IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0521

PLANNED PARENTHOOD OF MONTANA, and JOEY BANKS, 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.

OPENING BRIEF

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**Admitted Pro Hac Vice*
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QUESTIONS PRESENTED

I. Whether, in constitutional challenges like this, the preliminary injunction standard in MCA § 27-19-201 requires a finding of likelihood of success on the merits when the nonmovant offers contrary arguments and evidence.

II. Whether this Court should overrule *Armstrong v. State*.

III. Whether laws that merely *affect* the right to obtain an abortion automatically trigger strict scrutiny.

IV. Whether the district court manifestly abused its discretion by failing to consider and assess the State's arguments and rebuttal evidence adduced below.

STATEMENT OF THE CASE

Governor Gianforte signed HB 136, HB 171, and HB 140 into law on April 26, 2021. On August 16, Plaintiffs filed suit to challenge these laws, claiming they violated Montana's rights to privacy; equal protection; safety, health and happiness; individual dignity; free speech; and due process. They requested a preliminary injunction because of the "immediate" and "irreparable harm" that would ensue if the laws went into effect on October 1, 2021. This—after waiting 112 days from enactment to bring suit.

The State opposed and presented extensive counterargument and expert evidence that definitively rebutted Plaintiffs' claims. The State also noted that Plaintiffs' strategic delays created any exigent circumstances underlying their request for extraordinary injunctive relief.

After significant briefing and a lengthy hearing on Plaintiffs' motion, the State moved to disqualify the presiding judge for cause based on his prejudicial comments directed at the State during the hearing. In response, he withdrew. At the eleventh hour, on September 30, 2021, the new district court judge issued a TRO, halting the laws from going into effect while he reviewed the extensive record. One week later, on October 7, 2021, the district court granted Plaintiffs' motion for a preliminary injunction order. The district court held that Plaintiffs made a prima facie showing that each of the challenged laws was unconstitutional. The State timely appealed.

STATEMENT OF THE FACTS

Plaintiffs challenge HB 136, HB 171, and HB 140. The Legislature passed each of these bills during the 67th Legislature by substantial

margins. On April 26, 2021, the Governor signed each of these bills into law, and they were supposed to become effective on October 1, 2021.

HB 136 prohibits an abortion of an unborn child capable of feeling pain, which the Legislature determined occurs when the gestational age of the unborn child is 20 or more weeks. HB 136, 67th Leg. §§ 3(a)–(b) (2021). The purposes of HB 136 include protecting the lives of unborn children, preventing procedures which will cause them grievous pain, decreasing serious risks to women associated with late-term abortions, and maintaining the integrity of the medical profession. *Id.* Preamble.

HB 171 protects the health and welfare of women considering chemical abortions. HB 171, 67th Leg. § 2 (2021). It requires that qualified medical practitioners only dispense chemical abortion drugs in person after a physical examination. *Id.* § 4. The law also requires the qualified medical practitioner to schedule a follow-up visit after administration of the abortion-inducing drug. *Id.* § 5. And it establishes a protocol for obtaining informed consent 24 hours before the abortion drugs are administered and only after a detailed explanation of the risks related to a chemical abortion. *Id.* § 7.

HB 140 further enhances informed consent by requiring a person

performing an abortion to inform the woman of the opportunity to view an ultrasound and listen to the fetal heartbeat. HB 140, 67th Leg. § 1 (2021). It doesn't require the woman to view the ultrasound or listen to the fetal heartbeat—the provider must simply give her the option. *Id.*

STANDARD OF REVIEW

The district court's invocation of the incorrect preliminary injunction standard merits *de novo* review, and this Court should reverse. *See Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1171 (1996). This Court reviews the district court's decision to issue the preliminary injunction for a "manifest abuse of discretion." *Burke v. Rolle*, 2019 MT 6N, ¶ 5, 395 Mont. 519, 432 P.3d 716.

SUMMARY OF ARGUMENT

Last year, the Montana Legislature enacted three laws to promote the health and safety of pregnant women who are considering abortion. These laws ensure that pregnant women: (1) do not undergo medically risky late-term abortions (HB 136); (2) are not prescribed dangerous chemical abortion drugs without informed consent and physical examination by a qualified professional (HB 171); and (3) are afforded

the opportunity to see an ultrasound or hear a fetal heartbeat before undergoing an abortion (HB 140).

All three laws unquestionably enhance the health and safety of Montana women. And they represent basic regulations of the practice of medicine—bread-and-butter exercises of the state police power.

But Planned Parenthood's business is abortion, and these laws require modest changes to its business practices. So Plaintiffs asked the courts to do what they couldn't through the legislative process—save them the trouble of providing better care to Montana women. Relying on *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, Plaintiffs argued that—because these laws *affect* a woman's right to obtain an abortion—they must be reviewed under strict scrutiny, deemed unconstitutional, and immediately enjoined. To bolster its claims, Planned Parenthood submitted affidavits from its employees and board members. The State rebutted with expert practitioners who explained the solid medical bases for the laws and countered the self-serving opinions of Plaintiffs' on-the-payroll affiants.

Alarmingly, the district court granted the preliminary injunction. But its decision is riddled with reversible errors, and this Court can and

should correct them. The court below bungled the preliminary injunction standard, wrongly subjected each of the new laws to strict scrutiny, and plainly ignored the State's evidence, arguments, and interests. Each error independently justifies reversal; this Court should therefore do its duty, lift the injunction, and allow these commonsense, democratically enacted laws to take effect.

And this duty includes addressing the wellspring of the trouble—*Armstrong*.

ARGUMENT

I. The district court applied the incorrect standard for a preliminary injunction.

Montana law codifies the preliminary injunction standards at MCA § 27-19-201. Despite its plain language, it persistently confuses the lower courts. The result is a muddled and eroded standard that produces on-demand injunctions of any challenged law. Not only does that implicate the separation of powers—and ignore the presumption of constitutionality—it flips the burden to the State to show why its law shouldn't be enjoined and isn't unconstitutional. Any standard that deploys a triple negative is badly broken.

MCA § 27-19-201 establishes five disjunctive bases for granting a preliminary injunction. *Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825; *see also Stark v. Borner*, 226 Mont. 356, 359, 735 P.2d 314, 317 (1987). Most plaintiffs assert subsections (1) and (2) in constitutional challenges, so the State will focus on those.

A. A "prima facie" showing is not the statutory standard for a preliminary injunction.

The district court insisted the State sought to impose "additional elements [atop the standard] including 'likelihood of success on the merits.'" App.A 15 n.2 ("[L]ikelihood of success on the merits [only applies] … when a party's monetary judgment may be made ineffectual by the actions of the adverse party thereby irreparably injuring the applicant"). But this cannot be correct. Each subsection requires a finding of likelihood of success on the merits for an injunction to issue.

