No. 24-____

In the Supreme Court of the United States

STATE OF MONTANA, et al.,
Petitioners,

v.

PLANNED PARENTHOOD OF MONTANA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

AUSTIN KNUDSEN
Montana Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
peter.torstensen@mt.gov
(406) 444-2026

Counsel for Petitioners

QUESTION PRESENTED

Montana's Parental Consent for Abortion Act of 2013 requires physicians to obtain notarized written consent from a parent or guardian before performing an abortion for a minor. To comply with this Court's pre-*Dobbs* cases addressing parental rights and a minor's right to an abortion, the Consent Act included a judicial bypass procedure allowing minors to seek an abortion without their parents' consent. Yet the Montana Supreme Court held that the Consent Act violates a minor's fundamental right to privacy because it conditions a minor's abortion access on parental consent. While the court recognized that parents have a fundamental right to direct the care and custody of their children, it held that this right is superseded by a minor's right to obtain an abortion.

The question presented is:

Whether a parent's fundamental right to direct the care and custody of his or her children includes a right to know and participate in decisions concerning their minor child's medical care, including a minor's decision to seek an abortion.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Austin Knudsen, in his official capacity as Attorney General of the State of Montana, and his agents and successors, was a defendant in the district court and an appellant in the Montana Supreme Court.

Respondent Samuel Dickman, M.D., on behalf of himself and his patients, was a plaintiff in the district court and an appellee in the Montana Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

Montana Supreme Court

Planned Parenthood of Montana, et al., v. *State, et al.*, No. DA 23-0272 (Aug. 14, 2024).

Montana First Judicial District Court, Lewis and Clark County

Planned Parenthood of Montana, et al., v. *State, et al.*, No. DDV 2013-407 (Feb. 21, 2023).

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

STATEMENT OF RELATED PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vi

TABLE OF AUTHORITIES viii

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 15

I. Federal circuit courts and state courts have split on the question presented, and that split will only deepen 15

A. The Ninth and Fifth Circuits recognize a federal parental right to know and participate in a minor's major medical decisions 16

B. The Third and Sixth Circuits, along with the Alaska and Montana Supreme Courts, hold that parents have no right to know about their child's major medical decisions 17

II. The Montana Supreme Court's decision is egregiously wrong, and it conflicts with this Court's precedent 22

III. This petition presents an important federal question requiring this Court's guidance and is an excellent vehicle to answer it 25

CONCLUSION 29

TABLE OF APPENDICES

Appendix A — Opinion of the Supreme Court of the State of Montana, filed August 14, 2024 ..... 1a

Appendix B — Order, No. DA 23-0272, Supreme Court of the State of Montana, filed May 30, 2023 ..... 50a

Appendix C — Opinion & Order on Cross Motions for Summary Judgment, Montana First Judicial District Court, Lewis and Clark County, filed February 21, 2023..... 54a

Appendix D — Order Certifying Ruling for Immediate Appeal Pursuant to Rule 54(b), No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed March 15, 2023..... 113a

Appendix E — Excerpts from Appellants' Opening Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed October 10, 2023..... 124a

Appendix F — Excerpts from Appellants' Reply Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed January 16, 2024..... 135a

Appendix G — Defendants' Notice of Supplemental Authority, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed July 6, 2022 ..... 143a

Appendix H — Excerpts from Defendants' Brief in Support of Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed December 29, 2016 ..... 148a

Appendix I — Excerpts from Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed February 17, 2017 ..... 151a

Appendix J — Parental Consent for Abortion Act of 2013, Mont. Code Ann. §§50-20-501–511 ... 157a

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. *Elenis*,
600 U.S. 570 (2023) 24

Abigail All. for Better Access to Developmental Drugs v. *von Eschenbach*,
495 F.3d 695 (D.C. Cir. 2007) 25-26

