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 parents,

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

BRIEF OF *AMICI CURIAE* THE CENTER FOR REPRODUCTIVE RIGHTS AND ACLU OF MONTANA FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Kurt Krueger Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTEREST OF AMICI CURIAE

The Center for Reproductive Rights ("the Center") and the ACLU of Montana Foundation, Inc. ("ACLU-MT") (together, "Amici") respectfully submit this brief as amici curiae in support of Plaintiffs-Appellees. ACLU-MT supports and protects civil liberties in the State of Montana and has a long history of advocating in support of the robust privacy protections guaranteed by the Montana Constitution, including in *Weems v. State by & through Knudsen*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798.

The Center has been involved in nearly all major litigation in the U.S. concerning reproductive rights, in the U.S. Supreme Court and several state supreme courts. Among others, the Center was lead counsel defending the right to abortion under the U.S. Constitution in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). And in Montana, the Center represented the successful plaintiffs as lead counsel in *Weems*, and in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

Amici believe their collective expertise on personal autonomy rights and their national and state level perspectives on the legal issues implicated in this matter will assist the Court's decision-making.

SUMMARY OF THE ARGUMENT

Armstrong correctly held that the explicit right to privacy in Article II, Section 10 of the Montana Constitution protects procreative autonomy, including the right

to abortion. *Id.* ¶ 14 The State now asks this Court to abandon *Armstrong* in favor of the U.S. Supreme Court's reasoning and analysis in *Dobbs*, which overturned nearly 50 years of federal precedent recognizing a liberty right to abortion. There is no serious argument that *Dobbs*'s flawed interpretation of a federal constitutional provision that predates Montana's privacy clause by more than 100 years, lacks explicit reference to privacy, and reflects nothing about Montana's unique history and circumstances, could somehow undermine *Armstrong*. Montana is among the many states whose high courts have repeatedly recognized state constitutional protections for reproductive autonomy that exceed federal protections, both before and after *Dobbs*. These courts have rejected a retrograde constitutional analysis that would freeze rights based on their past limitations. Montana's constitutional tradition recognizes that the state's privacy rights were intended to be expansive, covering new applications and disallowing old violations. Any departure would have no basis in law.

Armstrong joins *Gryczan v. State* (1997), 283 Mont. 433, 455, 942 P.2d 112, which first recognized the autonomy component of personal decision-making, to form the precedential cornerstones for Montana's right to privacy. Expansive privacy rights have been critical for 2S-LGBTQIA+ people challenging laws that target them for discrimination, harassment and violence, as well as for people seeking to end a pregnancy. Displacing *Armstrong* with *Dobbs* would threaten to

unravel privacy protections beyond abortion, to the detriment of already vulnerable individuals and communities in Montana. This Court should affirm *Armstrong*'s validity and continue to interpret privacy rights in Montana in a broad and robust manner that allows their full force and effect.

ARGUMENT

I. *Dobbs*'s Retrograde Federal Analysis Does Nothing to Undermine *Armstrong*'s Expansive Protections for Personal Autonomy Under the Montana Constitution

In 1999, this Court unanimously decided *Armstrong*, holding that the explicit right to privacy in Article II, Section 10 of the Montana Constitution protects a right to abortion. ¶ 14. Over two decades later, a divided U.S. Supreme Court reversed nearly 50 years of precedent and held that the Fourteenth Amendment's liberty guarantee does not protect a right to abortion. *Dobbs*, 597 U.S. at 231. The State now asks this Court to abandon *Armstrong* in favor of *Dobbs*. But to read the Montana Constitution in parallel with the U.S. Constitution would be to "rewrite [it] without benefit of a constitutional convention and to deprive the people of [the] state of additional rights, which they adopted in [a] constitutional convention, without their consent." *State v. Smith*, 814 P.2d 652, 661 (Wash. 1991) (Utter, J., concurring). *Dobbs* does nothing to undermine *Armstrong*'s forward-looking development of intentionally broad constitutional concepts including personal autonomy under the Montana Constitution.

