December 18, 2023. (Doc. 151.01.) On February 29, 2024, the District Court granted summary judgment for Plaintiffs. (Order Granting Summary Judgment (Doc. 153), **attached as Appendix D**) Defendants timely appealed on March 8, 2024. (Doc. 156.)

STATEMENT OF FACTS

HB 136: HB 136—the Montana Pain-Capable Unborn Child Protection Act—prohibits abortions after 20 weeks’ gestation, except when necessary to protect the mother’s life or health. (App. A.) It does not regulate abortions before 20 weeks’ gestation. (*Id.*) Plaintiffs do not perform abortions on fetuses older than 21 weeks, six days’ gestation. (Doc. 118, Ex. A at 117:2–20; Ex. B at 19:16–20; Ex. C at 24:2–25:12.) Plaintiffs perform fewer than 10 abortions annually on fetuses more than 20 weeks’ gestation, which is “quite a small number of visits” compared to their overall business. (Doc. 118, Ex. C at 37:4–38:1.)

HB 140: HB 140 requires that a woman considering abortion have an opportunity to view ultrasound images and hear fetal heart tones. (App. B.)

HB 171: HB 171 ensures that before a woman undergoes a chemical abortion, a competent medical provider confirms a uterine pregnancy and gestational age, and

that she has access to a provider who can assist with complications. (App. C.) It also mandates that she receive information regarding options that may help her to continue her pregnancy if she changes her mind during the multi-day course of a chemical abortion. (App. C.)

STANDARD OF REVIEW

This Court reviews de novo a District Court’s grant or denial of summary judgment, applying the same criteria of Mont. R. Civ. P. 56. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664 (citations omitted). Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*; Mont. R. Civ. P. 56(c)(3). “When there are cross-motions for summary judgment, a district court must evaluate each party’s motion on its own merits.” *Id.* (citation omitted). Conclusions of law are reviewed to determine whether they are correct. *Id.* (citation omitted).

Statutes are presumed to be constitutional, and this presumption is a high burden to overcome. *See Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action. *Id.* (citations omitted). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Id.* (citations omitted). The party challenging a

statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt; if any doubt exists, it must be resolved in favor of the statute. *Id.* (citations omitted).

SUMMARY OF ARGUMENT

The District Court erred in awarding summary judgment because the parties dispute numerous material fact issues. Alternatively, the laws are constitutional under the post-*Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) legal landscape. The rationale of *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 was built upon the foundation laid by *Roe v. Wade*, 410 U.S. 113 (1973). Now dissolved, that foundation can no longer support an implied right of abortion under Montana’s constitutional right of privacy. No textual or historical right to abortion exists or has ever existed. But even if the Court rejects this argument, the laws pass constitutional muster under current law. Therefore, this Court should reverse the District Court’s summary judgment and remand for trial on the merits.

ARGUMENT

I. DISPUTED FACTS PRECLUDE SUMMARY JUDGMENT.

The District Court erroneously ignored many disputed material facts in this case. “[S]ummary judgment is an extreme remedy which should not be substituted for a trial on the merits if a controversy exists over a material fact.” *Sudan Drilling, Inc. v. Anacker*, 2009 MT 14, ¶ 7, 349 Mont. 42, 202 P.3d 778 (citation omitted).

“All reasonable inferences which may be drawn from the offered evidence must be drawn in favor of the party opposing summary judgment.” *Id.* (citation omitted).

A. THE PARTIES DISPUTE MATERIAL FACTS RELATED TO HB 136.

1. The State Disputes Plaintiffs’ Viability Assertions.

Plaintiffs’ assertion that “[n]o fetus is viable at 20 weeks LMP,” (Doc. 111, SUMF at ¶ 13) ignores the undisputed fact that pregnancy dating can be off one to two weeks. (Doc. 111, Ex. D at 116: 9–12; Doc. 118, Ex. D at 83:7–11; Ex. E at 1013–8.) Moreover, “medical and scientific advances show that the concept of viability is itself subject to change,” which demonstrates that “the viability standard will prove even less workable in the future.” *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774–75 (8th Cir. 2015) (cleaned up). Every year, advancements in medical science increase the odds of unborn children surviving outside the womb at a younger gestational age.¹ Survival rates for births at 22 weeks and earlier have dramatically and consistently improved.² (Doc. 153 at 6.) “As medical science

¹ Ruthann Richter, *Premature babies’ survival rate is climbing, study says*, STANFORD MEDICINE (Feb. 8, 2022), available at <https://tinyurl.com/mrxjn8mm> (a study of roughly 11,000 extremely premature babies showed those born at 22 weeks had a 28% survival rate and those born at 23 weeks had a 55% survival rate); see also Matthew A. Rysavy, B.S., et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801 (2015) (documenting survival rates of infants born at 22 weeks); *Edwards v. Beck*, 786 F.3d 1113, 1118 (8th Cir. 2015) (discussing survival of 21 week preemie).

² (See Doc 116 at 12, n. 7); see also *NICU Cares for, Discharges Home Youngest-Born Surviving Infant in Hospital History* (Dec. 14, 2021), available at <https://tinyurl.com/2nj5deah> (26th baby worldwide to be born before 23 weeks’

becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.” *Beck*, 786 F.3d at 1118 (quotation omitted). “The viability standard ‘is clearly on a collision course with itself.’” *Id.* (quotation omitted).

Inaccuracy of gestational age estimates increase with the length of the pregnancy. (Doc. 118, Ex. D at 97:9–14.) Thus, permitting abortions beyond 20 weeks—within one to two weeks of current viability—presents a bona fide health risk that viable children may be aborted. Establishing a set gestational limit at 20 weeks reduced that risk and accounts for potential dating inaccuracies. Material disputes regarding whether HB 136 affects pre-viability abortions preclude summary judgment.

