IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 26-0056

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

Plaintiffs, Appellees and Cross-Appellants,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, the MONTANA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services,

Defendants, Appellants and Cross-Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County Cause No. ADV-2023-231
The Honorable Mike Menahan, Presiding

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STATEMENT OF ISSUES

1. Whether Abortionists lack standing to challenge HB 575 because they do not perform abortions on viable or near-viable unborn children and thus suffer no injury from the statute's ultrasound requirement under its proper interpretation.

2. Whether HB 575 is facially constitutional under Article II, Section 10 of the Montana Constitution when properly interpreted to limit its ultrasound requirement to viability determinations at or near the 24-week threshold.

3. Whether the district court improperly granted summary judgment on HB 721 in the presence of genuine issues of material fact regarding psychological health risks and whether causing fetal demise prior to the procedure would alleviate the risks.

4. Whether the district court erred in awarding attorney fees under Montana Code Annotated § 25-10-711 by finding that the State pursued its defense in bad faith.

STATEMENT OF THE CASE

Planned Parenthood of Montana ("PPMT") and Samuel Dickman, M.D. (collectively, "Abortionists"), challenge two laws—House Bill 575

(2023) ("HB 575") and House Bill 721 (2023) ("HB 721")—alleging those provisions violate their patients' rights to privacy, individual dignity, and seeking health under the Montana Constitution. They named Appellants State of Montana, Montana Department of Health and Human Service ("DPHHS"), and Charlie Brereton, in his official capacity as Director of DPHHS (collectively, "the State") as defendants.

HB 575 and HB 721 protect unborn children and mothers from abortions that pose risks to both. HB 575 prohibits post-viability abortions except to preserve the mother's life and defines the process to determine viability (presumed at 24 weeks) through a required ultrasound. HB 721 bans dilation and evacuation ("D&E") (dismemberment) abortions to living children except in medical emergencies.

Much of the procedural history of this case, from its inception on March 11, 2023, to the determination affirming the district court's preliminary injunction on October 9, 2024, is well known to this Court. *Planned Parenthood of Montana v. State*, 2024 MT 227, ¶¶ 7–9, 43, 418 Mont. 226, 557 P.3d 471 ("*PPMT I*"). But a limited portion of the timeline bears repeating.

Abortionists initially challenged just HB 721, but the district court denied the requested preliminary injunction ("PI") and temporary restraining order ("TRO") because the Governor had not signed that bill into law. The State immediately sought dismissal of the premature lawsuit against HB 721. (Docs. 12–13, 29–30.) A few weeks later, Abortionists filed an amended complaint on May 3—the same day the Governor signed HB 575 into law. This amended complaint incorporated new allegations of unconstitutionality against HB 575. (Doc. 22.) The Governor still had not signed HB 721 into law. But Abortionists regardless sought a TRO and PI against both HB 721 and HB 575. (Docs. 23–24.) The day after—May 4—the State filed its oppositional brief to the TRO. (Doc. 32.) Despite the fact HB 721 remained unsigned and the State's Motion to Dismiss was pending, the district court acted with exceptional speed. On the same day the State responded—May 4—the district court granted Abortionists a TRO. (Doc. 31.) The next week, the State filed its opposition brief against the PI. (Doc. 41.)

On May 16, the Governor finally signed HB 721 into law, and a flurry of additional briefing on HB 721 ensued. Abortionists, for the third

time, sought a TRO and PI against HB 721, which the district court, again, expeditiously granted two days later. (Docs. 35–36, 42–44, 48, 51.)

Under this chaotic backdrop, the State had *one day* to develop a statutory interpretation argument for HB 575. One day. When the constant barrage of briefs, orders, and argument preparation finally ended and the State had a chance to review the statute books (literally), the district court already locked the State into its earlier interpretation of the law.

On September 13, 2024, Abortionists moved for summary judgment. (Docs. 113–15.) The State responded and cross-moved for summary judgment. (Docs. 117–24.) Further briefing followed. (Docs 125–26; 129.) The district court ultimately denied the State's motion and granted Abortionists' motion. (Summary Judgment Order, **attached as Appendix A**.)

Abortionists next moved for attorneys' fees and costs. (Doc. 134–35.) Following briefing, (Docs. 140; 143), the district court awarded Abortionists attorneys' fees and costs. (Attorneys' Fees Order, **attached as Appendix B**.) Although Abortionists failed to meet all three factors under the private attorney general doctrine ("PAGD"), the district court

regardless awarded fees under Section 25-10-711, MCA, titled "Award Of Costs Against Government Entity When Suit Or Defense Is Frivolous Or Pursued in Bad Faith." Afterwards, the parties stipulated the amount of fees and costs, if awardable, were reasonable. (Doc. 153.)

The State timely filed its appeal, asking this Court to reverse the district court's summary judgment order and final judgment.

STATEMENT OF FACTS

I. HB 575

HB 575 amends the Montana Abortion Control Act, Mont. Code Ann. tit. 50, ch. 20, pt. 1. It creates a process to determine "viability" and prohibits abortions of an unborn child "who is viable, unless necessary to preserve the life of a mother." (Doc. 124, Ex. A); HB 575, §§ 1(6)–2(1). In other words, an abortion of a non-viable unborn child remains untouched.

Viability is "the ability of a fetus to live outside the mother's womb, albeit with artificial aid." Mont. Code Ann. § 50-20-104(6)(a). The medical community accepts viability of an unborn child at 24 weeks. (Doc. 124, Ex. D at 155:1–16.) Indeed, "viability [is] presumed at 24 weeks gestational age and any period of time after that." Mont. Code Ann. § 50-20-104(6)(b)(ii); HB 575, § 1(6)(b)(ii). When required, the physician

or physician assistant performing the abortion must, in writing, make a viability determination. Mont. Code Ann. § 50-20-104(6)(b)(i). That determination includes the review and record of an ultrasound. *Id*. Viability determinations are necessary only at or near the 24-week threshold to ensure compliance with the viable fetus prohibition, as earlier abortions lack potential viability.

A. The undisputed facts on ultrasounds.

1. The 24-week presumption of viability does not impact abortionists.

The record shows that PPMT provides abortions only up to 21 weeks 6 days gestational age. (Doc. 124, Ex. C at 120:2–5.) Abortionist Dr. Samuel Dickman, PPMT's Chief Medical Officer, agreed that HB 575's 24-week gestational threshold does not affect the current practice of providing abortions up to 21 weeks 6 days gestational age. (*Id*. at 123:17–19; Doc. 114, Statement of Undisputed Material Facts ("SUMF") at ¶ 7.) Dr. Dickman also testified that, in his opinion, the wide medical consensus is that fetal viability occurs at 24 weeks gestational age, mirroring HB 575. (Doc. 124, Ex. D at 155:1–16.) Although not a party here, Abortionist Helen Weems, a provider in Whitefish, Montana, performs abortions only up to 14 weeks gestational age. (Doc. 70 at Ex. A

32:6–8.) Thus, the record confirms that Abortionists' own testimony establishes they would suffer no impact from the 24-week presumption.