In *Dobbs*, the U.S. Supreme Court relied on a test that defined the scope of the Fourteenth Amendment's Due Process liberty based on rights "'deeply rooted in this Nation's history and tradition.'" *Dobbs*, 597 U.S. at 231 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Adopting a crushingly narrow reading of history and tradition, *Dobbs* looked to Anglo-American common law reaching back to the 13th Century, and to statutory law in 1868 when the Fourteenth Amendment was ratified. Concluding that the majority of states banned abortion in 1868, it held that abortion could not be a fundamental liberty right that the present-day Constitution protects. *Dobbs* explicitly refused to consider historical evidence about the nativist and sexist reasons abortion bans were enacted. *See id*. at 253–54. *Dobbs* also declined to account for the actual experiences of people seeking abortion, overlooking the fact that abortion in early pregnancy was legal and common through much of American history, and rarely punished even when formally outlawed.[1] And *Dobbs* did not even consider the contemporaneous meaning of "liberty" to those who drafted and ratified the Fourteenth Amendment, ignoring whether it was meant to be broad or narrow, fixed or evolving, and how people of the day understood its relationship to bodily autonomy.

[1] *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1184 & n.216 (2022). *See also Planned Parenthood Association of Utah v. State*, 2024 UT 28, ¶ 127 (rejecting historical analysis that focuses narrowly on formal law, in particular what it historically criminalized, because "[f]ailure to distinguish between principles and [historical] application of those principles would hold constitutional protections hostage to the prejudices of the 1890s.").

Dobbs's retrograde method freezes the contours of liberty based on their historical limitations. It shuts the U.S. Constitution's doors to those who lacked any semblance of equal or adequate legal protection in 1868—among them women, 2S-LGBTQIA+ people, immigrants, and people of color. It would similarly reject rights unrecognized by formal laws of the past for any group, including rights to contraception, personal intimacy, and decision-making about one's health.

That flawed approach stands in stark contrast to *Armstrong,* in which this court held that the Montana Constitution's explicit privacy clause protects a right to procreative autonomy that includes abortion. ¶ 75. *Armstrong* credited the history of the Montana Constitutional Convention, including delegates' intent to enact expansive and evolving rights. *See id*. at ¶¶ 29–38; *see also id.* at ¶ 45 (abortion rights are necessarily protected "given the delegates' specific determination to adopt a broad and undefined right of individual privacy grounded in Montana's historical tradition of protecting personal autonomy and dignity"). It furthermore sought to extend protections to marginalized groups, holding that the right to privacy must be interpreted "as broad[ly] as . . . the State's ever innovative attempts to dictate in matter of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular." *Id*. at ¶ 38. At its core is the recognition that the right to privacy is without "final boundaries," *id.*, but instead evolves to

resist government intrusions on private life, some of which may have existed for decades or centuries before their repugnance became clear.

This Court should continue to abide by the enduring constitutional principles articulated in the 1972 Convention and reject the State's specious argument that *Dobbs* requires any changes to settled state law.

II. This and Other State High Courts Have Long Recognized Personal Autonomy Protections that Exceed Federal Precedent

A. This Court has consistently interpreted its Constitution to be more protective than the federal Constitution

Armstrong stated unequivocally that the Montana Constitution's privacy protections exceed those contained in the federal Constitution. "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." ¶ 34. The enhanced force of Montana's privacy rights is a defining, repeatedly affirmed feature of the state's constitutional doctrine. *See, e.g.*, *State v. Goetz*, 2008 MT 296, ¶ 22, 345 Mont. 421, 191 P.3d 489 (stating "without equivocation that the Montana Constitution expressly provides more privacy protection than that inferred from the United States Constitution"); *State v. Peoples*, 2022 MT 4, ¶ 13, 407 Mont. 84, 502 P.3d 129 (the Montana Constitution "grants an express right to individual privacy" and "provides greater protection, where implicated, than the Fourth Amendment" (citation omitted)); *Weems v. State by & through Knudsen*, 2023 MT 82, ¶ 35, 412

Mont. 132, 529 P.3d 798 ("Independently of the federal constitution, when the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than the federal constitution.").

The State cites no authority for why *Dobbs* should displace *Armstrong*. And it cannot, because this Court has repeatedly declined to follow federal precedent when it insufficiently protects rights that are fundamental in Montana. Even before *Dobbs*, *Armstrong* rejected the U.S. Supreme Court's weaker "undue burden" standard for evaluating abortion restrictions from *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), in favor of strict scrutiny. ¶ 41 ("Article II, Section 10, requires more than that the State simply not impose an undue burden on a person's exercise of his or her right of individual privacy."). *Gryczan*, another seminal privacy case discussed in detail below, was decided against the backdrop of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the U.S. Supreme Court upheld a Georgia state law criminalizing acts of sexual intimacy between consenting partners. *Gryczan* held that "[r]egardless of whether *Bowers* was correctly decided, we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution." 283 Mont. at 448. *See also State v. Johnson* (1986), 221 Mont. 503, 719 P.2d 1248 ("We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights

under our state constitution." (quoting *Butte Cmty. Union v. Lewis* (1986), 219 Mont. 426, 433, 712 P.2d 1309)), *overruled on other grounds by State v. Buck*, 2006 MT 81, 331 Mont. 517, 134 P.3d 53.