2. The Parties Dispute The Developmental Stage At Which A Fetus Can Feel Pain.

The parties’ experts are learned in the field of medicine and have divergent views on the question of whether a fetus can perceive pain before 20 weeks’

gestation and survive); *World’s most premature baby, given 0% odds of survival, celebrates first birthday*, GUINNESS WORLD RECORDS (June 11, 2021), available at: <https://tinyurl.com/4n9hetfb> (baby born at 21 weeks, 2 days survived through NICU care); Amar Mehta, *Alabama boy, born after 21 weeks and one day, breaks Guinness world record as most premature baby to survive*, SKY NEWS (Nov. 11, 2021), <https://tinyurl.com/54rz46zz> (baby born at 21 weeks, 1 day); Nick Trigg, *Babies born at 22 weeks ‘can now survive’*, (Oct. 23, 2019), available at <https://tinyurl.com/3nnutkj3>; *‘Micropremie’ baby who weighed just over 1 pound at birth goes home from Illinois hospital*, AP NEWS (May 14, 2024), available at <https://tinyurl.com/ysxb9xed> (born at 22 weeks).

gestation. (Doc. 118, Ex. A at 178:5–25; Ex. B at 89:1–10; Ex. D at 135:15–137:15; Ex. E at 104:2–21; Ex. F at 43:6–15; Ex. G at 36:22–37:7; 40:11–16.) The human nervous system develops throughout gestation; the ability to sense stimulation does not exist in a binary “on/off” state, but along a continuum. (Doc. 118, Ex. D at 121:16–20, 130:15–131:9; Doc. 118, Ex. F at 43:6–15.) Fetuses develop sensory receptors for painful stimuli called nociceptors; they react to stimuli that are universally understood as painful to adult humans—such as penetration by a needle—in a manner consistent with pain in any other stage of human development, including withdrawal from the stimulus, heart rate changes, oxygenation changes, hormonal response, and changes in their facial expressions. (Doc. 118, Ex. D at 131:7–9, 133:20–23, 177:10–24, 184:11–185:3, 193:22–195:15, 213:4–214:18; Ex. E at 103:6–21; Ex. G at 67:25–68:20, 83:6–85:25.) Extremely premature babies and unborn fetuses of the same gestational age both exhibit physical reactions and the release of stress hormones in response to noxious stimuli. (Doc. 118, Ex. D at 157.23–158:2; Ex. F at 45:5–8.)

Anesthesia and analgesia are administered directly to fetuses younger than 20 weeks’ gestation during intrauterine surgeries. (Doc. 118, Ex. B at 88:1–25, 94:1–13; Ex. D at 156:21–157:9, 174:1–175:5.) One purpose of administering pain medication to a fetus during intrauterine surgery is to suppress her stress response to the surgery. (Doc. 118, Ex. B at 88:7–20, 94:7–12.) Fetuses experience better

outcomes if they are administered anesthesia during intrauterine surgery. (*Id.* at 91:9–22; Ex. D at 156:21–157:9.) Fetal pain is a “medically-acknowledged, bona fide health risk” to unborn children, as recognized by the pain medication administered to them during intrauterine surgery.

B. THE PARTIES DISPUTE MATERIAL FACTS RELATED TO HB 140.

The State disputes Plaintiffs’ assertion that there is “no medical reason for offering an abortion patient the opportunity to listen to fetal cardiac activity.” (Doc. 111, SUMF at ¶ 30). Abortion carries certain inherent risks. In addition to the recognized immediate medical risks, in the year after an abortion, a woman is two to four times as likely to die compared to childbirth and is at a higher risk for a number of negative mental and physical health outcomes, including anxiety, depression, suicidal ideation, self-harm, and substance abuse. (Doc. 116, Exc. C at 120:3–19, 131:7–13, 192:9–193:22.) Plaintiffs’ claims about abortion safety ignore these facts, and also ignore the fact that abortion always ends an individual prenatal human life.

An abortion of a fetus older than seven to eight weeks’ gestation requires dilation of the mother’s cervix, as the fetus is too large to be extracted without dilation. (Doc. 118, Ex. E at 34:12–35:6.) An abortion of a fetus older than 13 weeks’ gestation requires a dilation and evacuation (“D&E”) procedure, in which the abortion provider dismembers the fetus in the mother’s uterus with a grasping

instrument such as ring forceps, and extracts fetal body parts from the mother’s body through her cervix. (*Id.* at 35:17–36:6.) A pregnancy terminated by a D&E procedure is always fatal to the fetus. (*Id.* at 100:21–24.)

Voluntary informed consent is vital to any non-emergency medical procedure to avoid a battery. *See Natl. Inst. of Family & Life Adv. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (“*NIFLA*”). HB 140 mitigates the risks described above by offering a woman considering abortion the opportunity to view ultrasound images and hear fetal heart tones—an offer she is free to refuse. This does not pose an onerous burden on Plaintiffs or their patients, because Plaintiffs already provide opportunities to view an ultrasound. (Doc. 111, Statement of Undisputed Material Facts (“SUMF”), ¶ 9.) Dr. Dickman testified that “[i]f a patient requested to hear [the fetal heart tones] . . . we would certainly make every effort to respect the patient’s wishes.” (Doc. 116, Ex. A at 122:8–15.) And Plaintiffs typically allow patients to see both an active ultrasound and an image of the unborn child. (*Id.* at 124:15–18) (“they’re offered the option to—view the ultrasound.”). Plaintiffs’ expert also testified that she offers patients the opportunity to view an ultrasound and hear the heartbeat in her own practice. (Doc. 116, Ex. B at 55–56.)

C. THE PARTIES DISPUTE MATERIAL FACTS RELATED TO HB 171.

1. The State Disputes Plaintiffs’ Assertions Regarding HB 171’s Telehealth And Waiting Period Provisions.

The District Court stated, “the State fails to establish the medical rationale” for HB 171’s telehealth provisions, and asserts that by enacting them, the Legislature has imposed a unique burden on abortion procedures. (Doc. 153 at 11.) In so doing, the District Court ignored Plaintiff Dickman’s direct statement that “[t]here are many types of medical services that require an in-person visit.” (Doc. 116, Ex. A at 54:5–6). It also mischaracterizes the testimony of Montana Health Resources Division Administrator Darci Wiebe, who testified that some medical procedures require in-person office visits, and allowances for telehealth because of the COVID-19 pandemic were being rescinded. (Doc. 116, Ex. F at 25:11–22).

The District Court makes passing mention of the State’s evidence that mifepristone can cause potentially lethal hemorrhage and sepsis, and may require surgery for an incomplete abortion. But it disregarded those concerns in deference to Plaintiffs’ assertion that requiring in-person visits *might* impose a travel burden on some Montanans to reach one of “only seven” abortion facilities in the state, the third highest number of abortion facilities per capita in the country. (Doc. 153 at 10–11; Doc. 111 at 14.)³ The notion that the State is limited in its ability to regulate

³ See Data Center, GUTTMACHER INSTITUTE (<https://data.guttmacher.org/states/>).

serious medical procedures by where Plaintiffs deem fit to place an abortion facility is not based in constitutional text, history, or precedent. More seriously, though, HB 171's in-person office visit requirement was nothing less than what the FDA required in its Risk Evaluation and Mitigation Strategies for physicians to distribute mifepristone to induce abortion. *See All. for Hippocratic Med. v. Food & Drug Admin.*, 2023 WL 2913725, at *2 (5th Cir. Apr. 12, 2023).