2. Ultrasounds are widely available in Montana, including at every PPMT location.

Undisputed evidence shows that ultrasounds are readily available throughout Montana. According to the State's expert, Dr. George Mulcaire-Jones, who practiced reproductive healthcare in rural Montana for 30 years, ultrasounds are "readily available in nearly every community that provides medical care in the state." (Doc. 124, Ex. E at 119:2–10; 27:9–15.)

Dr. Dickman did not dispute this availability, stating, "I'm familiar with the general accessibility of ultrasounds within medical practices, including hospitals and outpatient clinics." (Doc. 124, Ex. C at 113:6–8.) Fifty-one of Montana's sixty-nine hospitals conduct ultrasounds, as do Indian Health Service hospitals in the state. (*Id.* at 52:20–61:21.) Dr. Dickman's knowledge of statewide availability was limited, however, because he had only practiced in Montana for nine months. (*Id.* at 113:17–114:9 (unable to speak to whether ultrasounds were available at specific hospitals).) Abortionists' expert, Dr. Steven Ralston, had no knowledge regarding ultrasound availability in Montana. (*Id.* at 150:10–

12.) Every PPMT location has ultrasound equipment and staff capable of providing ultrasounds to patients. (Doc. 124, Ex. F at 21:23–22:2.)

Dr. Mulcaire-Jones further testified that where a medical office lacks ultrasound equipment, it is common practice to obtain an ultrasound at one facility and transmit the results to another. (Doc. 124, Ex. C at 60:17–22.) For example, a patient in Chester could obtain an ultrasound locally and have the result transferred to PPMT in Great Falls. (*Id.* at 61:22–62:1.) Ultrasound results may be transmitted electronically, by fax, or by hand. (*Id.* at 61:11–13; 61:22–62:1.) The record therefore confirms that ultrasounds are widely available.

3. Ultrasounds are the standard of care.

The parties agree that administering an ultrasound before performing an abortion is the medical standard of care. Dr. Mulcaire-Jones testified that an ultrasound is "the gold standard" for determining gestational age. (Doc. 124, Ex. C at 60:16.) This is partly because it removes "all the guesswork" from determining whether the fetus is alive and informs which procedure can be performed and where. (*Id.* at 55:16–56:6.) Dr. Mulcaire-Jones further testified that ultrasound is far more accurate than referencing the last menstrual period ("LMP")

or fundal height when determining gestational age. (Doc. 124, Ex. E at 26:20–23.) Ultrasound is the standard "supported by the American College of Obstetrics and Gynecology, the American Academy of Family Practice, [and] Society for Fetal-Maternal Medicine." (*Id*. at 26:23–27:2.)

Dr. Dickman testified that PPMT generally performs ultrasounds for procedural abortions after 11 weeks, (Doc. 124, Ex. C at 129:4–6), which is the standard of care he developed for Montana. (*Id*. at 106:17–107:1.) Even in Texas, where Dr. Dickman formerly provided abortions, "[he] was required to provide an ultrasound for every patient." (*Id*. at 107:14–15.) Ms. Weems likewise administers an ultrasound as part of her standard of care before providing abortions to confirm gestational age. (Doc. 70, Ex. A at 29:2–8.) She performs an ultrasound "to verify that [the] pregnancy within [the] uterus and that it's not an ectopic pregnancy, and to estimate [the] gestational age." (*Id*. at 73:17–20.) Thus, Dr. Mulcaire-Jones, Dr. Dickman, and Ms. Weems—all practicing in Montana—testified that performing an ultrasound is the standard of care prior to an abortion.

II. HB 721

HB 721 ("Dismemberment Abortion Prohibition Act") creates a new statutory section prohibiting a single specific procedure, D&E, which entails the dismemberment of a living child, except in cases of medical emergency. (Doc. 124, Ex. B.) "Dismemberment abortion" is defined as "a procedure that involves: (a) the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn human being; and (b) dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts from a *living* unborn human being." HB 721 § 2(4) (emphasis added.). HB 721 prohibits a person from "purposely or knowingly perform[ing], induc[ing], or attempt[ing] to perform or induce a dismemberment abortion procedure" "[e]xcept in a medical emergency." *Id*. § 3. HB 721 articulates a lengthy definition of what constitutes a "medical emergency." *Id*. § 2(9). It also includes a severability clause. *Id*. § 10. As the bill's sponsor explained, "[u]nder this Act, the one performing the abortion is required to kill the unborn child before ripping the body apart during the

extraction. So killing an unborn child and then dismembering is permitted. Killing the unborn child by dismemberment is not."[1]

A. Disputed facts regarding living D&E abortions.

1. D&E abortions present a bona fide mental health risk to the pregnant mother.

Abortionists failed to contradict the testimony of the State's expert, Dr. Aaron Kheriaty, who noted the lack of "empirical evidence that abortion improves mental health outcomes for women[]" and the "substantial empirical evidence that abortion worsens mental health outcomes for women[,] include[ing] adverse mental health outcomes following dismemberment abortions." (Doc. 124, Ex. G at ¶ 6.) Dr. Kheriaty testified that he has "treated patients after abortion who struggle even many years later with complex feelings of grief and loss, regret, shame or confusion, which in [his] clinical judgment have contributed to their depression and anxiety." (*Id.* at ¶ 8.) His clinical observations align with research on the psychological impact of D&E

[1] *HB 721 - Restrict Unborn Child from Dismemberment Abortion: Hearing Before the Senate Judiciary Committee*, 68th Leg. (2023) (Statement of Matt Regier) 8:04:54–8:05:10. Available at: https://tinyurl.com/4s8r73cp.

abortions, including studies identifying a significant risk of post-traumatic stress disorder ("PTSD"). (*Id*. at ¶ 14.)