Anspach v. *City of Phila.*,
503 F.3d 256 (3d Cir. 2007)..... 3, 18-19

Armstrong v. *State*,
989 P.2d 364 (Mont. 1999) 8, 12

Bellotti v. *Baird*,
443 U.S. 622 (1979) 7, 10, 23

Benavidez v. *Cnty. of San Diego*,
993 F.3d 1134 (9th Cir. 2021) 16-17, 25, 27

Brown v. *Ent. Merchants Ass'n*,
564 U.S. 786 (2011) 24

Curtis v. *Sch. Comm.*,
652 N.E.2d 580 (Mass. 1995) 20

Deanda v. *Becerra*,
96 F.4th 750 (5th Cir. 2024) 3, 17, 24-25

Dobbs v. *Jackson Women's Health Org.*,
597 U.S. 215 (2022) 8, 26, 27

Doe ex rel. Doe v. *Governor of N.J.*,
783 F.3d 150 (3d Cir. 2015)..... 25

Doe v. *Irwin*,
615 F.2d 1162 (6th Cir. 1980) 3, 19-20

Espinoza v. *Mont. Dep't of Rev.*,
591 U.S. 464 (2020) 17

H.L. v. *Matheson*,
450 U.S. 398 (1981) 3, 23

Hodgson v. *Minnesota*,
497 U.S. 417 (1990) 2-3, 7, 8, 23

Kansas v. *Carr*,
577 U.S. 108 (2016) 28

Kanuszewski v. *Mich. Dep't of Health & Hum. Servs.* 927 F.3d 396 (6th Cir. 2019) 25

L.W. v. *Skrmetti*,
83 F.4th 460 (6th Cir. 2023) 26

Mann v. *Cnty. of San Diego*,
907 F.3d 1154 (9th Cir. 2018) 1, 3, 16, 23-27

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 1

Nat'l Inst. of Fam. & Life Advocs. v. *Becerra*,
585 U.S. 755 (2018) 24

Parham v. *J.R.*,
442 U.S. 584 (1979) 1, 2, 22-25

Pierce v. *Soc'y of Sisters*,
268 U.S. 510 (1925) 2

Planned Parenthood of Cent. Miss. v. *Danforth*,
428 U.S. 52 (1976) 2, 8

Planned Parenthood of Cent. N.J. v. *Farmer*,
762 A.2d 620 (N.J. 2000) 20

Planned Parenthood of Se. Pa. v. *Casey*,
505 U.S. 833 (1992) 2, 26

Planned Parenthood of the Great Nw. v. *State*,
375 P.3d 1122 (Alaska 2016) 3, 20-21

Prince v. *Massachusetts*,
321 U.S. 158 (1944) 1-2, 7

Smith v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) 1

Snyder v. *Spaulding*,
235 P.3d 578 (Mont. 2010) 9

Troxel v. *Granville*,
530 U.S. 57 (2000) 1, 2, 11, 13, 23, 27

Weems v. *State*,
529 P.3d 798 (Mont. 2023) 12

Whole Women's Health v. *Hellerstedt*,
579 U.S. 582 (2016) 27

Wicklund v. *State*,
1999 Mont. Dist. LEXIS 1116 (Feb. 11, 1999) 6, 8

Constitutional Provisions

U.S. Const. amend. XIV, §1 4

Mont. Const. art. II, §4 ..... 4, 11

Mont. Const. art. II, §10 ..... 4, 9, 11, 14, 22

Mont. Const. art. II, §15 ..... 5, 8-12, 22

Statutes

2011 Mont. Laws 307 6

Ariz. Rev. Stat. §36-2271 26-27

Idaho Code §32-1015(3) 27

Md. Code Ann., Health—Gen. §20-102 26

Me. Rev. Stat. Ann. tit. 22, §1503 26

Mont. Code Ann §41-1-402 26

Mont. Code Ann. §§50-20-201–215 (1995) 5

Mont. Code Ann. §50-20-501–511 ..... 5, 6

Mont. Code Ann. §50-20-504 ..... 5, 6

Mont. Code Ann. §50-20-509 6

Other Authorities

1 William Blackstone, *Commentaries on the Laws of England* (1753) 1, 2

INTRODUCTION

Our constitutional system has long "recognized that [the] natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979); *see also* 1 William Blackstone, *Commentaries on the Laws of England* *447 (1753) ("Providence has … implant[ed] in the breast of every parent that natural … affection, which not even the deformity of person or mind … can totally suppress."). So courts presume that "fit" parents act in the best interests of their children and presumptively protect their right to make important medical decisions for their minor children. *See Troxel* v. *Granville*, 530 U.S. 57, 68-69 (2000) (plurality op.); *see also Parham*, 442 U.S. at 602; *Mann* v. *Cnty. of San Diego*, 907 F.3d 1154, 1160-61 (9th Cir. 2018).