The district court relied on § 27-19-201(1) and (2) when considering Plaintiffs' request. Under subsection (1), the Court analyzed Plaintiffs' claims and determined that they made a "prima facie showing of the unconstitutionality of these laws." App.A 32. "Prima facie" means "[s]ufficient to establish a fact or raise a presumption but subject to

further evidence or review." *Prima facie*, Black's Law Dictionary (7th ed.1999). A prima facie case is appropriate when looking only at one side of the argument. But subsection (1) authorizes a preliminary injunction "when it appears that the applicant is entitled to relief." MCA § 27-19-201(1) (emphasis added). When, as here, a preliminary injunction is contested, the statutory language—apparent entitlement to relief—requires more than a prima facie showing. It plainly requires showing a likelihood of success, or something like it. Otherwise, what would be the point of mounting contrary evidence and argument? What would be the difference between MCA § 27-19-201 and the requirements to obtain an ex parte TRO under MCA § 27-19-315? The State doesn't seek to impose

additional requirements on movants; it simply seeks to uphold the statutory standard.[1]

As for subsection (2), the court indicated that Plaintiffs' alleged "injuries are sufficient without any additional showing of likely success on the merits." App.A 34. That's wrong, and the Court should reverse. The district court further noted that Plaintiffs "established a prima facie case that each of the challenged laws are incompatible with the Montana Constitution and give rise to constitutional injuries." App.A 33–34. But that sounds a lot like the court's subsection (1) analysis; which means

[1] Clarifying the standard for lower courts may require this Court to address its own precedents. "Prima facie" first appears in *Porter v. K & S P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). But the Court cited no authority—or statutory text—from which this "prima facie" language is derived. Thirty-eight years later, this Court defined the term "prima facie" for the first time. *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4; *see also Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386 (quoting "prima facie" standard but also requiring parties to show a "violation" of their rights supported by *some* evidence). But as Black's Law Dictionary, which the Court relied on in *Weems*, makes clear, "prima facie" only establishes a fact or presumption until that fact or presumption is rebutted. When, however, an injunction is contested, a court must determine whether the presumption has been rebutted before concluding whether a movant is apparently entitled to relief. Otherwise oppositional briefing and the required evidentiary hearing on a preliminary injunction motion would be utterly pointless. Only the poorest plead claims would fail the standard. *See Weems*, ¶ 25 (considering the district court's weighing of the evidence).

either the district court incorrectly blended the two standards, *or* the district court impliedly acknowledged that Plaintiffs *must* do something more than allege constitutional injuries. The latter makes sense—a party cannot establish apparent irreparable constitutional injury without first establishing that a law is apparently unconstitutional.

When seeking a preliminary injunction to enjoin a law on constitutional grounds, subsections (1) and (2) both require the same inquiry: whether a movant is likely to succeed in demonstrating that a law is unconstitutional. After all, these subsections "are not unrelated." *M.H. v. Mont. High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996). "[T]he irreparable injury basis for granting preliminary injunctions is based on an implicit determination that the applicant is likely to succeed on his or her underlying claim, and as a result would suffer" an irreparable injury. *Id.* For subsection (2), an applicant is required to "show that it is at least doubtful whether he or she will suffer irreparable injury before an adjudication on the merits." *Id.* at 129, 929 P.2d at 243. To do this, the applicant must *prove* a "probable right and a probable danger that such right will be denied." *Id.* In other words, an applicant must do more than conclusorily allege irreparable harm—an

applicant must show that it is "probable" that the alleged constitutional right will be violated. *Id.*

It's unclear, however, what standard the district court actually employed. *Compare* App.B 6–8 *with* App.A 15 n.2. It certainly articulated the wrong standards, and its resulting analyses were at times contradictory and erroneous.

Confusion over the proper preliminary injunction standards is endemic in the lower courts. It's high time this Court tidied the muddle and reaffirmed § 27-19-201's plain language. To obtain a preliminary injunction—at least in constitutional challenges—an applicant "appears … entitled to relief" when it establishes a likelihood of success on the merits.

B. The preliminary injunction standard shouldn't distinguish between claims for money damages and constitutional claims.

As the district court noted, this Court adopted a four-factor preliminary injunction standard for claims where a "monetary judgment may be made ineffectual by the actions of the adverse party." *Van Loan v. Van Loan*, 271 Mont. 176, 895 P.2d 614, 617 (1995). The factors are: (1) likelihood that the movant will succeed on the merits of the action; (2)

likelihood that the movant will suffer irreparable injury without the injunction; (3) the threatened injury outweighs harm to the opposing party; and (4) the injunction would not be adverse to public interest. *Id.* at 617. This Court held that the four factors were appropriate to use under both subsections (2) and (3). *Id.* at 618.

But there's no principled reason—and *Van Loan* provides none—to limit this four-factor test to monetary damages cases, particularly because the test comports with MCA § 27-19-201's text. Its logic applies to each subsection of the statute, and this Court should clarify that it applies to all preliminary injunction applications. And it cannot be correct that enjoining a democratically enacted, presumptively valid law—where the ultimate burden requires establishing unconstitutionality beyond reasonable doubt—demands a lesser burden than safeguarding a prospective award of money damages.

Van Loan's test tracks the sensible and stable federal standard eventually set forth in *Winter v. NRDC, Inc.*, 555 U.S. 7, 21–22 (2008). There, the Navy challenged the Ninth Circuit's finding that under the second factor of the four-factor test, a movant need only show a *possibility* of irreparable injury. *Id.* at 21–22. That standard, the Supreme Court

concluded, was too low—the irreparable injury must be at least "likely." *Id.* at 22. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy." *Id.* at 22. Montana characterizes preliminary injunctive relief the same way. *See Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995)). And the *Winter*/*Van Loan* test better honors the statutory text than the "prima facie" standard. *Compare* MCA § 27-19-201(2) ("when it appears that … some act … would produce great or irreparable injury"), *with Winter*, 555 U.S. at 20 ("likely to suffer *irreparable harm* in the absence of preliminary relief") (emphasis added).

In *M.H. v. Montana High School Association*, this Court effectively adopted this four-factor test and concluded an applicant must show a likelihood of success on the merits. 280 Mont. at 135, 929 P.2d at 247.