The summary judgment Order disregards the parties' dispute over the need for in-person visits to minimize the real risk of coerced abortions. In a circumstance as sensitive as an abortion, it is critical that the provider establish that the pregnant woman is not being coerced to have an abortion she does not want. But the order does not address the State's evidence that this is impossible when—as Plaintiffs conceded—the healthcare provider cannot even ensure that a coercing person is not in the room with her, off camera. (Doc. 116, Ex. A at 38:4–39:24; Ex. B at 71:21–72:4.) Plaintiffs provide chemical abortion without videoconferencing if it is unavailable to the patient. (Doc. 116, Ex. G at 45:10–24.) With in-person visits, they do part of the patient interview in private, asking anyone accompanying the patient to leave the room. (Doc. 116, Ex. B at 59:5–11.) Unless coercion is ruled out, informed consent to abortion cannot be obtained. (Doc. 116, Ex. A at 37:6–15.)

The 24-hour waiting period under HB 171 reflects the State's interest in promoting respect for and preserving unborn life. The Order points out that there is

“[no] other medical procedure in Montana which requires a patient by law to wait 24 hours” for a procedure. (Doc. 153 at 11.) But this provision merely reflects the unique characteristic of abortion—no other medical procedure intentionally ends the life of another human. The Order ignores Plaintiffs’ admission that, even absent HB 171’s requirement, a pregnant woman already “may have to wait longer than the 24 hours mandated by the law,” (Doc. 111 at 15.) and their expert’s testimony that her patients face a two- to three-*week* wait for an appointment at her facility. (Doc. 116, Ex. B at 63:2–7.) In addition, Plaintiffs’ own documents explain that in-person follow-up visits are expected and required. (Doc. 116, Ex. A at 142–43.) If Montana law provides a three-day “cooling-off period” for consumers to cancel a personal-solicitation sale⁴ and seven days to cancel a timeshare purchase,⁵ a 24-hour period to leave the presence of an abortion provider and reflect on a decision as serious and irreversible as a completed abortion is reasonable.

2. HB 171’s Credentialing Requirements Ensure Competence.

The District Court’s Order overstates the credentialing requirements of HB 171 and ignores the parties’ dispute over their reasonableness. The Order asserts that HB 171 requires “a doctor” to be credentialed to “handle” *each* enumerated complication of chemical abortions. (Doc. 153 at 12–13 (“[S]urely a doctor with

⁴ Mont. Code Ann. § 30-14-504.

⁵ Mont. Code Ann. § 37-53-304.

credentials in all these areas would be among the world’s renowned medical experts.”.) Aside from the fact that Dr. Dickman testified that, in order for Plaintiffs’ abortion providers to be credentialed to administer chemical abortion drugs, they must be “able to provide surgical intervention in cases of incomplete abortion or severe bleeding or have made plans to provide such care through others and be able to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary” (Doc. 116, Ex. A at 173:7–12), HB 171 simply does not require what the Order claims.

Abortion drug manufacturers require physicians to agree that they can “provide surgical intervention or have made arrangements for others to provide that intervention” to handle complications. (Doc. 116, Ex. B at 42:14–43:9.) Similarly, HB 171 merely requires abortion providers to be competent to handle complications themselves, or to have an arrangement with an associated medical practitioner who can. Some of these complications, such as uncontrolled bleeding, may require the provider’s immediate surgical intervention, and others, from placenta previa in a subsequent pregnancy to suicidal ideations—for both of which there is a significantly higher risk after abortion—may manifest months or years after an abortion, and may be treated by another competent provider.

The State disputes that its interests addressed by HB 171 “have nothing to do with medical safety,” (Doc. 111 at 17), as the multi-billion-dollar abortion industry’s

income from performing abortions can easily provide incentive to place income above patient safety. For example, Plaintiffs openly administer mifepristone to induce abortion at a gestational age beyond that authorized by the FDA. (*See* Doc. 116 at 16.) Accordingly, HB 171 advances maternal health and the integrity of the medical profession by ensuring that practitioners administering this highly restricted drug or performing elective surgical procedures are also competent to address complications that may result.

3. The State Disputes Plaintiffs’ Assertions Regarding Progesterone Therapy And Plaintiffs’ Consent Forms.

The State disputes that information about progesterone therapy is false and misleading, and that Plaintiffs’ consent forms adequately inform patients of all options. Plaintiffs’ assertion—echoed by the District Court (Doc. 153 at 12)—that treatment with the natural pregnancy hormone progesterone “has not been shown to be safe and effective,” (Doc. 111 at 9) is simply false. Proponents of chemical abortion often point out that mifepristone is used to treat miscarriage, and that its use in chemical abortion and miscarriage is clinically indistinguishable.⁶ Thus, it is important to note that “progesterone has been prescribed for many uses in pregnant

⁶ *See, e.g.,* Lisa H. Harris and Daniel Grossman, *Complications of Unsafe and Self-Managed Abortion*, 382 NEW ENG. J. MED. 1029 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMra1908412> (patients who used these medications may be clinically indistinguishable from those with uncomplicated spontaneous pregnancy loss.).

women to sustain pregnancy ... including for recurrent miscarriages, prevention of preterm birth, and support of endometrial function for certain patients suffering from infertility.” *Bella Health & Wellness v. Weiser*, 2023 WL 6996860, at *2 (D. Colo. Oct. 21, 2023). “[P]roviders [use] progesterone in 5–12% of all pregnancies for a variety of reasons.” *Id.* (citation omitted). “[P]rogesterone is ‘generally considered a low-risk medication’ with ‘many off-label uses that meet generally accepted standards of medical practice.’” *Id.* (citation omitted).