Multiple studies cited by Dr. Kheriaty report elevated mental health risks following abortion. A study from the Netherlands found that "four months after termination, over one-quarter (27.4%) of women showed signs of pathological grief." (*Id*. at ¶ 15.) Another study examining "the psychological impact on women after second and third trimester termination of pregnancy … found significantly higher rates of psychiatric disorders at two weeks, six months, and fourteen months—including depression, anxiety, and PTSD—compared to women with preterm birth and women in the general population." (*Id*. at ¶ 15.) Reported risks include depression, anxiety, and PTSD, as well as a 110% increase in alcohol abuse, a 220% increase in marijuana abuse, and a 155% increase in suicidal behaviors. (*Id*. at ¶ 17.) A 2013 reappraisal similarly found that "abortion was associated with statistically significant increases in the risks of alcohol misuse (2.3 times higher), illicit drug use/misuse (3.91 times higher), and suicidal behavior (1.69 times higher), as well as elevated risks of anxiety." (*Id*. at ¶ 20.)

Contrary to Abortionists' assertion that abortion is "markedly safer" than giving birth, (Doc. 114, SUMF at ¶ 4), a meta-analysis found increased mental health risks for women who obtained an abortion compared to women who carried their pregnancy to term: "women who had an abortion still had a 55% increased risk of mental health problems[,] [but] [w]omen in the unintended pregnancy carried to term group were closer to the results for the no abortion group than they were to the abortion group." (Doc. 124, Ex. G at ¶ 18.) Studies also report an elevated suicide risk among women who obtained abortions. A Finnish study found women were three times more likely to commit suicide within one year of the abortion than the general population and six times more likely than those who carried the pregnancy to full term. (*Id.* at ¶ 22.) In Denmark, women faced a higher risk of admission to psychiatric hospitals within three months of an abortion compared to women who delivered. (*Id.*) A study analyzing California Medicaid claims of 173,000 women likewise found women were 154% more likely to commit suicide than women who carried their pregnancies to term. (*Id.*)

2. Requiring fetal demise prior to D&E using digoxin can alleviate that risk.

The State disputed Abortionists' assertion that no alternatives exist, that providers are not trained to use them, and that using digoxin[2] is not medically indicated. (Doc. 114, SUMF at ¶ 14.) PPMT's "Information on Informed Consent" demonstrates that digoxin is offered and is a safe and effective alternative to live dismemberment. (Doc. 124, Ex. H.) The document explains that "[s]ome people are helped by knowing that the fetus died before the in-clinic abortion." (*Id.* at 1.) It further states that "[s]ide effects usually do not last that long" and "need little or no treatment." (*Id.*) It also notes that "[s]ome experts believe it makes the in-clinic abortion easier to do." (*Id.*) The existence of this informed consent document contradicted Dr. Dickman's claim that D&E providers are not generally trained to use digoxin. (Doc. 124, Ex. C at 117:10–12.)

STANDARD OF REVIEW

The Court reviews summary judgment orders de novo. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704.

[2] Digoxin is a pharmacologic agent used to induce fetal demise prior to the dismemberment procedure. This practice is consistent with the intent of the sponsor of HB 721.

Summary judgment is proper only where "no genuine issue as to any material fact" exists and the movant "is entitled to judgment as a matter of law." 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." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. Under de novo review, the Court must determine whether: (1) the district court's conclusions of law are correct; and (2) its findings of fact are not clearly erroneous. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839 (internal citations omitted).

This Court "prima facie presume[s]" the constitutionality of legislative enactments. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. "Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638. Thus, "[e]very presumption must be indulged in favor of the constitutionality of the legislative act." *Powder River Cnty.*, ¶ 74. This Court's inquiry then is not whether it is possible to condemn, but whether it is possible to uphold the law unless it conflicts with the

Constitution beyond a reasonable doubt. *Id.* (quoting *State v. Lilburn*, 265 Mont. 258, 262, 875 P.2d 1036, 1039 (1994), *cert. denied*, 513 U.S. 1078 (1995)).

The Court's "review of constitutional questions is plenary." *Williams v. Bd. of Cnty. Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88 (internal citations omitted). The party challenging a statute thus bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, the Court must uphold the statute. *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997); *Heisler v. Hines Motor Co.*, 282 Mont. 270, 279, 937 P.2d 45, 50 (1997).

SUMMARY OF THE ARGUMENT

The district court's summary judgment order is riddled with reversible error. It overlooked a complete absence of injury, misread a straightforward statute, prematurely resolved clearly disputed facts, and punished good-faith advocacy with attorney fees. This Court should reverse.

First, as to HB 575, the district court erred in rejecting the State's lack-of-standing defense. Properly construed, HB 575's ultrasound

requirement applies only to a "determination of viability," which the plain text, structure, and 24-week presumption limit to abortions at or near viability. Because PPMT performs abortions only up to 21 weeks and 6 days gestation and its Chief Medical Officer concedes the statute imposes no burden on current practice, Abortionists suffer no concrete injury. The court's universal "prior to any abortion" reading produces absurd results and ignores the statute as a whole.

Second, under that correct narrow construction, HB 575 imposes no restriction on pre-viability abortions—the only procedures Abortionists perform—and is therefore facially constitutional under Article II, Section 10 of the Montana Constitution. It advances the compelling state interest in protecting viable fetal life without burdening any abortion that Abortionists actually provide.

Third, the district court improperly granted summary judgment on HB 721 in the face of genuine issues of material fact. Unrebutted expert testimony from Dr. Aaron Kheriaty, corroborated by peer-reviewed studies on PTSD, grief, depression, and substance-abuse risks following dismemberment procedures, together with PPMT's own informed-consent materials acknowledging the safety and psychological

benefit of inducing fetal demise, establish bona fide maternal health risks that the Legislature sought to address. These disputed facts preclude judgment as a matter of law.

Finally, the award of attorney fees under Section 25-10-711 rests on an erroneous finding of bad faith. The State's statutory interpretation was advanced in good faith under compressed preliminary-injunction deadlines and represents a legitimate, textually supported position. The Court should thus vacate the fee award.

For these reasons, the Court should reverse the summary judgment order, deny Abortionists' motion, grant the State's cross-motion as to HB 575, and remand for further proceedings on HB 721.

ARGUMENT

I. Abortionists lack standing to challenge HB 575.

Despite the State providing argument on this issue, the district court failed to rule on it. (Doc. 124 at 7–9; 133.) "Standing is the question of whether a litigant has the right to seek judicial resolution of a dispute." *Noland v. State*, 2025 MT 294, ¶ 10, 425 Mont. 328, 581 P.3d 47. "[F]acial challenges are still dependent upon the plaintiff alleging an injury in fact, causation, and redressability." *Noland*, ¶ 26. An injury in fact is "a

concrete harm that is actual or imminent, not conjectural or hypothetical," while redressability "requires a likelihood that the requested relief will redress the alleged injury." *Noland*, ¶ 10 (citation omitted). This Court "review[s] a district court's statutory interpretation and construction de novo for correctness." *State v. Clinkenbeard*, 2025 MT 54, ¶ 5, 421 Mont. 137, 565 P.3d 1259 (citations omitted). The district court erroneously interpreted the plain language of HB 575 as requiring ultrasounds for all abortions, despite the proper interpretation of the statute limiting the requirement to determinations of viability at or near the 24-week threshold. The court's broad reading—adopted from Abortionists isolated parsing—ignores the statute's structure, produces absurd results, and overlooks that the State's argument at summary judgment faithfully tracks with the text.