The Court then said that "[t]here must also be a showing that, absent a preliminary injunction, the applicant would suffer harm which could not be adequately remedied after a trial on the merits, and therefore, a preliminary injunction is necessary to maintain the status quo and minimize harm to the parties." *Id.*, 929 P.2d at 247. These considerations are functionally identical to the *Winter* factors. *See Porter*, 192 Mont. at 182, 627 P.2d at 840. Despite this Court's adoption of these standards, the lower courts continually spurn the federal standard under the fiction that Montana's standard is somehow unique. App.B 6–8. It's not.

In constitutional cases, courts must determine whether a plaintiff's claims are likely to succeed; absent that, there can't be irreparable constitutional injury.[2] This is the only possible understanding of the statutory standard, both as a matter of plain meaning and logic. Although a party need not show a certainty of winning at the preliminary

[2] The presumption of constitutionality requires this. *See Weems*, ¶¶ 34–35 (Rice, J., dissenting) (noting this presumption applies at every stage of the proceeding). Doing away with this presumption, and instead requiring the State to show beyond a reasonable doubt why the injunction should not issue and why the laws are not unconstitutional, creates a presumption in favor of injunctive relief. Presumptive relief of this kind cannot be "extraordinary." *See Citizens for Balanced Use*, ¶ 11; *see also Mazurek*, 520 U.S. at 972.

injunction stage, *Driscoll*, ¶ 16, it must do more than simply allege a constitutional violation. Yet that's all that's required under the standard lower courts—and the lower court in this case—currently apply. This Court should reverse and reaffirm the statutory standard

II. This Court should overrule Armstrong.

Twenty-three years ago, this Court invented from whole cloth a state constitutional right to elective abortion. *Armstrong*, ¶ 8. That right finds no support in the text of the Montana Constitution, and it unequivocally violates the framers' intent. Yes, the right to privacy is explicit in the Montana Constitution—unlike its federal counterpart—but the right to an abortion appears in neither. And yes, the Montana right to privacy is broader than its federal analog, but it nevertheless contains no right to abortion. *See State v. Staker*, 2021 MT 151, ¶ 8, 404 Mont. 307, 489 P.3d 489 ("In general, privacy is the ability to control access to information about oneself.") (cleaned up); *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224; *see also* App.C 42 (Article II, § 10 is necessary because government entities can "now snoop more easily and more effectively than ever before"). Instead, the right is entirely judge-made, arising from the sociological convictions of seven

justices. *Armstrong* was manifestly wrong the day it was decided. Now, it falls to seven *different* justices to reaffirm a juridical first principle: courts declare what the law is, not what judges think it should be. This Court should overrule *Armstrong*.

A. Stare decisis doesn't justify upholding *Armstrong*.

Adherence to precedent is the norm, *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020), but stare decisis provides no refuge for *Armstrong*. Stare decisis doesn't require courts to follow "manifestly wrong decision[s]." *State v. Gatts*, 279 Mont. 42, 52, 928 P.2d 114, 119 (1996). "Court decisions are not sacrosanct … and stare decisis is 'not a mechanical formula of adherence to the latest decision.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

Yet Courts should overrule precedent only when there is "special justification" or "strong grounds." *Ramos*, 150 S.Ct. at 1414. Several factors merit consideration, including the quality of the precedent's reasoning, its consistency and coherence with previous or subsequent decisions, its workability, and the existence of any reasonable reliance interests. *Id.* All these counsel in favor of overruling *Armstrong*.

1. Armstrong *is manifestly wrong.*

Armstrong's reasoning is a deeply flawed tribute to unrestrained judicial activism. Nowhere in Montana's constitutional text is there a right to elective abortion. Instead, the framers intentionally excluded abortion from the Constitution and left *to the Legislature* the prerogative to permit, prohibit, or regulate it.

i. The *Armstrong* decision

In *Armstrong*, Justice Nelson began by unremarkably noting that the state constitutional right to privacy is fundamental. ¶ 34. He then acknowledged the "judicially recognized" right to "personal autonomy," which the Court previously read into the right to privacy in *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). This new right to personal autonomy was undefined, and the Court had not "articulate[d] its scope." *Armstrong*, ¶¶ 35, 38 ("no final boundaries can be drawn around the personal autonomy component").

Justice Nelson then extrapolated three new rights from this personal autonomy component of the right to privacy—the "right of each individual to make medical judgments affecting … bodily integrity," the right to choose one's own health care provider free from government interference, and "a woman's right to seek and obtain pre-viability

abortion services." *Id.* at ¶ 39. These three "rights" don't arise from the constitutional text or flow logically from *Gryczan*. *Armstrong* leans on *Gryczan* where the Court held that the "personal component of individual privacy includes the right of consenting adults to engage in private, same-gender, non-commercial sexual conduct free from governmental interference." 283 Mont. at 455–56, 942 P.2d at 126. From that, Justice Nelson reasoned that "procreative autonomy"—a term used for the first time in his opinion—is a form of "personal autonomy" protected by Article II, §10. *Id.* at ¶ 39. Later, Justice Nelson bolstered the discovery of these new rights by surmising that because Montana's right to privacy is "broader" than the federal right, the right to "pre-viability" abortion" must also be included in this privacy right. *Id.* at ¶ 41.[3] He further noted—incorrectly, as explained below—that the framers never attempted to circumscribe the right to privacy. *Id.* at ¶ 36.

In just a few sentences, therefore, *Armstrong* remarkably located a right to pre-viability abortion in a constitutional provision meant to prevent government snooping. *See Staker*, ¶ 8; *Hoover*, ¶ 14.

[3] It's not so easy to pin down the constitutional basis for the federal abortion right. Even *Roe famously* struggled to root it in any particular constitutional guarantees. 410 U.S. at 152–153.

ii. The framers of the Montana Constitution expressly rejected *Armstrong*'s holding that the Declaration of Rights includes a right to abortion.

Armstrong erroneously concluded that the framers left room for abortion rights within the right to privacy. *Armstrong*, ¶¶ 35–38. They did not. At the time of the convention, abortion was criminal in Montana. *See* Mont. Rev. Code §§ 94-401 and 94-402 (1947); *see also* 35 Op. Att'y Gen. 9 (1973). And during debates, the framers rejected a proposed amendment to Article II, § 3's Inalienable Rights Clause that would've changed "persons born" to "persons conceived." App.C 1. Opposing the amendment, Delegate Dahood stated the position of the Bill of Rights Committee, explaining that abortion "*is a legislative matter insofar as we are concerned*." *Id*. The delegates clearly understood that the Legislature had not recognized a right to abortion, and they could've constitutionalized that public policy decision. But they chose to leave that abortion policy firmly in the hands of the Legislature. App.C 2 (rejecting the amendment 15 Ayes to 71 Nos).