Progesterone has been successfully used to counter mifepristone in animal studies and human case studies, *id.*, and for thousands of women who simply wanted to discontinue a chemical abortion. Since *Dobbs*, however, the therapy has come under fire from abortion advocates. *See, e.g., First Choice Women’s Res. Ctr., Inc. v. Platkin*, No. 24–1111 (3d Cir.); *Obria Grp., Inc. v. Ferguson*, No. 3:23–cv–06093 (W.D. Wash.); *New York v. Heartbeat International, Inc.*, No. 451314/2024 (N.Y. Sup. Ct.). In *Bella Health & Wellness*—as here—the federal court in Colorado noted that “some evidence [] suggests that progesterone may [] aid in preventing termination of a pregnancy after ingestion of the first abortion pill—a point hotly contested by the parties.” 2023 WL 6996860 at *2. That court cited the admission of Dr. Harvey Kliman, Director of the Reproductive and Placental Research Unit at the Yale University School of Medicine—who supports expansive abortion policy—that if his daughter had accidentally taken mifepristone during pregnancy, he would

recommend she take progesterone, adding, “I bet you it would work.” *Id.* (quoting Ruth Graham, *A New Front in the War Over Reproductive Rights: ‘Abortion-Pill Reversal’*, N.Y. TIMES MAGAZINE, Jul. 18, 2017).⁷ A chemical abortion takes several days to complete, and the State disputes that Plaintiffs’ consent processes adequately inform women paying them to perform an abortion that there may be options if they change their minds. (Doc. 116, Ex. H at 34:5–11.)

4. The State Disputes That HB 171 Creates A New Privacy Concern.

Plaintiffs assert that HB 171 could make public identifying information about patients receiving abortions. This concern is unfounded, as the Montana Department of Public Health and Human Services (“DPHHS”) does not provide individual data to other entities. (Doc. 116, Ex. I at 34:14–24, 56:21–57:6, 64:4–9.) Moreover, Dr. Dickman testified that Plaintiffs *already* collect and report patient data to DPHHS, including the name of the patient and the provider and the date of the abortion, after every surgical and chemical abortion. (Doc. 116, Ex. A at 18:22–21:22). Plaintiffs have asked—and the District Court has now required—that the State be enjoined from enforcing a reporting requirement with which Plaintiffs already comply. This is no basis for a permanent injunction of a valid statute.

⁷ Available at <https://perma.cc/CN75-8YEU>.

All of the above issues of disputed fact preclude summary judgment on HB 136, HB 140, and HB 171. This Court should reverse the District Court and remand for a trial on the merits of each of these bills.

II. THIS COURT MUST RECONCILE *ARMSTRONG* WITH *DOBBS*.

For half a century, all states were prevented from implementing regulations on the practice of abortion except as comported with *Roe*, 410 U.S. 113. “Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation.” *Dobbs*, 597 U.S. at 219. *Dobbs*, however, returned the authority to regulate abortion “to the people and their elected representatives,” affirming that states have “legitimate interests” in promoting “respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; [and] the preservation of the integrity of the medical profession.” *Id.* at 292, 301.

Montana’s *Armstrong* decision is premised on the now defunct rationale of *Roe*. See *Armstrong*, ¶ 40. If *Roe* stripped a fetus of constitutionally protected status, and *Armstrong* relied on *Roe* to reach the same conclusion, then *Dobbs*’s reversal of *Roe* also severely undermines *Armstrong*. The *Dobbs* Court held that “procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.” *Dobbs*, 597 U.S. at 300. The

same is true in Montana—there is no basis in our constitutional text or our state’s history for a “right” to abortion.⁸ Rather, *Armstrong*—like *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—“usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.” *Dobbs*, 597 U.S. at 269. It did so by the “exercise of raw judicial power,” *Id.* at 228–29 (citation omitted), despite “[t]he Constitution mak[ing] no reference to abortion, and no such right [] implicitly protected by any constitutional provision.” *Id.* at 231.

The Montana Constitution makes no express or implied reference to abortion. The *Armstrong* Court justified interpreting the right to privacy to include abortion on the basis that the right was meant to be “expansive,” and relied on statements of several delegates to support this proposition. *Armstrong*, ¶¶ 32–33, 44, 47. Not only does this, at best, ignore important context,⁹ but also it ignores the overwhelming evidence that the Constitutional Convention delegates expressly intended that the

⁸ Montana Territory criminalized abortion at all stages of pregnancy. *Dobbs*, 597 U.S. at 326; 1864 Terr. of Mont. Laws p. 184, Sec. 41. (prohibiting induction by medication or other substance or by “any instruments whatever” of a miscarriage, except to save her life). It continued to be banned with limited exceptions until 1973. Rev. Codes Mont. §§ 94–401 and 94–402 (1947) (held unconstitutional in light of *Roe*. See *Doe v. Woodahl*, 360 F. Supp. 20, 22 (D. Mont. 1973)).

⁹ *Montana Constitutional Convention, 1971–1972, Verbatim Transcript* (1981), at 295, 1671–73, 1680–84, 1851–52. (Delegate discussion showing that the right to privacy mostly focused on the government’s use of electronic surveillance).

issue of abortion be left to the Legislature.¹⁰ Under either mode of constitutional interpretation—the ratifiers’ understanding¹¹ or the Framers’ intent¹²—the conclusion is the same. In the period leading up to the ratification vote, the Constitutional Convention delegates (the Framers) and the media made repeated and widely distributed statements to the public (the eventual ratifiers) in newsletters, question and answer sessions, guest columns, and editorials that abortion would be an issue on which the Constitution was intentionally silent, to be resolved by the Legislature.¹³

¹⁰ *Id.* at 1640 (committee report favoring reservation of abortion to the Legislature).

¹¹ See *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117, 133 (2016) (the proper “inquiry seeks the meaning held by the voters themselves—not the drafters—since the voters enacted the constitution.”)

¹² *Crites v. Lewis & Clark Cnty.*, 2019 MT 161, ¶ 18, 396 Mont. 336, 444 P.3d 1025 (citations omitted.) (“The intent of the Framers controls this Court’s interpretation of a constitutional provision. . .”)