A. Ultrasounds are required just to prove viability.

Courts must apply the plain meaning of the words used, read the statute as a whole, and avoid inserting or omitting terms. Mont. Code Ann. § 1-2-101; *State v. Peplow*, 2001 MT 253, ¶ 20, 307 Mont. 172, 36 P.3d 922 (discern intent from "the plain meaning of the words used").

Section 50-20-104(6)(b) governs just "[a] determination of viability." A determination of viability must be:

> (i) made in writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound; and
> (ii) based on the best available science and survival data, with viability presumed at 24 weeks gestational age and any period of time after that. A calculation of gestational age must take into account a margin of error and, if uncertainty exists regarding viability, there is a presumption of viability.

HB 575 § 1(6)(b)(i)–(ii). An ultrasound thus is necessary only when viability is plausibly in question. That is to say, around a gestational age of 24 weeks, taking into account a margin of error.

The phrase "performing an abortion" identifies the responsible provider, not the scope of abortions; it qualifies who documents the determination, not mandating it universally. *Id.* at § 1(6)(b)(i). Even the bill's title—"An Act Prohibiting An Abortion Of An Unborn Viable Child Unless Necessary To Preserve The Life Of The Mother"—reinforces a post-viability focus, not pre-viability regulation. (Doc. 124, Ex. A); *Peretti v. State*, 238 Mont. 239, 245, 777 P.2d 329, 333 (1989) ("the title of an act is presumed to indicate the legislature's intent with regard to the provisions contained therein.") HB 575 "relates only to the gestational age at or near viability" and "prohibits no particular type of pre-viability

abortion according to its plain language." (Doc. 124 at 1.) This reading gives effect to all provisions, including the presumption and margin-of-error rules, without surplusage.

To read otherwise, to construe the statute as the district court has, is to "insert what has been omitted," rather than "simply [] ascertain[ing] and declar[ing] what is in terms or in substance contained therein." Mont. Code Ann. § 1-2-101. For example, in *Covenant Invs., Inc. v. State, Dep't of Revenue*, the district court directed the Department of Revenue to conduct a mid-cycle property reappraisal despite the absence of any statutory provision requiring such action. 2013 MT 215, ¶ 8, 371 Mont. 186, 308 P.3d 54. This Court halted that reappraisal, finding that the statute at issue "contain[ed] no such provision." *Id.* ¶ 8. The Court held that "the Montana Constitution prohibits courts from exercising legislative power" and that "Montana courts are not at liberty to amend statutes," concluding that "[t]he District Court improperly exercised legislative power." *Id.* ¶ 20. The district court did the same thing here.

The district court's broad reading that HB 575 requires ultrasounds "prior to any abortion procedure"—wording that is contained nowhere within the statute—would mandate formal viability determinations for

pregnancies where viability is impossible, such as at 6–11 weeks LMP. It also yields unreasonable outcomes that must be avoided when a sensible construction exists. App'x A at 2; *City of Missoula v. Pope*, 2021 MT 4, ¶ 10, 402 Mont. 416, 478 P.3d 815 (the Court must "read and construe each statute as a whole, both to give effect to the purpose of the statute and to avoid an absurd result"); *Peplow*, ¶ 20 (effectuate intent "from the plain meaning of the words used."). Requiring physicians to document an ultrasound-based assessment then—when science shows no fetus survives *ex utero* before ~22 weeks—serves no rational purpose. It equates to demanding a written evaluation of impossibility, wasting time and resources without advancing any real purpose. It renders the 24-week presumption superfluous for early cases, as ultrasounds would be needed regardless. Practically, it imposes needless burdens because patients must obtain ultrasounds for non-viable pregnancies, causing delay and increasing costs, travel, and risks—contrary to the bill's viable-fetus focus. It is an absurd result.

The district court's reading strains the text, transforming a targeted safeguard into a blanket barrier. It also expressly violates this Court's express mandate that courts "will construe a statute so as to

avoid an unconstitutional interpretation whenever possible." *State v. Samples*, 2008 MT 416, ¶ 14, 347 Mont. 292, 198 P.3d 803.

B. HB 575 does not injure Abortionists.

Under the proper construction, Abortionists lack a concrete and particularized injury traceable to HB 575, as the statute imposes no restriction on their pre-viability abortions. The undisputed record shows PPMT provides abortions only up to 21 weeks 6 days LMP, with no impact from the 24-week viability presumption (Doc. 124, Ex. C at 120:2–5, 123:17–19; Doc. 114, SUMF ¶ 7.) Dr. Dickman agreed the presumption does not affect current practice, mirroring medical consensus on viability at 24 weeks (Doc. 124, Ex. D at 155:1–16.) Ultrasounds are "readily available in nearly every community that provides medical care in the state," per expert Dr. Mulcaire-Jones. (Doc. 124, Ex. E at 27:9–15.) Thus, HB 575's requirements—tied to viability near or after 24 weeks—creates no actual or imminent harm to Abortionists' services, patients, or operations.

Abortionists' asserted injury collapses under the same narrow construction. Their entire theory of harm rests on the mistaken premise that HB 575 imposes a universal ultrasound mandate for every abortion,

including the direct-to-patient medication abortions they offer up to 11 weeks LMP. That premise is not only contrary to the statute's plain text and structure—it begs the very question presented and violates basic principles of justiciability. Because the law imposes *zero* compliance obligations on Abortionists' actual practice, any claimed burden is purely hypothetical, self-inflicted, and wholly untraceable to HB 575. *See* App'x A at 2 (acknowledging Abortionists' contention but never analyzing standing under the correct reading). Even assuming third-party standing on behalf of patients, the same absence of injury defeats that theory: no patient faces any burden from a statute that never applies to the pre-viability procedures Abortionists actually provide. Redressability is likewise absent: enjoining the statute would change nothing for PPMT or its patients because the law does not reach them unless and until they begin performing post-viability abortions. The district court's failure to address—let alone resolve—this threshold jurisdictional defect is reversible error. Standing is a jurisdictional prerequisite that must be established before any merits analysis; the court's complete omission of the issue required dismissal of the HB 575 claims at the outset.