With that understanding of the framers' intent, *Armstrong*'s entire rationale falls to pieces. *See Brown v. Gianforte*, 2021 MT 149, ¶ 43, 404 Mont. 269, 488 P.3d 658 (courts interpret constitutional provisions by

construing the plain text and giving effect to the framers' intent).[4] Whatever might be said of other rights recently discovered under Montana's right to privacy, the framers unequivocally excluded abortion from the list. That belongs to the Legislature. *Armstrong* was woefully wrong.

2. *Armstrong* is inconsistent with prior and subsequent decisions.

[4] *Armstrong*'s disingenuous attempt to navigate around the problem of the framers' intent is untethered from any serious constitutional principle. *See Armstrong*, ¶¶ 43–45. The Court declared with total assurance that the only reason the framers placed the issue outside the Constitution and in the Legislature's domain was "because of the historical debate as to 'when a person becomes a person.'" *Id.*, ¶ 44. And then, just as confidently, the Court remarked that *Roe* "resolved the debate from a legal standpoint" the next year. *Id.* The implications of this line of reasoning are astounding. It goes like this: one year after the framers unequivocally determined that abortion "is a legislative matter insofar as we are concerned" and that "[i]t has no part at this time in the Bill of Rights of the Constitution of the State of Montana," the U.S. Supreme Court—construing federal law—made a decision that effectively amended the Montana Bill of Rights to now include a right to abortion that is stronger than its federal counterpart. That sort of sophistry borders on the shameful. This Court interprets state constitutional provisions by giving effect to the intent of the delegates and the history and context of the 1972 Constitution, not subsequent federal decisions interpreting federal law. *See Brown*, ¶ 43. And Montana's Constitution has not been amended to include a right to abortion.

Armstrong considered a common regulation that allowed only physicians to perform abortions. *See Mazurek*, 520 U.S. at 975. *Armstrong* held the scope of the right to privacy to encompass "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." ¶ 75. The broad, virtually boundless, language has proven unworkable in practice as it seemingly calls into question every regulation of every medical provider.

Justice Gray presciently highlighted that *Armstrong*'s overbroad language jeopardizes common-sense health regulations. *See* ¶ 82 (Gray, J. concurring) ("I do not join in those portions of the opinion which cast too wide a net and which implicitly suggest that the Legislature has no role at all in matters relating to the health care to be provided to the people of Montana."). And predictably, this Court subsequently narrowed *Armstrong*'s overbroad language. *See Wiser v. State*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133 ("[I]t does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes on that right."); *Mont. Cannabis Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 286 P.3d 1161 ("*MCIA*"). But

according to the district court, *Wiser* and *MCIA I* in no way limited Armstrong's intolerance for basic abortion regulations. Until the Court overrules *Armstrong*'s unqualified language once-and-for-all, myriad challenges to basic public health and safety regulations will continue to arise.

3. *Armstrong* is an unworkable precedent.

Perhaps unsurprisingly, the legal rules *Armstrong* plucked from thin air have proven unworkable, and this Court need no longer follow them. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (the Supreme Court "has never felt constrained to follow precedent" that has proved "unworkable"). As demonstrated below, *Armstrong* now stands athwart *any* law that *affects*—not infringes—the right to pre-viability abortion, and subjects it to strict scrutiny. *See infra* Section III. And that means that *Armstrong* eviscerates any legitimate interest the State may have in regulating abortion to advance women's health, protect unborn life, and maintain the medical profession's integrity. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). It effectively bans any regulation—no matter how modest or necessary—the State may impose in furthering these interests. No enumerated constitutional right enjoys such unqualified

supremacy. *See MCIA I*, ¶ 20; *Wiser*, ¶¶ 17–18. Unenumerated rights concocted by courts shouldn't either. *See infra* Section III.B. "Better reasoning" counsels this Court to overrule *Armstrong*. *See Burnet v. Coronado Oil & Gas Co., 28*5 U.S. 393, 406–08 (1932).

4. Overruling *Armstrong* disrupts no reliance interests because federal abortion law applies in Montana.

Plaintiffs' alleged reliance interests lack persuasive merit. Women may still access abortions under federal law, even if Montana law provides no such right. *Armstrong* located a right in Article II, § 10 that the framers explicitly said didn't exist there. It was a breathtaking exercise in judicial activism, and it was manifestly wrong. It has created problems with other jurisprudence related to the State's exercise of traditional police powers, it is unworkable, and Montana women don't need it. It should infect Montana's jurisprudence no longer. The Court should overrule *Armstrong*.

III. Even under *Armstrong*, not every regulation affecting abortion warrants strict scrutiny review.

The district court misunderstood *Armstrong* and *Weems* to demand strict scrutiny review of any law that even remotely affects abortion. But laws may obviously *affect* abortion without *infringing* upon the right to

obtain an abortion. *See e.g.*, *Casey*, 505 U.S. at 873–74 (not every regulation is an infringement); *Moore v. E. Cleveland*, 431 U.S. 494, 538 (1977); *Miller v. Rumsfeld*, 647 F.2d 80, 82 (9th Cir. 1981). That much is clear in *Armstrong* itself, which instructed strict scrutiny only when "legislation *infring[ed]* the exercise of the right …." ¶ 34 (emphasis added). And as this Court noted in *Weems*, "not every restriction on medical care impermissibly infringes [the right to privacy]." *Weems*, ¶ 19 (citing *Wiser*, ¶ 15).

Many abortion regulations must be permissible under rational basis review. Abortion is still a medical procedure, and the Legislature routinely regulates the medical profession. *See, e.g.*, MCA §§ 2-15-1731, 37-20-101, 37-20-203, 37-20-301, 37-20-401, 37-20-301. As explained above, the framers left abortion regulation "to the legislature." And while a court's legal decisions—like the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)—may impact the scope of the Legislature's ability to regulate, caselaw makes clear that the Legislature can still regulate in this space. *See, e.g., Wiser v. State*, 2006 MT 20 (2006); *see also Armstrong,* ¶¶ 79–80 (Gray, J., concurring) ("[T]he practice of medicine is a privilege, not a right, in Montana and … it is generally

subject to legislative oversight in order to protect the health, safety, and welfare of the people of Montana."). To conclude otherwise—as the district court did—amounts to trapping pregnant Montana women considering abortion in 1999's now-outdated obstetrical care standards; or tethering their standard of care to abortion providers' revenue-maximizing business practices. Obviously, the State has regulatory latitude to guarantee women quality, up-to-date, individualized care.