Nearly 25 years ago, this Court said that parents' right to direct the care and custody of their minor children was "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. While this Court's formal recognition dates back more than a century to *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the origin of parents' fundamental rights stretches back much farther. *See Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy" is "older than the Bill of Rights" and "has its source … not in state law, but in intrinsic human rights[.]" (cleaned up)).

Parents' authority over their minor children depends on the principle that they are best suited to "prepar[e their children] for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*,

321 U.S. 158, 166 (1944); *see also Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State," but "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). "[T]he *power* of parents over their children is derived from … their duty" to their children. Blackstone, *Commentaries* *452.

And parents' authority extends to decisions about medical care. Because parents are presumed to act in their child's best interest, *see Parham*, 442 U.S. at 602, the State may not "inject itself into the private realm of the family [and] question the ability of that parent to make the best decisions concerning the rearing of [their] children" unless it has a reason to believe the parent is unfit. *Troxel*, 530 U.S. 68-69. And that presumption isn't overcome "[s]imply because the decision of a parent [about a child's medical treatment] is not agreeable to [the] child or because it involves risks." *See Parham*, 442 U.S. at 603.

Even when this Court's pre-*Dobbs* cases secured for unmarried minors a fundamental right to seek a pre-viability abortion, this Court routinely held that notice and consent statutes like Montana's were permissible provided they didn't give parents an absolute veto. *Planned Parenthood of Cent. Miss.* v. *Danforth*, 428 U.S. 52, 74 (1976); *see, e.g.*, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 895 (1992) ("[O]ur judgment that [these laws] are constitutional" is "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart."); *Hodgson* v.

Minnesota, 497 U.S. 417, 486 (1990) ("[M]ost States have enacted statutes requiring … physician[s to] notify or obtain the consent of at least one … parent[] … before performing an abortion on a minor"); *H.L.* v. *Matheson*, 450 U.S. 398, 409-10 (1981) (encouraging "unmarried pregnant minor[s] to seek the help and advice of her parents in making the very important decision" to have an abortion "further[s] constitutionally permissible end[s]") (citation omitted)).

Yet the Montana Supreme Court flouted these longstanding principles, holding instead that parents' federal fundamental rights do *not* include the right to know about and participate in their minor child's important medical decisions—at least not with the child's decision whether to get an abortion. In doing so, the Montana Supreme Court deepened an intractable split among federal and state courts on the scope of parents' fundamental rights. *Compare Mann*, 907 F.3d 1154; *Deanda* v. *Becerra*, 96 F.4th 750 (5th Cir. 2024); *with Anspach* v. *City of Phila.*, 503 F.3d 256 (3d Cir. 2007); *Doe* v. *Irwin*, 615 F.2d 1162 (6th Cir. 1980); *Planned Parenthood of the Great Nw.* v. *State*, 375 P.3d 1122 (Alaska 2016).

The current state of affairs is untenable. Parents shouldn't have to navigate a patchwork of federal and state laws and legal doctrines to exercise a fundamental federal right. And abortion providers shouldn't have to guess whether they'll be sued in federal or state court to determine their legal duties to parents. But this confusion will only grow until this Court intervenes and defines the scope of parents' fundamental rights. This Court should grant the petition and reverse the Montana Supreme Court's decision.

OPINIONS BELOW

The Montana Supreme Court opinion (Pet.App.1a-49a), is published at 554 P.3d 153 (Mont. 2024). The Montana district court's February 21, 2023 opinion and order (Pet.App.54a-112a) is unpublished.