C. HB 575's plain meaning in the Montana Abortion Control Act.

Within the context of the statutory scheme, Sections 50-20-104(6)(b)(ii) and 50-20-109(b)(ii) plainly lay out the process for determining viability of an unborn child. This is the only way to read the statutes together. When responding to the TRO against HB 575, the State did not have the benefit of reviewing the newly amended Montana Abortion Control Act. But when the State could grab the book, the legal theory became clear.

The Abortionists tried to paint the State's legal theory as inconsistent. They titled a section "The State's New Interpretation of HB 575 Lacks Any Basis In The Statute," and argued that the State contradicted earlier contentions and lacked textual support, insisting the ultrasound mandate applies "prior to any abortion procedure." (Doc. 125 at 5–7.) But these assertions were baseless. And the district court erred in adopting Abortionists' strawman. In awarding fees, the district court found that "[t]he State's changing positions on the interpretation of HB 575 is evidence of bad faith and frivolousness." App'x B at 10. But that is wrong.

Parties can change their legal theories; they cannot change factual positions though.

The district court here improperly entered a "judicial admission" to judicially estop the State's legal theory. "The rule of judicial estoppel does not apply to a change of position regarding matters of law[.]" *DeMers v. Roncor, Inc.*, 249 Mont. 176, 180, 814 P.2d 999, 1002 (1991). "Judicial estoppel bars changes in factual positions and does not extend to inconsistent opinions or legal positions." 28 Am. Jur. 2d, Estoppel & Waiver § 69, pg. 534 (2021).

"A judicial admission is 'an express waiver made in court by a party or his attorney conceding the truth of an alleged fact.'" *In re Raymond W. George Tr.*, 1999 MT 223, ¶ 36, 296 Mont. 56, 986 P.2d 427 (quoting *DeMars v. Carlstrom*, 285 Mont. 334, 337, 948 P.2d 246, 248 (1997)). "For a judicial admission to be binding upon a party, the admission must be one of fact rather than a conclusion of law or the expression of an opinion." *DeMars*, 285 Mont. at 338, 948 P.2d at 249. "[J]udicial admission applies to facts, not to legal theories or positions." *Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 2004 MT 144, ¶ 34, 321 Mont. 432, 92 P.3d 620.

In the fog of Abortionists' briefing flurry, the State did not have the clarity of the statute in the book. Instead, it had to assert a legal theory on an incomplete statement of the law. But this was not a factual determination. Indeed, the State has not changed declarations nor raised contradicting facts. Rather, the State asserted a different statutory construction legal theory when the statutory scheme became clear. The district court, however, cabined the State into an earlier theory on the bill's face rather than the actual language as it is in the statute. It entered a judicial admission that the State's legal theory was set in stone. But such a holding contradicts this Court's precedent. Judicially estopping a different legal theory through judicial admission is improper.

II. HB 575 is facially constitutional.

Abortionists failed to meet the heavy burden of facial invalidation of HB 575 under Article II, Section 10 of the Montana Constitution.[3]

[3] Despite challenging HB 575 under multiple constitutional provisions, the district court decided the case entirely upon Article II, Section 10. App'x A. As the State pointed out in its briefing, Abortionists abandoned other claims because they relegated substantive briefing to a two-line footnote, (Doc. 114 at 20 n.4), so it is possible the district court agreed by not addressing said claims. The State hereafter relies upon its briefing to the lower court and may expound upon further in later briefing should these claims be resurrected. (Doc. 124 at 11–12.)

Statutes are presumed constitutional, and the challenging party must prove unconstitutionality beyond a reasonable doubt. *Grooms*, 283 Mont. at 467, 942 P.2d at 703. For a law to be facially unconstitutional, the challenger must demonstrate that no set of circumstances exists under which the statute could be constitutionally applied. *Noland*, ¶ 12. This makes facial challenges "the most difficult challenge to mount successfully." *State v. Alford*, 2025 MT 171, ¶ 14, 423 Mont. 269, 578 P.3d 611. It also shifts the burden squarely to the challenger to negate every conceivable lawful application but only requires a single hypothetical scenario showing constitutional validity to defeat the challenge. Article II, Section 10—through *Armstrong v. State*—narrowly "protects a woman's right … [to] a pre-viability abortion" absent a "medically acknowledged, *bonafide* health risk." 1999 MT 261, ¶¶ 59, 75, 296 Mont. 361, 989 P.2d 364. HB 575 withstands facial scrutiny under this standard, as it regulates solely in the post-viability domain.

HB 575 imposes no facial burden on privacy, for it does not restrict pre-viability abortions in any manner—the very procedures that form the entirety of Abortionists' practice, limited to 21 weeks 6 days LMP. The statute prohibits abortion of a viable unborn child except to preserve

maternal life, HB 575 § 2(1)(b)(ii), reflecting a compelling interest in protecting fetal life capable of independent existence. *Roe v. Wade*, 410 U.S. 113, 163 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.") The ultrasound provision is confined to "a determination of viability" in cases of uncertainty with viability presumed at 24 weeks and a margin-of-error rule tilting toward viability. HB 575 § 1(6)(b). Absent any pre-viability mandate, *Armstrong*'s strict scrutiny does not apply and the right to privacy is not infringed.

Abortionists cannot satisfy their facial burden, as numerous constitutional applications demonstrate the statute's validity. For instance, in a 24-week pregnancy with gestational dating uncertainty, the ultrasound resolves the margin of error, confirms viability, and permits prohibition except to preserve the mother's life, directly serving the compelling interest without impinging on privacy. Similarly, for a 23-week fetus where survival data indicates viability, the determination process applies science-based criteria, narrowly tailored to prevent post-viability abortions while exempting pre-viability care entirely. In

hypothetical later-term emergencies beyond Abortionists' stated scope, the maternal-health exception ensures the law operates constitutionally, balancing interests. These examples suffice to defeat the facial claim; Abortionists have not negated them all.

A. Even if the Court determines that HB 575 implicates the right to privacy, it survives strict scrutiny.

This Court "employ[s] a three-step analysis to [] the challenged bill[]: (1) does the law infringe on a fundamental right to privacy; (2) does the State assert a compelling interest; and (3) if the State's interest is compelling, is the law narrowly tailored to achieve that interest? *Planned Parenthood of Montana v. State*, 2025 MT 120, ¶ 48, 422 Mont. 24, 570 P.3d 5 ("*PPMT II*") (citation omitted). The State reasserts that the right to privacy is not implicated because *Armstrong* narrowly protects a right to pre-viability abortions for which, properly interpreted, HB 575 does not regulate. *Armstrong*, ¶ 75. Assuming the Court finds to the contrary, HB 575 still survives steps two and three.