Under *Armstrong*, courts must determine whether a law intrudes upon a protected right before applying strict scrutiny. *Armstrong* identified a right to abortion in Montana's constitutional right to privacy. ¶ 39. And it is well established in privacy challenges that courts must first determine whether a law impermissibly intrudes upon a protected right before determining the proper level of scrutiny. *See Hastetter v. Behan*, 196 Mont. 280, 282–83 (1982). In *Gryczan*, for example, this Court first considered whether the conduct was protected by the right to privacy. 283 Mont. at 454; 942 P.2d at 125. The Court then considered whether the law "constitute[d] a governmental intrusion into [the] right to privacy." *Id.* Once it made those determinations, the Court applied strict scrutiny. *Id.* at 456, 942 P.2d at 126 ("finding no compelling state

interest for such an intrusion"). Although the Court's review of the alleged intrusion was succinct, it still supports the fact that there must be a threshold finding that (1) the conduct implicates the right to privacy and (2) the challenged law intrudes upon this right. The same is true when evaluating abortion regulations.

Federal abortion caselaw—upon which *Armstrong* relied—affirms the need for a pre-scrutiny judicial inquiry. In *Casey*, the Court observed that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." 505 U.S. at 873–74. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874. In other words, merely *affecting* the right to abortion does not a constitutional violation make. The law must impermissibly *impinge* the right to merit strict scrutiny. The laws at issue here do not.

Likewise in *Gonzales v. Carhart*, the Supreme Court determined that states "may … bar certain procedures and substitute others … [to] further[ ] its legitimate interests in regulating the medical profession." 550 U.S. 124, 158 (2007) (citing *Casey*, 505 U.S. at 873–74). Together,

these cases explain that a regulation with an incidental effect on abortion don't automatically garner strict scrutiny. And in *Whole Woman's Health v. Hellerstedt*, the Court made an initial determination that the burden was "substantial" before determining that the law was subject to strict scrutiny. 136 S. Ct. 2292, 2312 (2016). And this is consistent with other fundamental rights, including rights that are actually enumerated in the United States Constitution. Only when a right is subject to "severe" regulation, is strict scrutiny appropriate. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). There must accordingly be some threshold determination that the regulation impermissibly intrudes upon the right.

Not only did the district court fail to do this analysis, but it rejected the idea that it was even necessary. App.A 21 n.3. It concluded that because the right "[a]t issue here is a fundamental right," strict scrutiny must apply. App.A 29, 31. That, however, collapsed the inquiry into the first question (whether a right is implicated) and ignored the second (whether the right is violated). And if that is correct, then every abortion regulation must automatically merit strict scrutiny review. This categorical rule would set abortion apart as a subject matter the State may never regulate for the health, safety, and welfare of women. Simply

concluding—as the district court did—that a fundamental right is implicated isn't sufficient. It skipped the critical analysis—whether the law actually *infringes* the abortion right. Without that, the court's rush to strict scrutiny was error.

IV. The district court manifestly abused its discretion by failing to properly consider and assess the State's evidence and arguments that definitively rebut Plaintiffs' prima facie case.

This Court reviews the issuance of a preliminary injunction for a "manifest abuse of discretion." *Burke v. Rolle*, 2019 MT 6N, ¶ 5, 395 Mont. 519, 432 P.3d 716. An abuse of discretion is manifest where it is "obvious, evident, or unmistakable." *Id.* (citation omitted). Below, the district court manifestly abused its discretion by failing to properly weigh the evidence and arguments presented by the State. When there is competing evidence—as there was here—a district court must analyze and explain which evidence is more persuasive. *See Porter*, 192 Mont. at 180–82, 627 P.2d at 838–40 (reversing district court for failure to account for rebuttal evidence).

Like in *Porter*, the district court failed to consider most of the State's rebuttal evidence. It adopted significant portions of Plaintiffs' affidavits as undisputed fact, without explanation and without

accounting for witness credibility or bias.[5] *See generally* App.A. The court moreover disregarded the longstanding principle that courts must give "legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163; *see also Marshall v. United States*, 414 U.S. 417, 427 (1974). Expert testimony submitted by the State amply supports the challenged laws and squarely rebuts Plaintiffs' self-serving, speculative evidence. So Plaintiffs can't have carried their high burden. *See Citizens for Balanced Use,* ¶ 11. By failing to properly consider the State's rebuttal evidence, the district court manifestly abused its discretion. *See Porter,* 192 Mont. at 182, 627 P.2d at 840.

A. HB 136's limitations on abortions after 20 weeks LMP doesn't impinge the right to obtain pre-viability abortions, and even if it did, its provisions are narrowly tailored to serve compelling State interests.

The district court summarily determined that Plaintiffs made a prima facie showing that restricting abortions after 20 weeks regulates

[5] All of Plaintiffs' experts are current or former Planned Parenthood members, employees, or board members. App.H 3, ¶ 2; App.J 3–4, ¶¶ 1,6; App.K 3, ¶ 1; *see also Welcome Dr. Steven Ralston, Chair of the Department of Obstetrics and Gynecology and Pennsylvania Hospital*, Penn Medicine (Oct 28, 2016), shorturl.at/muR68.

pre-viability abortion. App.A 18–21. It reached that conclusion by ignoring the State's powerful rebuttal evidence. But then the district court also failed to consider the State's compelling interests in protecting unborn babies from pain,[6] women from dangerous late-term abortions, and the ethical integrity of the medical profession. That was a manifest abuse of discretion.

1. HB 136 doesn't violate the right to pre-viability abortion.

i. The district court inexplicably ignored the State's overwhelming rebuttal evidence regarding viability.

When *Roe* was decided in 1973, viability was "usually placed at about seven months (28 weeks)." 410 U.S. at 160. By the time of *Casey* in 1992, it was "at 23 to 24 weeks." 505 U.S. at 860. This can be attributed to advancements in medical technology. App.E 16, ¶ 30. Although the U.S. Supreme Court is reconsidering whether "viability" is an appropriate standard for constitutional purposes, *see Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2021 WL 1951792 (S. Ct. May 17, 2021), the fact remains that viability is not tied to legal

[6] Montana may permissibly protect its important interests in the life of its unborn citizens on the cusp of birth. *Cf.* MONT. CODE ANN. § 45-5-116 (criminalizing fetal homicide after 8 weeks gestation).

precedent but is rather based on advancing medical science and information.