¹³ *Congratulations Con-Con Delegates*, GREAT FALLS TRIBUNE, Mar. 26, 1972, **attached as Appendix E** (“[The delegates] avoided mistakes convention delegates in other states made by including emotional and controversial issues such as abortion and aid to parochial schools.”) (emphasis added); Gerald J. Neely, *The Bill of Rights: Analysis*, CON CON NEWSLETTER, Mar. 10, 1972, at 7, **attached as Appendix F** (“The matters of consumer protection, environment, abortion, euthanasia, and right to work are not included in the proposed version [of the Bill of Rights].”) (emphasis added); *Delegates Seek Local Comments*, THE DAILY INTERLAKE, Feb. 8, 1972, **attached as Appendix G** (“In a question and answer session afterwards, the delegates solicited views on issues such as . . . capital punishment, abortion and welfare. The consensus again seemed to be the constitution should leave these issues to the legislature.”); *Attempt to Outlaw Abortions Fails*, LEWISTOWN DAILY NEWS, Mar. 8, 1972, **attached as Appendix H** (“Wade J. Dahood, R–Anaconda, said the [abortion] issue was legislative and thus did not belong in the constitution. Dahood is chairman of the Bill of Rights Committee.”); *Attempt to Outlaw Abortions Fails*, THE BILLINGS GAZETTE, Mar. 8, 1972, **attached as Appendix I**; *Abortion Issue*

Delegate Wade J. Dahood, chairman of the Bill of Rights Committee, made this explicitly clear in a guest column a week before the ratification vote, stating, “In fact the Bill of Rights Committee specifically refused to deal with the issue of abortion in any way. The question is for the legislature.”¹⁴ The *Armstrong* Court admitted as much. *Armstrong*, ¶ 44. But rather than end its analysis based on the Framers’ clear intent, the *Armstrong* Court determined an implied right to abortion existed because: (1) *Roe* resolved the legal question about a fetus not being a “constitutional person” until viability; (2) there was nothing in the constitutional debates preventing an interpretation of an implied right; (3) floor debates referenced *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); and (4) Montana’s “broad, yet undefined, concept of individual privacy.” *Id.* at ¶¶ 44–48. Now, in light of *Dobbs* overturning *Roe*’s rationale—pivotal to the *Armstrong* Court’s conclusion—the illusory foundation for propping up an implied constitutional right to abortion collapses. *Armstrong*, like *Roe*, was nothing more than an act of raw judicial power, unmoored from the text of the Montana Constitution itself, the intent of the constitutional delegates, and the understanding of the ratifiers. *Armstrong*’s effect

Flares, Fails in Con Con, GREAT FALLS TRIBUNE, Mar. 8, 1972, **attached as Appendix J**; *Letters to the Editor*, GALLATIN COUNTY TRIBUNE AND BELGRADE JOURNAL, May 25, 1972, **attached as Appendix K** (“In fact the Bill of Rights Committee specifically refused to deal with the issue of abortion in any way. The question is for the legislature.”)

¹⁴ *Dahood Defends New Constitution*, THE INDEPENDENT-RECORD, Jun. 1, 1972, **attached as Appendix L**.

was to “short-circuit[] the democratic process” by closing it to the large number of Montanans who dissented in any respect. *See Dobbs*, 597 U.S. at 269. It also severely restricted the State’s ability to regulate abortion, denying it a “legitimate presence [] or voice” on this issue. *Armstrong*, ¶ 59.

Moreover, both *Roe* and *Armstrong* suffer from the same untenable defect: rendering viability a judicially created arbitrary line without legal or medical justification. *Compare Armstrong*, ¶ 49 to *Dobbs*, 597 U.S. at 275–78.

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. One is the state of neonatal care at a particular point in time. [...] Viability also depends on the quality of the available medical facilities. [...] And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country? [...] In addition, as the Court once explained, viability is not really a hard-and-fast line. A physician determining a particular fetus’s odds of surviving outside the womb must consider a number of variables, including gestational age, fetal weight, a woman’s general health and nutrition, the quality of the available medical facilities, and other factors. [...] The viability line, which *Casey* termed *Roe*’s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

Dobbs, 597 U.S. at 275–78 (internal quotations omitted).

Dobbs must inform the determination of the constitutionality of the laws at issue because—more than just overturning *Roe* and *Casey*—*Dobbs* underscored Montana’s numerous legitimate interests in regulating abortion, chided courts for

“substitut[ing] their social and economic beliefs for the judgment of legislative bodies,” and urged a “respect for a legislature’s judgment [] even when the laws at issue concern matters of great social significance and moral substance.” *Dobbs*, 597 U.S. at 300. *Armstrong* is fatally dependent on *Roe*. Without *Roe*’s resolution of the core legal question regarding the constitutional protected status of a fetus based on the arbitrary viability standard, *Armstrong* crumbles. If a viability rule “makes no sense” at the federal level (*Dobbs*, 597 U.S. at 278), the same is true at the state level.

Armstrong, like *Roe*, was decided without a textual basis in the Montana Constitution or in Montana history. Abortion was criminalized in Montana from territorial days until *Roe*. The Constitutional Convention specifically and explicitly left the issue of abortion to the Legislature. The judiciary usurped that legislative prerogative in *Armstrong*, building on the cornerstone set by *Roe*. Now that its foundation has collapsed, this Court must reconcile the now defunct rationale of *Armstrong* with *Dobbs*. The viability framework and the many legitimate and compelling state interests *Dobbs* upholds, including eliminating particularly gruesome or barbaric medical procedures, mitigating fetal pain, and the “State’s interest in ‘the potentiality of human life’” bear weighty on the laws at issue here. *Id.* at 271 (quoting *Roe*, 410 U.S. at 164–65). The District Court erred in thoroughly disregarding *Dobbs*.

III. THE LAWS SERVE COMPELLING STATE INTERESTS AND ARE NARROWLY TAILORED TO ACHIEVE THOSE INTERESTS.

Alternatively, even under the current state of Montana law, the laws at issue pass constitutional muster. They are narrowly tailored to promote the State's compelling interests in respecting and preserving prenatal life, protecting maternal health and safety, minimizing fetal pain, upholding the integrity of the medical profession, and promoting fully informed consent. HB 136's post-20 week prohibition is narrowly tailored to address these compelling interests because it prohibits only the most gruesome and destructive acts against fetal life; prevents the unborn from experiencing pain in the final moments of its life at a gestational time when pain can be felt; and very narrowly impacts access to abortion by targeting a window of time in which few abortions occur.

House Bill 140 facilitates informed consent by ensuring that a pregnant woman considering abortion has the opportunity to view ultrasound images of her unborn child and to hear the fetus' heart tones. House Bill 171 promotes maternal health and safety when undergoing a chemical abortion by ensuring a pregnant woman receives an examination to confirm a uterine pregnancy and gestational age, and that she has access to a provider who can assist in the event of complications; and it facilitates informed consent by ensuring she is aware that she may be able to stop the process and continue her pregnancy if she changes her mind during the multi-day course of a chemical abortion.