JURISDICTION

The Montana Supreme Court entered judgment on August 14, 2024. Pet.App.1a. On October 29, 2024, Montana applied for an extension of time to petition for a writ of certiorari. Justice Kagan granted that application, extending Montana's time to file a petition to and including January 11, 2025. Montana filed this petition on January 10, 2025. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, §1:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

Mont. Const., art. II, §4:

> **Individual dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.…

Mont. Const., art. II, §10:

> **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and

shall not be infringed without the showing of a compelling state interest.

Mont. Const., art. II, §15:

Right of persons not adults. The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

Mont. Code Ann. §50-20-504[1]:

Consent of parent or legal guardian required. (1) Except as provided in 50-20-507, a physician or physician assistant may not perform an abortion on a minor unless the physician or physician assistant or the agent of the physician or physician assistant first obtains the notarized written consent of a parent or legal guardian of the minor. (2) The consent of a parent or legal guardian of the minor is invalid unless it is obtained in the manner and on the form prescribed by 50-20-505.

STATEMENT OF THE CASE

1. The people of Montana have long attempted to safeguard parents' right to know about, and participate in, their child's decision to seek an abortion. But Montana courts have thwarted them at every turn. In 1995, the Montana legislature passed the State's first parental notice law. Parental Notice of Abortion Act, Mont. Code Ann. §§50-20-201–215 (1995) (repealed 2011). Four years later, Planned Parenthood

[1] The complete Parental Consent for Abortion Act of 2013, *see* Mont. Code Ann. §50-20-501–511, is included in the Petitioners' Appendix. Pet'r's App. ("Pet.App.") at 157a-170a.

challenged the law, and a state district court held it unconstitutional on state equal protection grounds. *Wicklund* v. *State*, 1999 Mont. Dist. LEXIS 1116, at *23 (Feb. 11, 1999).

Twelve years later, in 2011, the people of Montana tried again with LR-120 ("Notice Act")—a legislative referendum prohibiting physicians from performing abortions on minors under 16 without first notifying one of the minor's parents or legal guardians. 2011 Mont. Laws 307. The Notice Act passed with more than 70% of the vote. Two years later, the Montana legislature passed the Parental Consent for Abortion Act of 2013 ("Consent Act"). Mont. Code Ann. §§50-20-501–511. The Consent Act requires physicians to obtain notarized written consent from a parent or guardian before performing an abortion for a minor under 18, *id.* §50-20-504, and it also includes a judicial bypass procedure, *id.* §50-20-509.

Before the Consent Act's effective date, Planned Parenthood sued to enjoin both Acts. Pet'r's App. ("Pet.App.") at 3a, ¶3. Montana consented to a preliminary injunction of the Consent Act in June 2013.[2] Pet.App.3a, ¶3. After the parties cross-moved for summary judgment, the state district court held that Montana was collaterally estopped from defending both Acts because it failed to appeal the *Wicklund* decision holding that the 1995 notice law was unconstitutional. Pet.App.3a, ¶4. The Montana Supreme Court reversed and remanded, *id.*, and the parties engaged in

[2] The Consent Act repealed the Notice Act, but that repeal has never been effective because Montana consented to a preliminary injunction before the Consent Act's effective date. Pet.App.3a.

extensive discovery and completed another round of summary judgment briefing in March 2017.[3] After that, the case idled for almost six years.[4]

2. In its summary judgment briefing, Montana argued that parental consent laws "protect the parental right to be involved in their minor child's decision making process" concerning abortion. Pet.App.149a (citing *Prince*, 321 U.S. at 166); *see also* Pet.App.155a-156a (arguing that parents' rights have "constitutional and commonsense proportions" (quoting *Bellotti* v. *Baird*, 443 U.S. 622, 637-38 (1979))). That right, "through the assumption of personal, financial, or custodial responsibility," gives the "natural parent a stake in the relationship with the child rising to the level of a liberty interest." Pet.App.149a (quoting *Hodgson*, 497 U.S. at 446).