Indeed, in *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 21, 416 Mont. 44, 545 P.3d 1074, a recent case addressing voting rights, this Court noted flux in the U.S. Supreme Court's abortion precedent and rejected the State's request that it follow suit:

> Implicit rights embedded in the United States Constitution are subject to expansion or contraction. *See, e.g.*, *Roe v. Wade,* 410 U.S. 113 (1973); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). And even when the United States and Montana Constitutions have "nearly identical" express language we can—and have—broken with United States Supreme Court precedent on independent state constitutional grounds when that Court has changed the protections afforded under the United States Constitution.

This point has even more force when the Montana and U.S. Constitutions have *different* language, as is the case with Montana's explicit privacy clause. And this Court foreclosed any argument that *Dobbs* undermined *Armstrong*, when nearly two years after *Dobbs*, it affirmed and applied *Amstrong* to strike down a law that restricted from whom pregnant people could access abortion care. *Weems*, ¶ 35.

The State's argument that *Dobbs* should displace *Armstrong* is nothing but the latest and weakest version of its evolving attack on Montana's legacy of robust protections for procreative autonomy. Any alteration of Montana's steadfast commitment to enhanced privacy protections would have no basis in law and would

flout this Court's longstanding jurisprudence of strongly recognizing personal rights including and beyond abortion.

B. Other state high courts have recognized robust, independent protections for reproductive autonomy that reject federal doctrine before and after *Dobbs*

Armstrong is in good company. For decades, state high courts across the country have independently interpreted their unique constitutions to protect abortion, rejecting that they should follow federal standards or reasoning.

In a foundational opinion for state privacy jurisprudence, the Alaska Supreme Court held that its constitution's express privacy clause protects the right to abortion. *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) ("[R]eproductive rights are . . . encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. . . . These fundamental reproductive rights include the right to an abortion."). *Mat-Su* was decided in 1997, after the U.S. Supreme Court had abandoned strict scrutiny in favor of *Casey*'s weakened "undue burden" standard. But the Alaska court declined to adopt "the narrower" standard "promulgated in . . . *Casey*." *Id*. It instead specified a strict scrutiny test, noting that the "express privacy provision was adopted by the people in 1972 [and] provides more protection of individual privacy rights than the United States Constitution." *Id*. at 968. Subsequent decisions from the Alaska Supreme Court affirmed that the right to privacy encompasses personal decision-making

without government interference, including the right to choose abortion. *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 39–41 (Alaska 2001); *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581–82 (Alaska 2007).

Much like in Montana and Alaska, the people of California in 1972 voted to include an express right to privacy in their constitution, and the California state courts have given it robust effect. *See Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 784, 798 (Cal. 1981). Deciding that the state's public insurance program for low-income people could not exclude abortion, the California Supreme Court held that abortion is part of the "constitutional right of procreative choice" included in the right to privacy, as it is "essential to [the pregnant person's] ability to retain personal control over her own body." *Id.* at 784, 792. More than 15 years later, in *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 800, 813 (Cal. 1997), the California Supreme Court struck down another abortion restriction as a violation of the state constitutional right to privacy. By this time, the U.S. Court had adopted *Casey*'s undue burden standard. But the California court declined to follow suit, stressing the state's unique commitment to privacy requires strict scrutiny. *Id*. at 823–29.

Other state high courts have held that inclusive and flexible provisions in their constitutions protect reproductive autonomy more strongly than the federal constitution, even in the absence of an express privacy clause. In striking down a

ban on the most common second trimester abortion procedure, the Kansas Supreme Court held that the Kansas Constitution protects the right to choose abortion as "an inalienable natural right." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019). It rejected the state's argument that the Kansas Constitution's drafters did not intend for natural rights to include abortion, holding that "[t]he historical record overwhelmingly shows an intent to broadly and robustly protect natural rights and to impose limitations on governmental intrusion into an individual's rights." *Id.* at 471. *Hodes* explicitly rejected the federal undue burden standard then in effect in favor of strict scrutiny, noting the court's "obligation to protect (1) the intent of the [constitutional convention] delegation and voters who ratified the Constitution and (2) the inalienable natural rights of all Kansans today." *Id.* at 496.