A. HB 136 DOES NOT VIOLATE THE RIGHT TO PRIVACY.

HB 136's 20-week ban is a constitutional enactment. The State has a compelling interest in mitigating fetal pain. *Dobbs*, 597 U.S. at 301; *Thornburgh v. Am. Coll. of Ob. & Gyn.*, 476 U.S. 747, 778 (1986) (Stevens, J. concurring) (“I should think it obvious that the State’s interest in the protection of an embryo—even if that interest is defined as protecting those who will be citizens—increases progressively and dramatically as the organism’s capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.”) (internal quotations omitted); *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 280 (5th Cir. 2019) (Ho, J., concurring) (citation omitted) (*overruled on other grounds by Dobbs*, 597 U.S. 215 (“A State has an unquestionably legitimate (if not compelling) interest in preventing gratuitous pain to the unborn.”) “It would be surprising if the Constitution requires States to use execution methods that avoid causing unnecessary pain to convicted murderers, but does not even permit them from preventing abortions that cause unnecessary pain to unborn babies.” *Jackson Women’s Health Org.*, 945 F.3d at 280.

The District Court erred in ruling that “more” than fetal pain was needed to justify HB 136, disingenuously comparing the pain of childbirth to the pain of being

dismembered in the womb.¹⁵ (Doc. 153 at 7.) A law that prevents the pain of death by Sopher clamp is not “ideologically motivated legislation,” (*Id.*)—it is a lawful, reasonable intervention by the State to prevent a gruesome, bona fide health risk to an unborn child. *See Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Scalia, A., dissenting) (“The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off.”) (internal citation omitted).

There is no serious or substantial doubt that unborn children capable of life outside the womb experience pain reactions to stimuli that would evoke a similar response to those outside the womb. Moreover, any uncertainty about the full extent of an unborn child’s capacity for pain militates in favor of affirming the State’s legitimate interest in mitigating fetal pain. *Harrison v. Missoula*, 146 Mont. 420, 425, 407 P.2d 703, 706 (1965); *Gonzales v. Carhart*, 550 U.S. 124, 161–62 (2007)

¹⁵ (*See* Doc 118 at 7) (Abortions post-13 weeks require D&E procedure); *District of Columbia Pain-Capable Unborn Child Protection Act (H.R. 3803): Hearing Before the Subcomm. on the Constitution, Judiciary Committee, 112th Cong. 1–3* (2012) (Anthony Levatino, MD, JD testimony), available at <https://tinyurl.com/5n7wt7yr> (describing from personal experience performing D&E procedures and using a Sopher clamp to reach inside the womb to “tear out the spine, intestines, heart, [] lungs and limbs. The toughest part. . . is extracting the baby’s head, which is crushed until you see a white gelatinous material coming through the cervix. That was the baby’s brains.”)

("[S]tate and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

The State also has a compelling interest in protecting women's health and safety. *Weems v. State*, 2023 MT 82, ¶ 38, 412 Mont. 132, 529 P.3d 798; *Dobbs*, 597 U.S. at 301. It is uncontested that the larger an unborn child grows, the more difficult, risky, and physically traumatic a surgical abortion becomes for the mother. (Doc. 116, Ex. C at 70–71, 137–139.) An abortion at this stage of development requires dilation of a woman's cervix, anesthesia and/or sedation to minimize her pain during surgery, dismemberment of the fetus by tearing with forceps in utero and extraction of his body parts, and reassembly of those members outside the woman's body to ensure that no fetal body parts remain inside her body. (Doc 111.1, Ex. 12.)¹⁶ The State's expert opines that, "Beyond 21 weeks, around the cutoff for fetal viability, the risk of maternal mortality from D&E exceeds the risk from childbirth. CDC data further document that the risk of mortality increases by 38% for each week an abortion is performed beyond eight weeks, reaching a 15-fold increase early in the

¹⁶ Plaintiffs' Exhibit 12 explains D&E abortions on 16- to 20-week-old fetuses require slow dilation from "a few" to "48 hours" before analgesia, sedation, and/or anesthesia are administered. Then: [b]eyond 16 weeks, suction is not effective, and forceps are used to remove fetal parts. [...] Following the procedure, the provider examines the tissue to confirm that the evacuation was complete. [...] Ultrasonography is recommended so the physician can visualize the surgical instruments, locate fetal parts, and confirm an empty uterus. [...] Performing D&E procedures requires advanced training and/or experience.

second trimester, 30-fold increase in the mid-second trimester, and 76-fold after viability.”¹⁷ Further, the risks of future pregnancy complications increase. “Many statistically significant studies show a connection of abortion with preterm birth. One meta-analysis found that there was a 25 percent increased risk of premature birth in a subsequent pregnancy after one abortion, 32 percent after more than one, and 51 percent after more than two abortions. Another meta-analysis found a 35 percent increased risk of delivery of a very low birth weight infant after one abortion, and 72 percent after two or more abortions.”¹⁸ And “[i]nstrumental trauma to the endometrium may result in faulty placentation in subsequent pregnancies,” causing the placenta to “invade into the cervix, uterine wall, and other adjacent organs.”¹⁹ In 1950 the incidence of [Placenta Accreta Spectrum] was 1:30,000 deliveries but in 2016 the incidence was reported to be 1:272 deliveries. This 110-fold increase in incidence raises the risk of pregnancy-related mortality.”²⁰

Abortion carries with it inherent bona fide health risks to the mother. These risks increase in abortions occurring after 20 weeks’ gestation. A limit on such abortions is narrowly tailored to advance the State’s compelling interests in protecting maternal health and safety, and in minimizing the number of these

¹⁷ Expert Report of Ingrid Skop, p. 3 (Depo Ex. 65/F), **attached as Appendix M.**

¹⁸ App. M at 13.

¹⁹ *Id.*

²⁰ *Id.* at 14.

gruesome procedures because it only forecloses abortions occurring between 20 weeks and 21 weeks, 6 days—approximately 10 abortions per year. The impact to abortion access is minimal compared to the significant protections it provides. The District Court erred in concluding otherwise.

B. HB 136 DOES NOT IMPLICATE EQUAL PROTECTION.

The District Court likewise erred in finding an equal protection violation. “The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same.” *Powell*, ¶ 22. “Accordingly, a statute does not violate the right to equal protection simply because it benefits a particular class, as discrimination only exists when people in *similar circumstances* are treated unequally.” *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528 (citations and internal quotations omitted) (emphasis in original). “To identify similarly situated classes, we ‘isolate the factor allegedly subject to impermissible discrimination. Thus, two groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination.’” *Id.* at ¶ 16 (quotation omitted).