Even so, Montana recognized that some "parents will [not] respond well to their daughter's pregnancy, and may even be unhelpful[,]" but it argued that this wasn't "a sufficient reason to doom the entirety of the parental involvement laws," especially when they provide for judicial waiver. Pet.App.150 That *some* parents act against the best interest of their children was "hardly a reason to discard wholesale those pages of human experience that teach that parents generally

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[3] Plaintiffs' and Defendants' motions for summary judgment were briefed on an identical schedule, with opening briefs filed on December 29, 2016, and reply briefs filed on March 3, 2017.

[4] Between March 2017 and February 2023, the district court resolved two motions—a motion to dismiss on mootness for lack of a proper plaintiff and a motion to dissolve the preliminary injunction—but neither bear on the merits of this petition. The motions were resolved in early 2022.

do act in the child's best interests." Pet.App.155a (quoting *Hodgson*, 497 U.S. at 495). Recognizing pre-*Dobbs* cases holding that "parents may not exercise 'an absolute, and possibly arbitrary, veto' over [an unmarried minor's abortion] decision," Montana argued that this Court had "never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." Pet.App.153a (quoting *Danforth*, 428 U.S. at 74 and *Hodgson*, 497 U.S. at 445).

After *Dobbs*, Montana filed a notice of supplemental authority. Pet.App.143a-147a. At bottom, Montana argued that Planned Parenthood couldn't prevail on its arguments because *Dobbs* "eviscerate[d]" the central rationale of the two cases Planned Parenthood cited—*Armstrong* v. *State*, 989 P.3d 364 (Mont. 1999) and *Wicklund*, 1999 Mont. Dist. LEXIS 1116. Pet.App.144a. Those cases—which located a "right to pre-viability abortion in Montana's Right to Privacy"—"rel[ied] on federal abortion jurisprudence that … *Dobbs* held to be 'egregiously wrong from the start.'" Pet.App.144a (quoting *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022)).

The district court resolved the summary judgment motions in February 2023. Pet.App.54a-112a. First, it held that the Consent Act was facially unconstitutional because it violated a minor's fundamental right to seek an abortion under the Montana Constitution. *See* Pet.App.83a, 91a-92a, 104a-105a. The district court reached that conclusion in part by holding that Article II, Section 15 of Montana's Constitution—which grants minors all fundamental rights in Article II unless "specifically precluded by laws which

enhance the protection of [minors]"—grants minors nothing less (but possibly more) than the full scope of fundamental rights granted to adults. *See* Pet.App.83a-92a. Second, it held that there were material disputes of fact on whether the Notice Act survived strict scrutiny. Pet.App.105a-106a.

The district court held that a minor's right to an abortion was "at the core of personal privacy," and the Consent Act interferes with a "minor's right to privacy" under Mont. Const. art. II, §10. Pet.App.81a-82a. It conceded that it is "well-established" that parents, not the State, are the "primary source of authority over children" and that parents possess a "fundamental right to make decisions concerning the care, custody, and control of [thei]r children." Pet.App.78 (quoting *Snyder* v. *Spaulding*, 235 P.3d 578, 584 (Mont. 2010)). Yet it held that this fundamental right—which this Court has recognized under the federal Constitution—did not extend to "decisions intimately affecting the child's own body." Pet.App.79a.

The district court then held that the Consent Act wasn't narrowly tailored to any of Montana's four compelling interests (though it agreed that each interest was compelling, *see* Pet.App.92a-93a, 97a, 98a, 104a): (1) protecting children from sexual offenses; (2) monitoring post-abortion complications and mental health trauma; (3) ensuring that minors engage in fully informed decisionmaking; and (4) promoting healthy families. Pet.App.92a-105a. As for Montana's interest in promoting healthy families, the district court concluded that because the Consent Act "empowers the parent to take the [abortion] decision … from the minor," it goes beyond "facilitating parental

involvement and guidance, and instead establishes conflict between parent and child." Pet.App.104a. Because a notice requirement would facilitate parental involvement without this conflict, it found that the consent requirement wasn't narrowly tailored to this interest. Pet.App.104a-105a.