The State presented evidence that viability can occur as early as 21 weeks, yet the district court entirely ignored this evidence and adopted Plaintiffs' version of reality wholesale. The State explained that babies usually survive in the U.S. at 22–23 weeks LMP, App.F. 3, ¶ 6, with some even surviving at 21 weeks. App.D 16, ¶ 60. This advancement in medical science is unsurprising 30 years after *Casey*. Indeed, a wide-ranging 2007 survey revealed that 37.2% of maternal-fetal health specialists believed threshold viability was about 23 weeks LMP. *See* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 138 (2013), https://bit.ly/3qkfvGE (cleaned up). A comparative 2% believed threshold viability resided at 22 weeks LMP, *see id.*, and—again—that was 15 years ago. The State's experts confirm that the viability range now includes 21-22 weeks LMP. And to the extent nailing down the viability mark involves "medical and scientific uncertainty," the Legislature's decisions are entitled to deference—even in the abortion context. *See Carhart*, 550 U.S. at 163.

Plaintiffs' experts, conversely, trotted out viability ranges from 24-

26 weeks LMP, App.H 10, ¶ 34. But these estimates ignore 30 years of medical advancements, the State's contrary evidence, and the trends illustrated by the survey results discussed above. And Plaintiffs' contrary views are not entitled to deference.

So the State definitively established that viability frontier now extends to 21-22 weeks LMP. And the reason that removes HB 136 from strict scrutiny is a reason the district court simply ignored. App.A 22. The best technology routinely measures gestational age with a 1–2 week margin of error. App.E 17, ¶ 34. So under normal circumstances, an unborn child assessed to be 20 weeks LMP may actually be 22 weeks LMP, well within the consensus viability range. Plaintiffs' expert argues the margin of error is 10 days at most. App.L 13, ¶ 24. But that changes nothing. Even if 10 days marked the outer extreme of the margin of error, ultrasounds could still mistake a 22-week LMP baby for a 20-week LMP baby. And because that baby would fall within the consensus viability range, the fundamental *pre-viability* abortion right *Armstrong* created

isn't implicated at all.[7] HB 136, marshalling contemporary medical evidence and the best available technology, serves the State's legitimate—and exceedingly compelling—interest in protecting the lives of *viable* fetal persons.

If the Court must use viability as its standard, *see Armstrong*, ¶ 14, then it must reckon with a developmental stage constantly trending earlier, according to the *best* scientific and medical evidence. App.E 17, ¶ 30. In this case there can be no doubt—the State's evidence is more current, credible and persuasive. Plaintiffs' evidence, by contrast, swims against the current of advancing medical science. The court below didn't even consider the State's evidence, or explain why. This was a manifest abuse of discretion.

ii. The district court failed to consider the State's compelling interests in limiting dangerous and brutal dismemberment abortions that subject the unborn to pain and undermine the integrity of the medical profession.

Even if HB 136 was properly evaluated under strict scrutiny,

[7] For the same reason, HB 136 can't violate equal protection under Plaintiffs' theory. And even if the Court concluded it did, it would survive the most exacting scrutiny for the same reasons explained in Section IV.A.1.c.

Montana undoubtedly has compelling interests in protecting the unborn. And this interest must be "measure[d]" "in 'the light of present medical knowledge.'" *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976) (quoting *Roe*, 410 U.S. at 163). States may exercise "legislative judgment," *Doe v. Bolton*, 410 U.S. 179, 190 (1973), based on "advancing medical knowledge," *Roe*, 410 U.S. at 116, to determine when abortions should be permissible.

Present medical data establishes that, among many important developmental milestones at 20 weeks, an unborn child of this age not only feels pain but has an "increased sensitivity" to it. App.F 3, 20, ¶¶ 7, 43–44. Dr. Pierucci, a respected clinical neonatologist, cites many recent studies confirming this and establishes the irrelevancy of the outdated studies Plaintiffs' expert relies on to claim unborn babies cannot feel pain until 24 weeks LMP. App.F 10–16, ¶¶ 21–33 (engaging with App.H 11, ¶¶ 37–38).

Most abortions performed in the second trimester are dismemberment and evacuation (or "D&E") procedures using surgical instruments to crush and tear the unborn child apart before removing pieces of the dead child from the womb. App.E 5, ¶ 11. These procedures

not only inflict grievous pain on the unborn, they are more invasive and dangerous to the mother because they can cause sepsis, uncontrollable bleeding, infection, chronic pain, and infertility. App.E, 5, ¶¶ 10–11.

And such a brutal procedure obviously "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician." Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. 1531 §§ 2(14)(J), 2(14)(K).

Based on available medical information and extensive factfinding, the Legislature reached the same conclusions as the State's experts. *See* HB 171, 67th Leg. (2021); HB 136, 67th Leg. (2021); HB 140, 67th Leg. (2021). Plaintiffs, of course, disagree with this policy outcome. But policy disagreement cannot undermine the State's thoughtful pursuit of its compelling interests, which is entitled to deference. *See Carhart*, 550 U.S. at 163.

Montana "has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of … 'D&E' abortions." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018).

It also "has an interest in protecting the integrity and ethics of the medical profession from being tarnished by participation in gruesome procedures." *Gonzales*, 550 U.S. at 157 (cleaned up). This, of course, includes preventing the infliction of brutal pain unborn children experience during these procedures, limiting increased danger and pain to their mothers, and protecting the medical profession's integrity by "promot[ing] respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158. The district court manifestly abused its discretion by ignoring these compelling interests.

2. The common medical exceptions to the 20-week limit are not impermissibly vague.

Plaintiffs' vagueness attack on HB 136's exceptions likewise fails because laws with the same medical exceptions, *Casey*, 505 U.S. at 880, or even without health exceptions, *Gonzales*, 550 U.S. at 161, have been repeatedly upheld by the U.S. Supreme Court. The district court dismissed these cases as "inapposite federal law," App.A 23, but there is no difference between Montana and federal vagueness analysis, *Montana v. Dixon*, 2000 MT 82, ¶ 27, 299 Mont. 165, 172, 998 P.2d 544, 548. The district court attempted to flip the burden to the State to "rebut" Plaintiffs' assertions, but Plaintiffs face a "high burden of proof in

showing that the statute specifies no standard of conduct at all." *State v. Allen*, 2009 MT 90N, ¶ 13, 2009 Mont. LEXIS 101. The basis for the district court's vagueness ruling was that the parties disagreed about what the statute means. App.A 30. This is not sufficient.

Plaintiffs argue that the health exceptions fail because they do not allow the use of "appropriate medical judgment." App.I 8 n. 8. But the statute is clear: abortion providers need only exercise "reasonable medical judgment" as defined in HB 136(2)(8)—a common medical requirement doctors—at least Montana doctors—understand. App.D 17, ¶¶ 63–64.