In *Mont. Cannabis Industry Association* (“*M CIA*”), this Court determined that (1) persons whose medical condition could be treated effectively with pharmaceutical drugs were not similarly situated to (2) persons whose medical condition could be treated solely or most effectively with marijuana. *M CIA v. State*,

2016 MT 44, ¶¶ 17–18, 382 Mont. 256, 368 P.3d 1131. “We decided that the single distinguishing factor—use of medical marijuana, a substance prohibited by federal law—was a fundamental difference that sufficiently distinguished the classes and rendered them dissimilar.” *Gazelka*, ¶ 19 (citing *MCIA*, ¶ 18). Here, the District Court found that the single distinguishing factor between those who choose abortion and birth is whether fetal pain is regulated—because fetal pain is only regulated for abortions, HB 136 violates equal protection. (Doc. 153 at 8.) Not did the District Court discount the fact that fetal pain is treated with pain medication during intrauterine surgeries (as described above), but is also ignores the glaring fact that fetal pain is not regulated during childbirth because the child is not being torn apart by the limbs and bleeding to death. There is, clearly, a fundamental difference between the pain created by Sopher clamp dismemberment versus any pain that might occur as a child passes through the vaginal canal. This difference—the difference between delivering life and administering death—sufficiently distinguishes the classes and renders them dissimilar.

Moreover, the *Armstrong* Court strained logic by relying on the false premise that the termination of a pre-viability pregnancy and choosing to carry a baby to full term are analogous, despite the obvious flaw that “abortion is a unique act because it terminates life or potential life,” far different from other private intimate acts in

one’s life. *Armstrong*, ¶ 49; *Dobbs*, 597 U.S. at 290 (internal quotations and citations omitted); *see also Roe*, 410 U.S. at 159 (abortion is “inherently different from marital intimacy,” “marriage,” or “procreation”). Abortion is not contraception. *Dobbs*, 597 U.S. 289–90 (rejecting a comparison to *Griswold*). Abortion is inherently incomparable to childbirth. Absent *Roe*, an unborn child capable of life enjoys the same constitutionally-protected status as a child born at full term—to hold differently would thus create the impermissible treatment of similar classes—both viable children—that the equal protection clause forbids.

C. HB 136 IS NOT VOID FOR VAGUENESS.

The District Court erred in finding that HB 136 was vague. This Court has adopted the federal vagueness standard: “The general rule is that a statute or ordinance is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.” *City of Choteau v. Joslyn*, 208 Mont. 499, 505, 678 P.2d 665, 668 (1984) (quotation omitted). “But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for ‘[i]n most English words and phrases there lurk uncertainties.’” *Rose v. Locke*, 423 U.S. 48, 49–50 (1975) (quotation omitted). “All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.” *Id.* “[A]

void for vagueness analysis has two elements: (1) actual notice to citizens; and (2) minimal guidelines to govern law enforcement.” *State v. Dixon*, 2000 MT 82, ¶ 27, 299 Mont. 165, 998 P.2d 544.

Numerous federal courts have rightly held that a “reasonable medical judgment” standard is not unconstitutionally vague. *See, e.g., Planned Parenthood of Ind. & Ky. v. Marion Cnty Prosecutor*, 7 F.4th 594, 601 (7th Cir. 2021) (“a reasonable medical judgment standard does not render a statute void for vagueness in the abortion-regulation context”); *Karlin v. Foust*, 188 F.3d 446, 468 (7th Cir. 1999) (upholding abortion law because “‘reasonable medical judgment’ standard is not void for vagueness”); *Christian Med. & Dental Assn. v. Bonta*, 2022 WL 18142547, at *12 (C.D. Cal. Sept. 2, 2022) (medical providers would understand “reasonable medical judgment” standard, such that it is not unconstitutionally vague); *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404, 1442 (M.D. Ala. 1998) (“reasonable medical judgment” standard did not render abortion law “per se vague”). This is because “reasonable medical judgment” creates an objective standard for doctors to determine whether the exception applies to a particular pregnancy complication.

The first element requires “determin[ing] whether the statute gives a person of ordinary intelligence fair notice that their contemplated conduct is forbidden.” *Dixon*, ¶ 28. Plaintiffs allege, and the District Court found, that HB 136 is vague

because it requires “a medical provider to exercise ‘reasonable medical judgment’ when performing abortions before obtaining a gestational age, or to avoid death or serious risk of harm to the patient.” (Doc. 153 at 8–9.) But “assessing the seriousness of a risk to a patient’s health and the necessity of immediate treatment is something that physicians are called upon to do routinely,” and such a requirement “does not render the medical emergency provision impermissibly vague.” *Karlin*, 188 F.3d at 464. Plaintiffs’ experts testified that physicians “make determinations about patients’ health risks all the time,” (Doc. 116, Ex. B at 81:10–11) can “make a determination that a person is more likely to suffer death or substantial physical impairment of a major bodily function,” (*id.* at 84) and make “recommendations based on risks of death, risks of injury, and risks of adverse outcomes of all kinds,” (Doc. 116, Ex. D at 35:14–16.) And while physicians may occasionally disagree “as to whether a specific situation rises to the level of posing a significant threat to a woman’s health sufficient to necessitate an immediate abortion, the fact that one physician would choose to perform the emergency abortion under those circumstances while others would not, does not necessarily mean the former physician is acting unreasonably.” *Id.* “Reasonable medical judgment” is a clear objective standard that has been repeatedly upheld.

On the second element, it must be “determined whether the law provides sufficient guidelines to prevent arbitrary and discriminatory enforcement.” *Dixon*, ¶

30. Pursuant to the criminal penalties section, “A person who purposely or knowingly performs or attempts to perform an abortion in violation of [section 3] is guilty of a felony punishable in accordance with 50-20-112.” (App. A at § 4.) As written, Section 4 contains a *mens rea* requirement. “The Court has made clear that scienter requirements alleviate vagueness concerns.” *Carhart*, 550 U.S. at 149 (citation omitted); *see also Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (“This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.”) “The scienter requirements narrow the scope of the Act’s prohibition and limit prosecutorial discretion. It cannot be said that the Act ‘vests virtually complete discretion in the hands of [law enforcement] to determine whether the [doctor] has satisfied [its provisions].’” *Id.* at 150 (quotation omitted).