After *Dobbs*, the Kansas Supreme Court affirmed that *Dobbs*'s interpretation of the federal constitution "do[es] not control or even bring into question our interpretation of the Kansas Constitution Bill of Rights." *Hodes & Nauser, MDs, P.A. v. Kobach*, 551 P.3d 37, 45 (Kan. 2024). *See also Hodes & Nauser, MDs, P.A. v. Stanek*, 551 P.3d 62, 77 (Kan. 2024) (affirming the pre-*Dobbs* holding that "the inalienable natural right of personal autonomy under section 1 of the Kansas Constitution Bill of Rights allows a woman to make her own decisions regarding whether to have an abortion.").

Going back decades, other courts have similarly recognized that the federal precedent protecting abortion is inadequate and their state constitutions confer rights that protect personal decision-making and autonomy more strongly.[2] And in the wake of *Dobbs*, additional state high courts have for the first time interpreted their unique constitutions to effectuate meaningful protections for abortion access that diverge from the U.S. Supreme Court. In *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A.3d 808 (Pa. 2024), the Supreme Court of Pennsylvania evaluated a challenge to a restriction on state Medicaid funding for abortion under the state constitution's equal rights amendment and equal protection provisions, overturning an earlier decision that had upheld the same restriction in part by borrowing the U.S. Supreme Court's reasoning and analysis. Noting that the federal constitution has no textual equivalents, the Pennsylvania court held that because of the unique text, history, case law, and policy environment in the state, it was not bound to follow federal precedent. *Id.* at 925.

State high courts in North Dakota and Oklahoma have also interpreted their constitutions to protect critical aspects of abortion rights and access after *Dobbs*. The

[2] *Women of State v. Gomez*, 542 N.W.2d 17, 19, 26, 29–30 (Minn. 1995) (holding that several provisions of the Minnesota Constitution protect a broad range of privacy rights subject to strict scrutiny, for reasons including "the inadequacy we find in the federal status quo."); *see also Right to Choose v. Byrne*, 450 A.2d 925, 931–33 (N.J. 1982) (finding "expansive" language in the state constitution protects rights that are "implicit," and "[a]lthough the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete"); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 397–400 (Mass. 1981) (locating a right to abortion in the implicit right to privacy guaranteed by the state constitution's due process provision, noting that "our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution [as interpreted by the U.S. Supreme Court.]").

North Dakota Supreme Court relied on unique constitutional language to hold that the state constitution protects a fundamental right to abortion in situations where a patient's life or health is threatened, subject to strict scrutiny. *Wrigley v. Romanick*, 988 N.W.2d 231, 245 (N.D. 2023) ("The North Dakota Constitution guarantees North Dakota citizens the right to enjoy and defend life and the right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health."). The Oklahoma Supreme Court similarly held that the state constitution's inherent rights and due process clauses protect a right to abortion to preserve life defined broadly, rejecting that the right is limited to when threat to life is imminent or certain. *Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023). The court noted that while *Dobbs* foreclosed a right to abortion under the federal constitution and applied deferential rational basis, it would instead adopt strict scrutiny, writing that "here, we are concerned with an inherent right to terminate a pregnancy to preserve the woman's life which is protected under the Oklahoma Constitution." *Id.* at 1130. Although these decisions did not rule on broader protections for abortion, they chart a course of independent interpretation based on state courts' obligation to give unique constitutional provisions due effect.

In contrast, some state high courts have chosen to march in lockstep with the Supreme Court after *Dobbs*.[3] In doing so, unlike this Court, they deny that their unique constitutions protect abortion rights, sometime trampling decades of precedent. In each of these states, the courts applied interpretive methods that mirrored *Dobbs*'s narrow focus on history and tradition, rigid textualism that excludes unenumerated rights, and denial that even explicit rights can be expansively protected in ways that change over time. Montana's constitutional tradition disallows that approach.[4] And in each of these states, the decisions allowed total or near-total bans on abortion to take effect, wrenching away from millions the autonomy to make their own decisions about procreation and bodily integrity. Montana's constitutional commitment to heighted privacy and robust protections for individual rights where federal law falls short cannot allow that outcome.

III. Undermining *Armstrong* Would Threaten to Unravel Privacy Protections Beyond the Sphere of Reproductive Rights, to the Detriment of Already Vulnerable Montanans.

