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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, v. STATE OF MONTANA and AUSTIN KNUDSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, in his official capacity, and his agents and successors. Defendants.	Cause No. DDV 2013–407 Hon. Christopher Abbott **DEFENDANTS BRIEF IN SUPPORT OF R.54(b) CERTIFICATION**

This Court should certify as final for purposes of immediate appeal those parts of its February 21, 2023, Order granting declaratory judgment and permanently enjoining the Parental Consent for Abortion Act of 2013, 2013 Mont. Laws 307 ("Consent Act"). (Doc. 295 at 50).

As the State argued, this law closes important gaps in Montana's abortion reporting regimes that protect vulnerable minors from exposure to repeated instances of sexual violence and abuse. (Doc. 175 at 6–8). This Court recognized the validity of the State's compelling interests, disagreeing only on whether the law was sufficiently tailored. (Doc. 295 at 33, 37–38, 43–44). The Court's Order should be certified for immediate appeal so that the State may seek to vindicate its interest in protecting children at the earliest possible opportunity.

BACKGROUND

The State and this Court previously documented this case's background and extraordinary history of procedural delay. (Doc. 251 at 2–7; Doc. 295 at 5–14). On February 21, 2023, the Court declared the Consent Act violates Article II, Section 10 of the Montana Constitution and permanently enjoined the State from enforcing the Act. (Doc. 295 at 50). The Court recognized the State possesses compelling interests in protecting children from sexual violence, monitoring post-abortion complications and mental health trauma, ensuring minors engage in fully informed decision-making, and promoting family integrity. (Doc. 295 at 33, 37–38, 43). However, the Court determined in each instance that the State failed to narrowly tailor the Consent Act. (Doc. 295 at 37–38, 43–44). The Court pointed to the Parental Notice of Abortion Act of 2011, 2011 Mont. Laws 307 ("Notice Act"), as a potentially less restrictive means to further these interests. (*E.g.* Doc. 295 at 43) ("…the Notice Act is necessarily a less restrictive alternative to the Consent Act….").

Finally, the Court recognized that while Plaintiffs challenge both the Notice Act and Consent Act as violative of Article II, Section 10 of the Montana Constitution, and both Acts require

interpretation of Article II, Section 15, the Acts involve somewhat different considerations. (Doc. 295 at 48). The Court invited the parties to brief the issue of whether Rule 54(b) certification is appropriate.

LEGAL STANDARD

A district court may direct final entry of judgment as to one or more, but fewer than all, claims in an action only if the court expressly determines that there is no just reason for delay. Mont. R. Civ. P. 54(b)(1). The district court must also "balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and the court shall … articulate in its certification order the factors upon which it relied in granting certification …." Mont. R. App. P. 6(6); *see also* Mont. R. Civ. P. 54(b)(2).

The reviewing court will ordinarily consider the following factors when considering a Rule 54(b) certification:

1. The relationship between the adjudicated and unadjudicated claims;
2. the possibility that the need for review might or might not be mooted by future developments in the district court;
3. the possibility that the reviewing court might be obliged to consider the same issue a second time;
4. the presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final;
5. miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Roy v. Neibauer, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980). Further, the district court must follow three guiding principles:

> (1) the burden is on the party seeking final certification to convince the district court that the case is the "infrequent harsh case" meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; (3) the district court must marshall and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

Rogers v. Lewis & Clark Cty., 2020 MT 230, ¶ 11, 401 Mont. 228, 472 P.3d 171 (citing *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 16, 317 Mont. 413, 77 P.3d 531).

ARGUMENT

There is no just reason for delay in certifying the Court's February 21, 2023, Order for immediate appeal. Rule 54(b) serves to expedite cases like this one for appeal. As the Court observed, the Consent Act and Notice Act involve different considerations regarding the factual issue of whether the statutes are appropriately tailored. (Doc. 295 at 48). Further the Consent Act repeals the Notice Act. (Doc. 295 at 8). If the State appeals and succeeds on appeal, then that outcome moots the need for a trial on the Notice Act. This unquestionably promotes judicial economy. Finally, the developed record in this case alleviates any concern that an appeal of the Consent Act judgment presents a premature appeal of an issue unready for appellate review. *Roy*, 188 Mont. at 84, 610 P.2d at 1187.

Given the procedural posture of the separate challenges to the Notice Act and Consent Act, the *Roy* factors are met in this case and it is in the interest of justice that the challenge to the Consent Act be certified for immediate appeal.

I. THE ADJUDICATED CLAIMS ARE LEGALLY AND FACTUALLY DISTINCT FROM THE UNADJUDICATED CLAIMS.

"Ideally the facts and theories separated for immediate appeal should not overlap with those retained …." *Weinstein v. Univ. of Mont.*, 271 Mont. 435, 898 P.2d 101, 105, (1995) (quoting *NAACP v. Am. Family Mut. Ins. Co.,* 978 F.2d 287, 292 (7th Cir. 1992)). Two claims may arise from the same transaction for Rule 54(b) purposes "provided that the facts and theories are sufficiently distinct." *NAACP*, 978 F.2d at 292. Two legal theories are sufficiently distinct if they call for proof of substantially different facts. *Id.* The underlying purpose in ensuring separation between the adjudicated and unadjudicated claims is to ensure the appellate court doesn't issue

advisory opinions on the remaining claims. *See Kohler*, ¶ 19 (If the Montana Supreme Court decides the merits of an improper Rule 54(b) appeal it "would be deciding claims which are still technically pending in the District Court.").