"For step two, … the compelling interest must be a medically acknowledged, bona fide health risk, shown by clear and compelling evidence." *PPMT II*, ¶ 48. HB 575's entire focus is protecting viable

children, which coincides not only with its mandated viability determination, but also its prohibition on killing them. HB 575 §§ 1(6); 2(1)(b). HB 575 thus aligns with the *Armstrong* Court's finding "that a fetus does not enjoy a constitutionally protected status—i.e., that a fetus is not a constitutional person—until 'viability[.]'" *Armstrong*, ¶ 44 (citing *Roe*, 410 U.S. at 160, 162–65). Because of this constitutionally protected status, "[p]ost-viability is when the State's interest in the preservation of fetal life may attach."[4] *PPMT II*, ¶ 55. This is the "'compelling' point." *Roe*, 410 U.S. at 163. The State's compelling interest is thus straightforward: protecting unborn viable children (presumed at 24 weeks gestational age) from being dismembered alive while in the womb.[5] Dismemberment and death are clearly bona fide health risks to these constitutional persons.

"For step three, a narrowly tailored law must effectuate only the asserted interest [] and be the least onerous path needed to achieve the

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[4] Because an unborn child acquires constitutionally protected status at viability, *Armstrong*, ¶ 44, it is not accurate to assert that the State's interest in preserving fetal life "may attach"—it fully and compellingly attaches. *PPMT II*, ¶ 55; *see Roe*, 410 U.S. at 163. HB 575 is directed at precisely that compelling interest.

[5] (*See* Doc. 124 at 18 (description of the procedure by a physician that routinely performed it.)

state objective[.]" *PPMT II*, ¶ 48 (citations and internal quotations omitted.) "A statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *Id.* (citation omitted). HB 575 satisfies that standard because it does not ban, restrict, or even regulate a single pre-viability abortion. The statute therefore has zero practical effect on Abortionists' current practice. It applies only when viability is actually at issue—at or near the 24-week presumption where the State's compelling interest attaches.

The means chosen is the least onerous imaginable: an ultrasound is only required if viability is in question. Every PPMT location already has ultrasound equipment and trained staff, and 51 of Montana's 69 hospitals perform ultrasounds. (Doc. 124, Ex. F at 21:23–22:2; Ex. C at 52:20–61:21.) The statute contains an immediate life-of-the-mother exception and leaves every pre-viability procedure untouched. HB 575 § 2(1)(b)(ii). Any less restrictive alternative would fail. Eliminating the ultrasound requirement could allow viable fetuses to be aborted without confirmation of viability, directly undermining the State's compelling interest. HB 575 is therefore neither over- nor under-inclusive; it is the precise, minimally intrusive tool that protects only the exact class of

unborn children the State is constitutionally permitted—and compelled—to safeguard once viability is reached.

Because HB 575 is narrowly tailored to achieve only the State's compelling post-viability interest, it survives strict scrutiny.

* * *

The district court erred by invalidating the statute based on Abortionists' expansive interpretation and failing to consider the valid applications under the facial challenge. Abortionists' insistence on a universal ultrasound mandate distorts the text and disregards realistic scenarios. Should the Court find that HB 575 implicates the right to privacy, it should then find that it satisfies strict scrutiny. This Court should reverse; HB 575 is constitutional on its face under Article II, Section 10.

III. Questions of fact precluded the district court's granting of summary judgment on HB 721.

The district court erred in granting summary judgment on HB 721, and this Court should reverse and remand for trial. Summary judgment is an extraordinary remedy that "was not intended nor can it be used as a substitute for existing methods in the trial of issues of fact." *In re Est. of Kuralt*, 1999 MT 111, ¶ 27, 294 Mont. 354, 981 P.2d 771 (quoting *Kober*

v. Stewart, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966)). Its sole purpose is to determine whether genuine issues of material fact exist, not to resolve them. *Id.* (citing Mont. R. Civ. P. 56(c)). A genuine issue arises when the record presents nonspeculative evidence upon which a reasonable factfinder could rule for the nonmoving party on an essential element, precluding judgment as a matter of law. *Hanson v. Town of Fort Peck*, 2023 MT 208, ¶ 16, 414 Mont. 1, 538 P.3d 404; *see also PPMT II*, ¶ 70 ("A fact is material if it is outcome-determinative.") The State's evidence creates two intertwined questions of material fact that preclude summary judgment on HB 721: (1) whether D&E abortions pose a bona fide psychological health risk to the mother, and (2) whether requiring fetal demise prior to D&E using digoxin alleviates that risk.

A. D&E abortions pose a bona fide psychological health risk to the mother.

Dr. Kheriaty's declaration establishes that second-trimester surgical abortions—predominantly performed by D&E,[6] also known as dismemberment abortions—pose serious and well-documented

[6] At PPMT, D&E abortions are the only procedure used beginning at 15 weeks LMP to 21 weeks 6 days LMP, which is exclusively within the second trimester of pregnancy. (Doc. 22 at ¶4–5.)

psychological health risks to women. He begins with the overarching conclusion, drawn from both his clinical experience and the empirical literature, that "there is, however, substantial empirical evidence that abortion worsens mental health outcomes for women …. This includes adverse mental health outcomes following dismemberment abortions (D&E)." (Doc. 124, Ex G at ¶ 6.)

Dr. Kheriaty then turns directly to the procedures at issue. He identifies studies that "specifically examine later abortions in the second trimester that utilize the D&E procedure, which is especially relevant to the state law in question." (*Id.* at ¶ 14.) In a randomized controlled trial by Suddes and colleagues comparing medical and surgical (D&E) abortion at 13–20 weeks' gestation, women who underwent D&E reported an average Impact of Events Scale (IES) score of 30.1. An IES score above 26 predicts a 75% chance of developing PTSD. The study's 60% non-participation rate further suggests the true risk is understated, because "women who were most disturbed by the abortion were least likely to participate." (*Id.* at ¶ 14.) Later-term D&E procedures, often performed for fetal anomalies diagnosed after the first trimester, show even clearer harm. A longitudinal cohort study by Dawood and colleagues

in the Netherlands found that, four months after second-trimester termination, 27.4% of women exhibited pathological grief and 19.8% had scores indicative of post-abortion depression. (*Id*. at ¶ 15.) A parallel study by Kersting and colleagues on second- and third-trimester terminations due to fetal anomalies documented "significantly higher rates of psychiatric disorders at two weeks, six months, and fourteen months—including depression, anxiety, and PTSD—compared to women with preterm birth and women in the general population." (*Id*. at ¶ 15.) These findings address precisely the invasive surgical experience of D&E at gestations when maternal-fetal bonding is advanced and the procedure itself is more physically and psychologically traumatic.