By asking this Court to supplant *Armstrong* with *Dobbs*, the State seeks to undo a far broader swathe of the interwoven personal rights that Montana's robust

[3] *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1148 (Idaho 2023) (rejecting that the alienable rights clause protects abortion because abortion was not "deeply rooted" when it was adopted); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 9 N.W.3d 37, 49–50 (Iowa 2024). Brazenly, the Florida Supreme Court overturned 35 years of precedent holding that the state constitution's explicit right to privacy protected abortion, asserting that it had previously "rel[ied] on reasoning the U.S. Supreme Court has rejected [in *Dobbs*]" and had been wrong to look beyond "the supremacy-of-text principle." *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 71, 77 (Fla. 2024). *See also Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121 (S.C. 2023).

[4] Indeed, one justice in South Carolina explicitly contrasted that state's privacy provision with Montana's, noting that the Montana delegates specifically intended for the privacy right to be expansive. *Planned Parenthood S. Atl.*, 882 S.E.2d at 849 (James, J. concurring in part).

privacy guarantee now provides. Doing so would leave a gaping hole in the state's constitutional jurisprudence and lessen protections for many already marginalized groups and individuals. Although *Armstrong* specifically concerned abortion, the Court made clear that its holding applied beyond the procreative-autonomy context. In particular, it expanded on *Gryczan*, Montana's seminal case identifying the personal autonomy component of the right to privacy in striking down a restriction targeting same-sex intimacy 283 Mont. at 451, 455. *Gryzcan* and *Armstrong* inextricably establish the privacy rights that enable individuals to challenge laws that subject them to discrimination, harassment, and violence around the most intimate personal decisions.

Gryczan held that all adults have a right to privacy in non-commercial, consensual sexual conduct—regardless of whether dominant values approve of such conduct. *Gryczan*, relying on the transcripts from the 1972 Montana Constitutional Convention and providing extensive historical context, determined that the "separate textual protection" for an individual's right to privacy "in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Id.* at 451, 455. *Gryczan* furthermore contemplated the expansive evolution of privacy rights to provide Montanans with continued protection from governmental intrusion. *Id.* at 447–49. Building on *Gryzcan*, *Armstrong* made clear that beyond protecting relationships and private

conduct in non-public settings, "the personal autonomy component of this right broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." ¶¶ 35, 75.

By developing *Gryczan*'s core premise, *Armstrong* broadened avenues for individuals to challenge discriminatory state action and "excessive governmental interference in their personal lives." *See Gryczan*, 283 Mont. at 455. 2S-LGTBQIA+ individuals in particular have faced ceaseless interference as evidenced by the slew of anti-transgender laws and referendums that the Montana State Legislature has proposed in recent years, forcing trans people to rely on personal autonomy rights to exercise the most basic freedoms, such as use of public facilities, possessing state identity documents, and receiving essential health care. Many transgender individuals suffer from the serious medical condition of gender dysphoria, treatment for which entails living one's life consistently with one's gender identity, and when indicated, receiving medical treatment from a qualified provider. But Montana and other states have sought to impede or ban medically indicated treatment for political ends. *Armstrong*'s extension of the right to privacy to protect medical treatment and decisions between a treating provider and an individual has critical force in this context. As *Armstrong* held, "legal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods

and procedures of science and in the collective professional judgment, knowledge and experience of the medical community." ¶ 62.

In *van Garderen v. State*, a Missoula District Court recently granted a preliminary injunction against SB 99, a bill restricting access to gender affirming care for transgender youth. Order Granting Pls.' Mot. for Prelim. Inj. at 2, 47, *van Garderen v. State*, No. DV-23-541 (Mont. 4th Jud. Dist. Ct., Missoula Cty., Sept. 27, 2023). The plaintiffs, including transgender young people and health care providers, asserted that the law violated young peoples' right to privacy by limiting their ability to make medical decisions and intruding on their relationship with their health care providers. *Id.* at 16. The court noted that the standard from *Armstrong* controlled—namely "[e]xcept in the face of a medically-acknowledged, *bonafide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a healthcare provider." *Id.* at 38 (quoting *Armstrong*, ¶ 62). Applying this standard and finding that the State had not demonstrated a bonafide health risk, the court held that the plaintiffs were likely to succeed on the merits of their privacy claim.