B. The district court discounted the State's strong interests in HB 171's informed consent enhancements and heightened standards of care for pregnant women considering abortion.

HB 171 establishes a protocol for obtaining informed consent 24 hours before administering chemical abortion drugs and requires a physical examination by a competent medical provider to minimize the risks. These provisions facilitate fully informed consent and mitigate documented risks like hemorrhage or death from ectopic pregnancy. App.E 30, ¶ 55; App.D 21, ¶¶ 10, 76. These are sensible medical regulations, and they survive the appropriate level of scrutiny.

1. Requiring informed consent and a physical exam before a chemical abortion doesn't violate the right to privacy.

The district court found Plaintiffs made a prima facie showing that HB 171 violates *Armstrong* because it requires (i) informed consent 24 hours before the abortion, (ii) chemical-abortion providers to be able handle complications personally or by referral, and (iii) a physical examination before the abortion. App.A 26–28.

i. 24-hour informed consent is reasonable.

Informed consent does not infringe any fundamental right. A patient cannot—in any context—waive informed consent to a medical treatment because it supposedly violates her privacy, dignity, happiness, or other rights. And that's no surprise: failure to obtain informed consent for a medical procedure can constitute medical malpractice. *See DeMoney v. Kaufman*, No. DA 18-0295, 2019 MT 195N*, 2019 Mont. LEXIS 316 (Aug. 13, 2019) (tonsillectomy); *Howard v. Repogle*, 2019 MT 244, 397 Mont. 379, 450 P.3d 866 (spinal fusion). Obtaining informed consent a mere 24 hours before the procedure is so reasonable and commonplace

that it is the law in a majority of states.[8] *See also Casey*, 505 U.S. at 881–83 (upholding 24-hour informed-consent period). Indeed, Montana already has such a law. The still in-effect parental notification law requires abortion providers give at least 48 hours actual notice to a minor's parent or legal guardian prior to performing an abortion upon the minor. *See* MCA, § 50-20-224 (2011).

The district court didn't address these arguments, and relied instead on an unreported district court case, *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *22 (Mont. Dist. Ct. Mar. 12, 1999) (App.A 28), where the court enjoined a previous 24-hour informed consent provision. But this provision, unlike *Casey*, required the information to be provided by the physician performing the abortion. Here, the statutory requirements are like *Casey* because HB 171 allows any "qualified medical practitioner" to provide the information. HB 171(7)(3); *see* § B(4) below. *Planned Parenthood of Missoula* does not stand for the proposition that any informed consent requirement is unlawful.

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[8] *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE (Jan. 1, 2022), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

ii. Physical exams by qualified professionals better protect women from chemical abortion's known risks.

A physical examination requirement doesn't violate the *Armstrong* right. There is no right to administer chemical abortion drugs—or to perform any other significant medical treatment—without first examining the patient and obtaining proper informed consent. Like other informed-consent laws, the State has determined physical exams better protect patients' welfare and the medical profession's integrity. *See, e.g.*, MCA § 37–3–333 (breast cancer treatment); § 50–12–105 (certain treatments of terminal or chronic illness). The in-person visit requirement is common before prescribing medication with potentially severe complications. *See e.g.,* MONT. ADMIN. R. 24.156.813 (2018) (requiring in-person visit before prescribing a Schedule II drug by telemedicine).

Unsurprisingly, HB 171(5)(2) reasonably requires chemical abortion providers to "be credentialed and competent to handle complications management, including emergency transfer, or must have a signed contract with an associated medical practitioner who is." HB 171 doesn't require a provider to handle *all* complications, which is how

the district court incorrectly interpreted the statute. App.A 25. A reasonable reading of HB 171 shows it simply requires the provider to be able to treat or refer for treatment patients experiencing complications while and immediately after the drugs are terminating their pregnancies. App.D 21–22, ¶¶ 79–83.

HB 171's definition of "complication" in Section 3(5) applies only to Section 7(5)(e)'s required consent form, which must contain "a description of the risks of complication from a chemical abortion …." "Complication" therefore encompasses both long and short-term complications that can arise from chemical abortions. "Complications management" is a different term, and contextually covers only short term treatment during and immediately following a chemical abortion. *See* App.D 21–22, ¶¶ 78–80. Indeed, the subsection immediately following "complications management" imposes efforts to schedule a follow-up appointment. Logically, the two provisions in close proximity refer to short-term care. The State did engage in this argument below, and the district court's refusal to engage the arguments is baffling.

HB 171's directive promotes the health and safety women. In particular, it promotes the health and safety of women in rural

communities, where chemical abortions are the most dangerous because they lack access to facilities that can manage complications. "A woman living in rural Montana hours away from a hospital who is given a prescription of misoprostol for an at home-directed medical abortion and develops life-threatening bleeding may be 100 miles or more from the nearest hospital. In the winter her transport may be compromised by impassable or dangerous roads. Her …risk of hemorrhagic shock is much greater than a woman who receives the same treatment in an urban area with a critical care hospital nearby." App.N 10, ¶ 24. The district court grappled with this strong evidence by ignoring it, instead summarily concluding that "telehealth enables providers to provide healthcare for Montanans in remote areas without causing them to have to drive significant distances." App.A 27. And on that conclusory basis, the district court determined Plaintiffs met their prima facie burden.

Finally, it is worth noting that driving at least one to two hours each way to obtain an abortion is not a constitutional injury. More than 8,000 medical providers in Montana are eligible to perform abortions, App.M 2, ¶ 3 & Ex. A, and abortion clinics are located in several Montana cities, App.G 4, ¶ 4.c. Plaintiffs' failure to recruit abortion providers in

more locations or set up operations in more remote areas is no reason to mandate decreased protections for women by permitting unregulated chemical abortions. *See* App.E 33–34, ¶ 59.

The court's inexcusable disregard of the State's arguments, interests, and evidence was a manifest abuse of discretion.

2. HB 171 doesn't violate anyone's free-speech rights.

The district court held that HB 171's informed-consent requirements impermissibly compel speech based on content. But that conclusion ignores the U.S. Supreme Court's holding that disclosures necessary to obtain informed consent for abortion do *not* violate the providers' free-speech rights because it is part of the practice of medicine. *Casey*, 505 U.S. at 884 ("[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure …. To be sure, the physician's First Amendment rights … are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." (cleaned up)). The district court wrongly relied on an employee retaliation case, App.A 30, that had nothing to do with

informed consent.