This evidence of profound psychological injury is not merely empirical or clinical; it is self-evident. As the U.S. Supreme Court observed in upholding Congress's ban on partial-birth abortion (a procedure sharing critical elements with D&E):

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Gonzales v. Carhart, 550 U.S. 124, 159–60 (2007). The Court's recognition of this "anguished" and "profound" grief directly corroborates Dr. Kheriaty's clinical observations of women who, years or decades later, still suffer from unresolved grief, regret, shame, and depression after abortion—including those who described the experience in stark terms: "I killed my baby." (Doc. 124, Ex G at ¶¶ 8–11.)

The specific D&E evidence is reinforced by broader, high-powered research that encompasses second-trimester procedures. Coleman's 2011 meta-analysis of 22 studies involving more than 800,000 participants and 161,000 women with abortion histories found an 81% increased risk of mental health problems overall, including 34% higher anxiety disorders, 37% higher depression, 110% higher alcohol abuse, 220% higher marijuana abuse, and 155% higher suicidal behaviors. Even when compared solely to women with unintended pregnancies carried to term, abortion was associated with a 55% increased risk. (*Id.* at ¶¶ 16–18.) Fergusson et al. (2013) similarly found statistically significant increases in alcohol misuse (2.3 times), illicit drug misuse (3.91 times), and suicidal behavior (1.69 times), expressly rejecting the hypothesis that abortion confers mental-health benefits. (*Id.* at ¶ 20.) Longitudinal studies

(Sullins 2016; Canadian 2010) confirm additive effects from repeated abortions and elevated risks for mood disorders, substance abuse, and suicidality. (*Id*. at ¶¶ 24–25.)

Dr. Kheriaty concludes that PTSD, pathological grief, depression, anxiety, substance abuse, and suicidality are serious medical conditions that "can significantly impair a person's daily social, occupational, and/or educational functioning" and carry "significantly elevated risks for suicidal behaviors and substance abuse." (*Id*. at ¶ 27.) In short, the declaration supplies both targeted D&E evidence and consistent overarching findings—reinforced by the Supreme Court's own recognition of the unique anguish of post-abortion regret—that second-trimester surgical abortions, including D&E, worsen, not improve, women's mental health.

Abortionists responded with, and the district court found, that "[t]he underlying studies the State and its expert cite likewise cannot attribute negative mental health outcomes to D&E." (Doc. 125 at 13); App'x A at 9 ("However, the State's argument is fatally flawed because the State's purported evidence is largely unrelated to D&E procedures

specifically.") Both statements are incorrect and mischaracterize the declaration.

First, the declaration expressly attributes negative mental health outcomes to D&E. Paragraph 6 states that the "substantial empirical evidence that abortion worsens mental health outcomes for women … includes adverse mental health outcomes following dismemberment abortions (D&E)." Paragraph 14 then identifies studies that "specifically examine later abortions in the second trimester that utilize the D&E procedure," citing the Suddes randomized controlled trial that measured IES scores predictive of PTSD after D&E at 13–20 weeks. Abortionists' claim that the studies "cannot attribute" harm to D&E is therefore factually false; Dr. Kheriaty directly links the D&E procedure itself to elevated PTSD risk.

Second, the evidence is not "largely unrelated" to D&E procedures. Dr. Kheriaty repeatedly frames the cited research as "especially relevant to the state law in question" precisely because it addresses second-trimester D&E abortions. (*Id*. at ¶ 14.) The Dawood and Kersting studies focus on later-term terminations (second and third trimesters) that, when surgical, are performed by D&E and show markedly elevated

rates of pathological grief, depression, anxiety, and PTSD. (*Id*. at ¶ 15.) These are not general first-trimester studies; they target the exact gestational window and procedure type at issue. The broader meta-analyses and record-linkage suicide studies (*Id*. at ¶¶ 16–25) encompass later abortions and supply additional support, but the declaration does not rely on them alone—it foregrounds the D&E-specific data. The U.S. Supreme Court's recognition in *Gonzales v. Carhart* of the "grief more anguished and sorrow more profound" that attends a mother's later understanding of these procedures only underscores the relevance of this evidence.

Abortionists and the district court's narrow reading would require every study to isolate D&E from all other abortion methods before any risk could be recognized. This is absurd and is contradicted by the declaration itself. Dr. Kheriaty's expert opinion—grounded in decades of clinical psychiatry, ethics committee leadership, and peer-reviewed literature—establishes that D&E abortions carry documented psychological risks that the legislature may legitimately consider. Abortionists' assertions and the district court's conclusions are therefore both factually inaccurate and legally immaterial.

B. "Some people are helped knowing that the fetus died" prior to a D&E abortion.

The State showed that fetal demise via digoxin is safe for the mother, effective, and may mitigate psychological harm by ensuring the fetus is not alive during dismemberment. PPMT's own "Information on Informed Consent" document states digoxin is offered, noting "[s]ome people are helped by knowing that the fetus died before the in-clinic abortion." (Doc. 124, Ex. H at 1 (emphasis added).) This one document contradicts Abortionists' claims that no alternatives exist, providers lack training,[7] and digoxin is not medically indicated. (Doc. 114, SUMF at ¶ 14; Doc. 124, Ex. C at 117:10–12). But PPMT's document also states that "[y]ou may choose not to have digoxin. This may mean that you will be referred to another provider for your abortion." (Doc. 124, Ex. H at 1.) This appears to mean that fetal demise is the preferred approach, and that they would send the patient away should they "choose not to have digoxin."

Abortionists responded that digoxin "may result in increased risks and side effects; may increase time and expense required to obtain an

[7] Dr. Dickman conceded he was trained to use digoxin. (Doc. 124, Ex. C at 117:10–14.)

abortion; and may not be possible or successful in all circumstances." (Doc. 125 at 17.) But, again, their own document undercuts their arguments. It explicitly states that "[s]ide effects usually do not last long. They usually need little or no treatment." (Doc. 124, Ex. H at 1.) Their document states also states that "[i]t is likely that you will still be able to have the abortion completed on the scheduled day." (*Id.*) And on its success rates, it states, "Digoxin will cause fetal death about 99 out of every 100 times it is given." (*Id.*) This is not just true with their document, but also from studies provided by the National Abortion Federation ("NAF") of which PPMT is a member.[8] According to NAF, "[i]nduced fetal demise should be provided using an evidence-based regimen." (Doc. 124, Ex. I at 38; Doc. 124 at 16) (emphasis added.) This is because their own studies showed that 91% of women preferred their unborn child to be dead prior to an abortion; another showed no significant differences in adverse effects or side effects; and, consistently,

[8] NAF requires that its Member Clinics "pass a rigorous application process, "have regular site visits from NAF," and "provide high-quality abortion care." https://tinyurl.com/25t4zsan. It's Member Clinics include PPMT's three locations in Helena and Billings.
https://tinyurl.com/bn3jfjk3.

studies showed that digoxin is safe for the mother and effective for fetal demise in the second trimester. (Doc. 124 at 16–17 n.16–18.)