Transgender individuals have relied on *Armstrong* in multiple other challenges to laws to vindicate their rights to private and medical decision-making. For instance, plaintiffs challenged a restriction that made it nearly impossible for a

transgender person to correct their Montana birth certificate's sex designation by mandating onerous proof of compliance with a vague surgery requirement, irrespective of need, want, or feasibility. Complaint, *Marquez v. State*, No. DV-21-873 (Mont. 13th Jud. Dist. Court, Yellowstone Cty., Jan. 16, 2021); *see also* S.B. 280, 67th Leg. Reg. Sess. (Mont. 2021). The challengers contended that under *Armstrong*, the State could not dictate what medical procedures are appropriate to bring a person's body in line with their gender identity, nor could it coerce them into surgery in exchange for an accurate identity document. *Id.* 13–17. The law was permanently enjoined as unconstitutional. Order Granting Pls.' Mot. for Summ. J. at 19, *Marquez*, No. DV-21-873 (June 26, 2023) .[5]

And in *Hobaugh v. State*, plaintiffs including transgender Montanans challenged the constitutionality of the anti-LGBTQIA I-183 ballot initiative, which sought to prohibit transgender and gender-nonconforming Montanans from using public facilities that correspond with their gender identity. Compl. for Declaratory & Inj. Relief at 2-3, 6-7, *Hobaugh, et al. v. State*, No. CDV-17-0673 (Mont. 8th Jud. Dist. Ct., Cascade Cty., Oct. 17, 2017). To comply with I-183, transgender individuals would have had to ignore the private medical counsel of their doctors,

[5] Following *Marquez*, in February 2023 the Department of Health and Human Services adopted a new rule categorically preventing transgender Montanans from obtaining birth-certificate amendments that reflect the sex they know themselves to be. The ACLU and partners challenged the rule on several grounds including the right to privacy, with litigation ongoing. Compl. for Declaratory & Inj. Relief, No. DV-25-2024-0000261, *Kalarchik v. State*, (Mont. 1st Jud. Dist. Court, Lewis & Clark Cty., Apr. 18, 2024).

not to mention unwillingly "out" themselves as transgender every time they needed to use a public facility. While litigation ended when the initiative failed to qualify for the ballot, plaintiffs relied on *Armstrong* to bring both personal and informational autonomy claims that when and where to use a bathroom or public facility must be a private decision free from government intrusion.[6]

Abandoning *Armstrong* in favor of *Dobbs* would enable brazen attempts to dictate private matters through laws that unconstitutionally infringe upon personal autonomy, including but in no way limited to abortion. *Gryczan* and *Armstrong* are inextricably linked in rejecting such attempts. Individually and together, they hold that to fully exercise personal autonomy and self-determination, individuals must retain the right to make certain choices without State interference, especially those related to the most personal and intimate decisions, such as sexual partnership and medical treatment. In stark contrast, *Dobb*'s approach would reject any right that formal law of the past denied, with devastating consequence for women, 2S-LGBTQIA+ people, and others who were historically excluded. This Court should uphold *Armstrong* to ensure that individuals, in particular members of marginalized communities, remain protected from ever-expanding state overreach into the most intimate and private zones of their lives.

[6] This Court did not have the opportunity to reach the merits of the privacy claim, after it rejected the sufficiency of the statement and note accompanying the proposed initiative. The proponents then failed to reacquire enough signatures for the initiative to proceed to the ballot. See American Civil Liberties Union, *Hobaugh v. Montana* (Oct. 17, 2017), https://www.aclu.org/cases/hobaugh-v-montana.

CONCLUSION

Armstrong is fully grounded in Montana's unique constitutional text, history, and decades of precedent recognizing an expansive right to privacy that was not meant to be frozen in time. Montana's protections for abortion have always exceeded federal protections, and *Dobbs*'s regressive approach cannot amend privacy rights in the state as adopted by the people and applied by the courts. This Court should affirm *Armstrong*'s validity and continue to interpret Montana's privacy guarantee to broadly and robustly protect personal autonomy including the right to choose abortion.

Respectfully submitted this 12th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that the foregoing brief is printed with proportionately-spaced Times New Roman typeface in 14-point font; is double spaced except for lengthy quotations or footnotes, and the word count calculated by the word processing software does not exceed 4,868 words, excluding the cover page, tables, and certificates.

Dated: August 12, 2024

/s/ Alex Rate
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CERTIFICATE OF SERVICE

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Representing: Montana Constitutional Convention
Delegates and Research Staff

Electronically signed by Krystel Pickens on behalf of Alex Rate
Dated: August 12, 2024

CERTIFICATE OF SERVICE

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