The district court certified its judgment on the Consent Act as final under Montana Rule of Civil Procedure 54(b) and Montana Rule of Appellate Procedure 6(6). Pet.App.113a-123a.

3. Montana appealed the district court's judgment under Rule 54(b), and the Montana Supreme Court allowed the appeal to proceed. Pet.App.50a-53a.

On appeal, Montana reiterated that the district court's construction of Article II, §15—that it "*always* requires the law to treat minors as adults unless the law seeks to 'enhance' minor's rights"—would upend minor-protective laws and conflict with parents' fundamental right to "decide on the care, custody, and control of their child." Pet.App128-130a. Rather than construing the Consent Act as balancing parents' fundamental rights and a minor's right to seek an abortion, Montana explained that the district court castigated the Act's respect for parents' fundamental rights as "interference." Pet.App.130a-131a. But that disregard for parents' rights was inappropriate because there is no doubt "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." Pet.App.131a (quoting *Bellotti*, 443 U.S. at 640-41). And it "threatens to place Article II, [§]15 at odds with the Fourteenth Amendment of

the United States Constitution." Pet.App.140a-141a (citing *Troxel*, 530 U.S. at 65).

The Montana Supreme Court held that the Consent Act "violates the fundamental right of a minor to control her body and destiny as guaranteed by Article II, Section 10, of the Montana Constitution … without adequate justification from the State." Pet.App.2a, ¶1. In particular, because "[t]he Consent Act conditions a minor's right to obtain an abortion on parental consent unless a judicial waiver is obtained," the court held that Montana "failed to demonstrate a real and significant relationship between the statutory classification and the ends asserted." Pet.App.2a, ¶1.

To resolve Planned Parenthood's claims, the majority determined that it needed to address the protections conferred by three provisions in the Montana Constitutions: the rights of minors (art. II, §15), the minor's right to privacy (art. II, §10), and equal protection (art. II, §4).[5] Pet.App.15a, ¶19.

Starting with the rights of minors, the court noted that Article II, §10 provides minors with the same fundamental rights as adults. Pet.App.16a-19a, ¶¶20-21. But it construed Article II, §15's qualifying clause—"unless specifically precluded by laws which enhance the protection of [minors]"—to permit the State to pass minor-protective laws *only if* it can "clearly show a compelling state interest" that "enhance[s] the

[5] The district court did not address Planned Parenthood's equal protection claim, Pet.App.4a, ¶5, but the Montana Supreme Court considered it anyway, Pet.App.15a, ¶19.

protection of [minors]." Pet.App.18a, ¶21 (third alteration added).

Turning to a minor's right to privacy, the court held that "minors, like adults, have a fundamental right to privacy, which includes procreative autonomy" and the right to make "medical decisions affecting his or her bodily integrity and health in partnership with a chosen health care provider free from governmental inter[ference]." Pet.App.21a, ¶24 (citing *Weems* v. *State*, 529 P.3d 798, 809 (Mont. 2023) and *Armstrong* v. *State*, 989 P.2d 364, 370 (Mont. 1999)) (alteration added). Because the Consent Act conditions a minor's right to obtain an abortion on parental consent (or a judicial waiver), the court said it infringes on the minor's fundamental right to privacy and may be upheld only if it can satisfy strict scrutiny. Pet.App.21a-22a, ¶¶24-25.

Wrapping up with a minor's equal protection rights, the court determined that "[t]he guarantee of equal protection is a fundamental right … which extends to minors by virtue of Article II, Section 15." Pet.App.22a, ¶26. The court then identified the classes involved—pregnant minors who want an abortion and pregnant minors who don't—and determined that they were similarly situated because both classes consisted of pregnant minors. Pet.App.24a, ¶28. And it reasoned that the Consent Act discriminates against minors because it denies them the right to seek an abortion unless they obtain parental consent but permits minors to obtain pregnancy care without parental consent. Pet.App.24a, ¶28. Because the Consent Act infringes on a minor's fundamental right to privacy and denies minors their right to equal protection,

the court held that Montana must show that the Consent Act is supported by compelling state interests and is designed to enhance the protection of minors. Pet.App.25a, ¶29.