The Consent Act and Notice Act must be considered separately because they differ in the facts necessary to demonstrate the State properly tailored the two Acts. (Doc. 296 at 16; *see also* Doc. 296 at 48) (citing *Alaska v. Planned Parenthood*, 171 P.3d 577 (Alaska 2007); *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122 (Alaska 2016)). For example, the Acts apply to distinct age populations. (Doc. 295 at 5, 8) (the Notice Act applies to minors under the age of sixteen while the Consent Act applies to all minors). There are also substantial differences in the mechanisms by which the Acts achieve their purpose. (*E.g.* Doc. 295 at 5) (the Notice Act requires "actual notice" either in-person or by telephone with some exceptions); Doc. 295 at 8) (the Consent Act requires notarized written consent with some exceptions)). The factual question of whether the State's compelling interests can be achieved through a less restrictive means differs for the two Acts and the two Acts must be considered separately.

An immediate appeal doesn't present a risk of an improper advisory opinions. *Kohler*, ¶ 19. Both the Consent Act and Notice Act require interpretation of Article II, Section 10 and Article II, Section 15 of the Montana Constitution. (Doc. 296 at 16). But application of those sections to the specifics of each Act differs because the two Acts operate in mechanically different ways. The lodestar inquiry is whether the immediate appeal renders a decision on the merits for claims still pending in district court. *Kohler*, ¶ 18 (citing *Weinstein*, 271 Mont. at 442, 898 P.2d at 105). As

this Court identified, an adverse ruling on an immediate appeal doesn't foreclose the State prevailing at trial on the Notice Act. (Doc. 295 at 45). That is because the two Acts are distinguishable and need not rise or fall together.[1]

Even if, as the State contends, this Court incorrectly interpreted Article II, Section 10 and Article II, Section 15 as applied to the Consent Act and the Montana Supreme Court reverses or otherwise remands after appeal, that will not be an advisory opinion on the Notice Act. Instead, that decision would function much as this Court treated *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The decision, while applying only to the Consent Act, would inform related cases dealing with parental rights, abortion, and the reach of Article II, Section 10 of the Montana Constitution.

That falls short of rendering an advisory opinion on the Notice Act and, therefore, this case may be certified under Rule 54(b) for immediate appeal. *Roy*, 188 Mont. at 87, 610 P.2d at 1189.

II. AN IMMEDIATE APPEAL WILL NOT BE MOOTED BY FUTURE DISTRICT COURT PROCEEDINGS.

This Court granted full relief to Plaintiffs on their challenge to the Consent Act. (Doc. 295 at 50). As stated, the Consent Act operates to repeal the Notice Act. (Doc. 295 at 8). But the operation of the Notice Act doesn't affect the Consent Act. So the remaining factual dispute over the Notice Act doesn't affect the Consent Act judgment. In sum, there are no pending claims or counterclaims in the district court that can moot the Consent Act judgment. *Roy*, 188 Mont. at 87, 610 P.2d at 1189.

[1] As previously noted, if the Montana Supreme Court reversed this Court on the Consent Act, then it does control the Notice Act, but only because the Consent Act repeals the Notice Act. (Doc. 295 at 8).

III. AN IMMEDIATE APPEAL DOESN'T RISK REPETITIVE APPEALS ON THE SAME ISSUE.

Immediate appeal of the Consent Act concerns only the grant of summary judgment for declaratory and injunctive relief. (Doc. 295 at 50). The third *Roy* factor isn't implicated in this case because an immediate appeal concerns only the grant of summary judgment, which can be affirmed, reversed, or remanded, and any subsequent appeal will concern a different standard of review.

Additionally, the Consent Act closes a gap in reporting under the Notice Act. (Doc. 175 at 6). This Court found the Consent Act's requirements "excessive" to meet that purpose. (Doc. 295 at 36–37). The State will certainly appeal that determination because that determination lies at the heart of the differences in the two Acts. It serves the interests of justice to resolve that factual issue—key to understanding why the Consent Act exists—at the earliest opportunity, not after a trial on the Notice Act. Doing so now will not risk repetitive appeals, but will instead promote an efficient resolution to the compelling interests at stake.

IV. OTHER FACTORS COUNSEL TOWARDS CERTIFYING AN IMMEDIATE APPEAL.

Judicial economy and fairness counsel towards certifying an immediate appeal. As stated, because the Consent Act repeals the Notice Act, a reversal on appeal moots the need for a trial on the Notice Act. This unquestionably conserves judicial resources. It also conserves the parties' resources by potentially staving off the need for additional discovery given that discovery closed more than five years prior to any trial and it obviates the need for pre-trial motions practice. While judicial economy and conservation of the parties' resources and time are insufficient standing alone for Rule 54(b) purposes, they support certification when analyzed in conjunction with the other *Roy* factors. *See Rogers*, ¶ 13 (such factors "are not sufficient bases for certification under Mont. R. Civ. P. 54(b) without additional explanation of the *Roy* factors.).

The Court identified the fundamental issues of fairness at stake due to the procedural delays in this case. (Doc. 295 at 14 n. 4, 48; *see also* Doc. 261 at 2–6; Doc. 281). The Consent Act was passed a decade ago and the State needs resolution, which as this Court acknowledges will come only through appeal, to know whether it can finally enforce laws necessary to protect vulnerable Montanans.

CONCLUSION

Accordingly, the State respectfully requests that the Court certify its grant of Plaintiffs' motion for partial summary judgment under Rule 54(b) of the Montana Rules of Civil Procedure.

DATED this 7th day of March, 2023.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document to counsel for the Plaintiffs via electronic mail and regular mail, postage pre-paid.

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Dated: March 7, 2023

Dia C. Lang