The district court also adopted carte blanche Plaintiffs' baseless objections to HB 171's required abortion pill reversal ("APR") information. For example, Dr. Banks cites *no studies* supporting her opinion that women shouldn't be informed of the possibility of APR, the potential need for Rh immunoglobulin, or the breast-cancer risks associated with abortion. App.J 11–12, ¶¶ 29–32. Indeed, she concedes there is a danger of Rh incompatibility "which may cause complications in subsequent [wanted] pregnancies," *Id.* ¶ 33, but cites no evidence for her view that the risk is very low under 8 weeks LMP. Dr. McNicholas testifies only that APR is "experimental," App.L 20, ¶ 38, and she isn't "aware" of evidence that APR is possible. App.H 18, ¶¶ 57–58. She also cites an ACOG[9] bulletin and mischaracterizes a partial study which unremarkably demonstrated the danger of chemical abortion drugs—not progesterone. App.E 37, ¶ 71. As demonstrated by the State, there is abundant evidence that APR can work, that Rh immunoglobulin is

[9] The American College of Obstetricians and Gynecologists (ACOG) is an avowedly pro-abortion organization. *Abortion Policy*, Am. Coll. of Obstetricians and Gynecologists (reaffirmed Nov. 2020, shorturl.at/ruxHK.

necessary for a significant percentage of pregnant women, and that the risk of breast cancer increases for women who don't have children. App.E 32, 35–39, ¶¶ 56, 64–69,74–76.

3. The district court improperly credited Plaintiffs unfounded fears about disclosing personal information.

The district court also credited Plaintiffs' unsupported speculation that HB 171's reporting requirements "could" expose patient personal information, and "may" chill women's willingness to have abortions or providers' willingness to administer them. App.A 30. But that ignores HB 171's plain text, which prohibits the reporting of any "information or identifiers that would make it possible to identify, in any manner or under any circumstances, a pregnant woman who has obtained or seeks to obtain a chemical abortion." HB 171(9)(3), (9)–(10).

HB 171's required reports will provide accurate, currently unavailable information that will help the State understand the risks and complications associated with chemical abortions, which will further its obvious interests in advancing the health and safety of Montana women. *See* App.E 27, 43, ¶¶ 50, 80; App.D 8, ¶ 21. Plaintiffs' unfounded fears about informational misuse are undercut by both statutory text and experience. The district court abused its discretion when it failed to

consider the State's rebuttal arguments (and the statutory language).

4. The district court failed to explain its cursory holding that HB 171 is likely impermissibly vague.

Lastly, the district court held that Plaintiffs met their prima facie burden that HB 171 is impermissibly vague because the parties disagree about some of its requirements. App.A 30. But that analysis relies on Plaintiffs' misreading of HB 171.

Plaintiffs interpret HB 171 to be more restrictive than it is to bolster their facial challenge. Contrary to Plaintiffs' argument, HB 171 doesn't require the medical practitioner administering the abortion drugs to obtain the informed consent. It only requires "the qualified practitioner providing an abortion-inducing drug" to examine the woman, in person, beforehand. There's no requirement that the same practitioner obtain informed consent 24 hours before that. Instead, any "qualified medical practitioner" can provide Section 7(3)'s required consent. So Plaintiffs' exaggerated concern that the process "could span weeks" because it is "unlikely" the same medical provider would be available to obtain consent and then conduct the physical exam 24 hours later is predicated on their own misreading of HB 171.

Plaintiffs also misread the informed-consent requirements in HB

171(7)(5)(a) to always require an ultrasound before the abortion. That provision merely lists the requirements for the consent form, which must include "the probable gestational age of the unborn child as determined by both patient history and ultrasound results used to confirm gestational age." Ultrasound results are noted only if one is administered. But an ultrasound is not required. This is supported by the fact that Sections 4 and 5 of HB 171 list the steps a provider must follow to legally administer chemical abortion drugs, and conducting an ultrasound is not one of them. *See Dukes v. City of Missoula*, 2005 MT 196, ¶ 14, 328 Mont. 155, 119 P.3d 61; *see also* Antonin Scalia & Bryan A Garner, *Reading Law*: *The Interpretation of Legal Texts* 167 (2012) ("the whole-text canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts").

Plaintiffs' misreading of HB 171 helps support their narrative that the law is unconstitutional. But Plaintiffs' business operations don't inform the constitutionality of the law. Rather, this Court must consider the plain text of HB 171, which belies Plaintiffs' interpretation.

C. HB 140 is a basic informed consent law.

The right to choose should mean a right to make informed decisions.

Abortion is a momentous decision, and Plaintiffs would have women make it based only on the limited information *they* wish to share. Offering an expectant mother the opportunity to view an ultrasound or hear the fetal heartbeat, both of which she is free to decline, nevertheless empowers her to more fully understand the procedure that she is choosing to undergo. App.E 43, 45, ¶¶ 81, 86. A woman has a right to know what is happening inside her and to make an informed decision about whether to obtain an abortion. HB 140 offers truthful, nonmisleading, and relevant information—the type states may obviously include in informed consent requirements. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 427–29, 446 (6th Cir. 2019) *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012). Laws like HB 140—that require at least an opportunity to view an ultrasound—exist in 21 other states.[10]

Yet the district court enjoined HB 140, concluding that it facially violated the rights to privacy, equal protection, and individual dignity. App.A 31. With no explanation, the district court summarily adopted

[10] *Requirements for Ultrasound*, GUTTMACHER INSTITUTE (Jan. 1, 2022) www.guttmacher.org/state-policy/explore/requirements-ultrasound.

Plaintiffs' assertion that HB 140 serves no medical purpose and only serves to stigmatize or discourage women from obtaining abortions. App.A 31. But that's nonsense. Plaintiffs presented no concrete facts, statistics, or studies supporting that speculation. Nor did they provide evidence that requiring women to sign a form if they declined the ultrasound opportunity "may" further stigmatize and discourage them from seeking medical care. App.I 17 (citing App.J 18, ¶¶ 51–52).

If a woman is given the option to view an ultrasound, does so, and then decides *not* to have an abortion, then that additional information will have made a consequential difference in her decisionmaking. That's a good thing—informed women making choices based on more, relevant information. For Plaintiffs, apparently, such an outcome would mean a woman got too much information.

Once again, the district court simply ignored the State's arguments and evidence. In so doing, it manifestly abused his discretion.

CONCLUSION

Accordingly, the State respectfully requests this Court to VACATE the district court's preliminary injunction.

DATED this 19th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 9,748 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0521

PLANNED PARENTHOOD OF MONTANA, and JOEY BANKS, 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.

APPENDIX