From there, the majority applied strict scrutiny to evaluate the compelling interests Montana asserted in support of the Consent Act. Before addressing Montana's asserted interests, the court broadly rejected any argument that "abortion care presents a medical health risk" based on its *ipse dixit* conclusions in *Weems* that "abortion care is safe and presents relatively minimal health risk." Pet.App.25a-26a, ¶30. Turning to Montana's asserted interests, the court declared that the Consent Act wasn't narrowly tailored to any of them: protecting minors from (1) sexual victimization, *see* Pet.App.29a-31a, ¶¶32-35; (2) psychological and physical harm, *see* Pet.App.29a-34a, ¶¶36-40; and (3) their own immaturity, *see* Pet.App.34a-37a, ¶¶41-45.

The court also rejected Montana's argument that the Consent Act "protects parents' long-recognized fundamental rights in the custody, care, and control of their children." Pet.App.37a, ¶46. While the court recognized that parents have a "fundamental right to parent," Pet.App.37a, ¶46 (citing *Troxel*, 530 U.S. at 65), it concluded that the Consent Act empowers parents to control a minor's fundamental right and "establishes conflict within the family unit," *see* Pet.App.37a-38a, ¶¶46-47. Parents' fundamental rights could not, the court explained, reach as far as the federal Constitution because of the "minor's own fundamental right of privacy and because the minors' rights provision expressly affirms the rights of minors

except when necessary to enhance a minor's *own* protection—not the protection of a parent." Pet.App.38a, ¶48. And it reasoned that parents' rights were limited to "a right to parent free from state interference, not a right to enlist the state's powers to … make it more difficult for a minor to exercise their fundamental rights." Pet.App.38a, ¶48.

The court rejected Montana's argument that the Consent Act's judicial bypass procedure satisfies narrow tailoring because it "guarantees that any minor who should obtain an abortion without parental consent can do so." Pet.App.39a, ¶51. It said that the bypass procedure didn't address the tailoring issue because it *could* delay a minor's abortion care and eliminate more affordable abortion care options, like medication-assisted abortion. Pet.App.39a-40a, ¶51. Not only that but the bypass procedure requires minors to reveal personal information to judges and lawyers, its vests veto power in a judge, and it creates access issues for indigenous and marginalized people. Pet.App.40a-41a, ¶¶52-54.

Justice Rice concurred with the majority's ultimate holding but wrote separately to address deficiencies in the majority's equal protection analysis. Pet.App.44a, ¶57. First, Justice Rice explained that the majority should not have addressed the issue because it determined that the Consent Act violates minors' right to privacy under Article II, §10. Pet.App.46a, ¶60. Second, Justice Rice argued that the majority's classification was erroneous—the classes should be minors seeking an abortion and adults seeking an abortion. Pet.App.48a, ¶63. But Justice Rice agreed with the

majority's holding that strict scrutiny applied and with its strict scrutiny analysis. Pet.App.49a, ¶64.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court's expansive view of minors' state constitutional right to privacy threatens parents' longstanding fundamental right under the Fourteenth Amendment of the federal Constitution to direct the care and custody of their minor children. And in holding that the Fourteenth Amendment does not guarantee to parents the right to participate in—or even know about—their minor children's medical decisions, the Montana Supreme Court joins the wrong side of a deep and intractable split among federal courts of appeal and state supreme courts on the scope of parents' fundamental rights concerning their children's medical care.

This Court's review is urgently needed to resolve the deepening split on this critically important issue. It cannot be the case that parental rights vary depending on where they live, and this case presents a clean vehicle for resolving the conflict. The Court should grant the petition.