Similarly, HB 136’s *mens rea* requirement restrains law enforcement from engaging in arbitrary enforcement. And in any case, Plaintiffs’ arguments are speculative—HB 136 has never been enforced. *See id.* at 150 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982)) (“Respondents’ arguments concerning arbitrary enforcement, furthermore, are somewhat speculative. This is a pre-enforcement challenge, where ‘no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a

discriminatory manner or with the aim of inhibiting [constitutionally protected conduct].”). HB 136 is not vague.

D. HB 140 DOES NOT VIOLATE THE RIGHT TO PRIVACY.

Plaintiffs’ assertion that there is “no medical reason for offering an abortion patient the opportunity to listen to fetal cardiac activity” (Doc. 111, SUMF at ¶ 30) is wrong: voluntary informed consent is vital to any non-emergency medical procedure to avoid a battery. *See NIFLA*, 138 S. Ct. at 2373. By ensuring that a woman considering abortion has an opportunity to view an ultrasound image and to hear for herself the beating heart of her developing fetus, HB 140 advances the State’s interest in ensuring her access to information that may affect her choice to terminate or continue her pregnancy. By presenting these options—which she is free to decline—HB 140 ensures the pregnant woman understands the nature (*i.e.*, the extent of fetal development and what will be “terminated”) of the abortion procedure she is contemplating.

Informed consent is not a new concept in medicine or law. The gist of the ‘informed consent’ theory of liability is that a physician is under a duty in some circumstances to warn his patient of known risks of proposed treatment so that the patient will be in a position to make an intelligent decision as to whether he will submit to such treatment. *Doerr v. Movius*, 154 Mont. 346, 349, 463 P.2d 477, 478–479 (1970) (quotation omitted). HB 140 preserves the woman’s right to privacy by

giving her the option of additional information about her decision to obtain an abortion to ensure the woman can make an intelligent decision. Offering an ultrasound and a fetal heart tone gives the woman a choice of medical treatment—part of the right to privacy under *Armstrong*.

This Court has recognized that, “Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one’s bodily integrity and health.” *Armstrong*, ¶ 53. In the context of “informed consent” cases, Montana, too, has recognized that each individual is the sovereign of his or her own body. *Id.* at ¶ 57 (citation omitted). Because a woman is the sovereign of her own body, when seeking an abortion (or any other medical procedure), she has the right to all the information necessary to put her in “a position to make an intelligent decision about whether [s]he will submit to such treatment,” which this Court has recognized is necessary for fully informed consent. This means the woman seeking an abortion has the right to know what is occurring inside her body—hence the offer of an ultrasound and a fetal heart tone—to fully understand and choose her medical procedure.

The District Court erred in ruling that HB 140 “infringes the right to privacy by requiring providers to offer medical interventions which may violate their own best judgment, without basis in generally-accepted medical consensus, and potentially stigmatizes patients in the process.” (Doc. 153 at 15). Rather, HB 140

complements the right to privacy by offering a woman more information to ensure informed consent and the ability to make an intelligent decision about her medical treatment. Moreover, ultrasounds can detect and rule out dangerous conditions such as an ectopic pregnancy, as well as confirm gestational age to determine whether a medication abortion or D&E abortion is appropriate.

HB 140 requires the *offer* of an ultrasound and fetal heart tone. It does not require a specific treatment. Such offers are commonplace in medicine. For example, a patient with a back injury would likely be offered an MRI prior to any procedure to treat the injury. A patient with a kidney infection would also likely be offered a urine test or other preliminary tests prior to any medical treatment for the infection. In all of these cases, the offer prior to treatment is an offer for more information to ensure the patient is in a position to make an intelligent decision about his or her medical treatment. Informed consent is a medical purpose that is furthered by HB 140. HB 140 does not violate the right to privacy; HB 140 enhances and protects the right to privacy.

E. HB 140 DOES NOT VIOLATE SPEECH PROTECTIONS.

HB 140 does not violate constitutional speech protections any more than other preliminary scans for other medical procedures, such as the MRI or urine test described above. Kentucky had a similar law to HB 140 that was challenged on similar grounds. The 6th Circuit found:

...H.B. 2 provides relevant information. The information conveyed by an ultrasound image, its description, and the audible beating fetal heart gives a patient greater knowledge of the unborn life inside her. This also inherently provides the patient with more knowledge about the effect of an abortion procedure: it shows her what, or whom, she is consenting to terminate. That this information might persuade a woman to change her mind does not render it suspect under the First Amendment.

EMW Women’s Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 430 (6th Cir. 2019).

Additionally, a similar challenge in Texas led the 5th Circuit to conclude:

[I]nformed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures...such laws are part of the state’s reasonable regulation of medical practice and do not fall under the rubric of compelling “ideological” speech that triggers First Amendment strict scrutiny.

Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012). Like these regulations, HB 140 is an informed consent law that does not violate free speech principles.

F. HB 171 IS LIKEWISE CONSTITUTIONAL.

As with HB 136 and HB 140, the Legislature enacted HB 171 to address legitimate state interests. In the main, HB 171 requires of healthcare providers little more than what the U.S. Food and Drug Administration (“FDA”) requires of them to distribute mifepristone. The FDA imposed several risk mitigation strategies as conditions of its approval of mifepristone because a chemical abortion always involves a significant risk of serious complications that may require emergency

medical treatment or surgical intervention. The unique obligations imposed on healthcare providers by HB 171 are the rational efforts by the Legislature to minimize interference with a pregnant mother's rights while promoting respect for and maximizing opportunities to preserve the unborn life within her *in a process designed to end that unborn life*—a consideration that is not present in any other medical procedure. Further, HB 171 is rationally designed to guard against coercion or pressure on a pregnant woman from her parents, the unborn child's father, or others to have an abortion she does not want. In addition, the process of a chemical abortion takes multiple days, during which many women have changed their minds and sought to continue their pregnancies. The Legislature has rationally acted to ensure these women know that treatments that might stop the effects of mifepristone are available to them. Finally, it cannot be said that HB 171's credentialing and reporting requirements are an undue burden on Plaintiffs when Plaintiffs acknowledge that they already have similar credential requirements and already report their abortions to DPHHS.

CONCLUSION

For these reasons, this Court should reverse the District Court's summary judgment award and remand for a trial on the merits on all three bills.

RESPECTFULLY SUBMITTED this 29th day of May, 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 9,633 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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