If that's not enough, look at the findings by the Fifth Circuit on this issue. In *Whole Women's Health v. Paxton*, the Fifth Circuit found the use of digoxin to be "hardly a novel phenomenon," that its success rate is "between 90 and 100%," and did not cause the abortion procedure to be any lengthier. 10 F.4th 430, 449–51 (5th Cir. 2021); (Doc. 124 at 14–15.) It was also discovered that in 2007, Planned Parenthood Federation of America mandated that all its affiliates[9] use digoxin to cause fetal death for abortions at or above 18 weeks. *Id*. at 449. It's simply a fact that the use of digoxin or other agent to induce fetal demise prior to performance of a D&E is a "commonly used and generally accepted" alternative procedure, as the U.S. Supreme Court determined. *Gonzales*, 550 U.S. at 164 (One of the alternatives mentioned by the Court is "an injection that kills the fetus" and "allows the doctor to perform the procedure." Earlier in the opinion, the Court expressly mentioned "digoxin or potassium chloride" injections as two methods used by physicians.)

[9] Planned Parenthood Federation of America lists PPMT as one if its affiliates. https://tinyurl.com/4nmch2rv.

These facts are fatal to Abortionists' arguments. But most of all, that "some people are helped knowing that the fetus died before the in-clinic abortion" underscores digoxin's feasibility and potential to reduce trauma from live dismemberment awareness and raises a triable issue of fact.

Instead of acknowledging these questions of fact for what they were (and still are), the district court engaged in improper fact-weighing. It found the State's argument to be "fatally flawed" because the evidence "is largely unrelated to D&E specifically." App'x A at 9. But this shows that the court judged the State's evidence for persuasiveness and specificity and credited Abortionists' view of what was proffered rather than viewing it in the light most favorable to the State as the non-moving party, thereby resolving the factual disputes over whether second-trimester psychological risks apply to D&E's unique dismemberment nature and whether fetal demise via digoxin alleviates those harms. These were inferences that must be drawn in the State's favor at summary judgment.

IV. The district court erroneously found bad faith to support awarding attorneys' fees for Abortionists.

The State did not act in bad faith. Section 25-10-711 requires courts to find that a government entity's claim or defense was "frivolous or pursued in bad faith" before awarding attorney fees and costs to a prevailing opposing party. A claim or defense is frivolous or pursued in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion. *Ostegren v. Dep't of Revenue*, 2004 MT 30, ¶ 23, 319 Mont. 405, 85 P.3d 738. To assert bad faith, Abortionists focused their ire on the State's different statutory construction arguments on HB 575. (Doc. 135 at 10–11.) Abandoning Abortionists' argument, the district court instead went on its own excursion for bad faith. But that excursion was a misadventure. The district court's finding of bad faith was improper.

As discussed above, the district court improperly entered a judicial admission to estop the State from raising a new statutory construction argument. *Supra* 6–7; 28–30. But the State's argument was not a factual admission; it was a different legal theory. And judicial admission does not apply to new legal theories. *DeMers*, 249 Mont. at 180, 814 P.2d at 1001; *George Trust*, ¶ 36; *DeMars*, 285 Mont. at 337, 948 P.2d at 248;

Watkins Trust, ¶ 34. As stated, Abortionists aggressively criticized the State for changing how it interpreted HB 575. App'x A at 10–11; *see also* (Doc. 125 at 5–8). The State responded in turn. (Docs. 124 at 7–12; 129 at 7–8.) The State thus did not concede this issue because it had already been argued twice. App'x B at 8 ("Moreover, the failure of the State to raise any defense is indicative of bad faith.")

Yet despite these exchanges, the district court still ultimately determined that "[t]he State's changing positions on the interpretation of HB 575 is evidence of bad faith and frivolousness." App'x B at 10. But the district court could reach that conclusion only through judicial admission of the State's legal theory developed in *one day* under a condensed timeline. *Supra* 6–7; 28–30. It was not until after the preliminary injunction phase ended that the book included the amendments to the Montana Abortion Control Act. (Doc. 129 at 3.) The State's interpretation of HB 575 is not only correct, *supra* 22–26, but it was a good faith and "legitimate argument on a substantial issue." *Ostegren*, ¶ 23. The Court should reject the district court's finding as contradictory to this Court's precedent. The district court relied on an erroneous finding of bad faith

to award fees. Yet the State acted within the boundaries of this Court's precedent.

But the district court's other bases for bad faith strain credulity. For example, it faulted the State for supposedly arguing that the litigation was mooted because Constitutional Initiative ("CI") -128 passed on November 5, 2024. App'x B at 10–11. This distorts the State's actual, narrower argument. The State argued that Abortionists could not satisfy the PAGD factors because private enforcement likely was not necessary. (Doc. 140 at 5.) The district court also faulted the State for filing a cross-motion for summary judgment. App'x B at 10 ("Rather than simply opposing PPMT's motion, the State also filed its own cross-motion for summary judgment. The State continued to press its arguments in its January 24, 2025, reply brief.") But again, this is not bad faith.

This Court should reverse the district court's award of attorney fees against the State under Section 25-10-711. The State's interpretation of HB 575 was a legitimate argument on a substantial issue involving a bona fide difference of opinion, not frivolousness or bad faith. The court's *sua sponte* reliance on unbriefed issues denied the State fair opportunity to respond and punished good-faith advocacy. Imposing fees here would

chill zealous defense of state laws and improperly lower the bar to establish bad faith.

CONCLUSION

The district court should be reversed as to Abortionists' motion for summary judgment on HB 575, grant the State's cross-motion of the same, and remand HB 721 for trial. Should this Court affirm the district court's summary judgment determination, it should still reverse the district court's fee award.

DATED this 30th day of March 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,243 words, excluding certificate of service and certificate of compliance.

/s/ Michael Noonan
Michael Noonan

N THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 26-0056

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, the MONTANA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services,

Defendants and Appellants.

APPENDIX

March 7, 2025 Order on Motions for Summary Judgment (Doc. 133) ..... App'x A

August 13, 2025 Order – Plaintiffs' Motion for Attorney Fees and Costs (Doc. 146) ..... App'x B

CERTIFICATE OF SERVICE

I, Michael Noonan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-30-2026:

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