I. Federal circuit courts and state courts have split on the question presented, and that split will only deepen.

With its faulty reasoning below, the Montana Supreme Court deepened an established split on the scope of parents' federal fundamental rights to know and participate in their minor child's medical decisions. On one side, the Ninth and Fifth Circuits have held that a parent's right to direct the care and upbringing of their child includes, at a minimum, the

right to know about that child's major medical decisions. On the other side, the Third and Sixth Circuits and the Alaska Supreme Court, now joined by the Montana Supreme Court, have held that parents' fundamental rights do not include a right to know about their child's major medical decisions. The split is intractable and warrants this Court's immediate review.

A. The Ninth and Fifth Circuits recognize a federal parental right to know and participate in a minor's major medical decisions.

Both the Ninth and Fifth Circuits hold that parents' federal fundamental rights include, at a minimum, the right to know and participate in their minor child's major healthcare decisions.

Start with the Ninth Circuit. In *Mann* v. *Cnty. of San Diego*, the Ninth Circuit considered whether physical exams performed on children without parental involvement violated parental rights. 907 F.3d 1154, 1160-61 (9th Cir. 2018). Suspecting abuse, county officials subjected minor children to physical examinations without their parents' knowledge. *Id*. at 1159. *Mann* held that these examinations, performed without the parents' knowledge and without consent or judicial approval, violated the parents' right to direct the care and upbringing of their children. *Id*. at 1161. And it reaffirmed that "the right of parents to make important medical decisions for their children" necessarily includes the right to know and consent to medical procedures performed on their children. *Id*. Absent urgent medical necessity, the county could not circumvent those constitutional guardrails without violating parental rights. *Id*.; *see Benavidez* v. *Cnty. of San Diego*, 993 F.3d 1134, 1150 (9th Cir. 2021)

(plausibly alleged violation of fundamental rights where "medical examinations [of minor children] took place without [parents'] notice, consent, or presence").

Move to the Fifth Circuit. In *Deanda* v. *Becerra*, the Fifth Circuit likewise held that parental rights include a right to know and participate in a minor child's medical decisions—including the child's access to contraceptives. 96 F.4th 750, 757 (5th Cir. 2024). *Deanda* considered a parent's challenge to the federal Title X program, which required state participants to provide contraceptive services to minors without parental notification or consent, arguing that this requirement violated Texas law and his federal constitutional right to "direct his children's upbringing." *Id.* at 755. In concluding that Deanda asserted an Article III injury, the court explained that the Title X program interfered with "parental rights … [that federal] courts have traditionally protected." *Id.* at 758 & n.6. Even though "parental rights over their children's medical treatment are not unlimited," the "injuries [that] Deanda asserts [here]"—depriving Deanda of the right to know and consent to his minor child's medical case—"fall within this 'enduring American tradition.'" *Id.* 758-59 (quoting *Espinoza* v. *Mont. Dep't of Rev.*, 591 U.S. 464, 486 (2020)).

B. The Third and Sixth Circuits, along with the Alaska and Montana Supreme Courts, hold that parents have no right to know about their child's major medical decisions.

In contrast, two federal circuits and two state supreme courts have held that parents' federal fundamental rights do not include a right to know or participate in a child's medical decisions, including decisions

on abortion and contraceptive access. Some of these courts have held that states may facilitate minors' access to abortion and contraceptives without parents' knowledge or consent provided the state doesn't coerce a minor to get an abortion or contraceptives.

1. Start with the Third Circuit. In *Anspach* v. *City of Phila.*, the Third Circuit considered a minor's parents' challenge to a clinic's provision of abortifacient drugs to end a minor's suspected pregnancy without parental notice or consent. 503 F.3d 256, 259-60 (3d Cir. 2007). After taking the pills, the minor experienced severe stomach pain and vomiting, and her father only discovered what happened after he found her lying on the floor in her room. *Id.* at 260. The parents alleged that the clinic violated their fundamental parental rights by providing their minor child with abortifacient drugs without their knowledge or consent. *Id.*

The Third Circuit disagreed. While it acknowledged that this Court has "long recognized that the right of parents to care for and guide their children is a protected fundamental liberty interest," it explained that this interest must be "balanced with the child's right to privacy." *Id.* at 261. Yet it further explained that "[t]his delicate balance is only implicated … if the constitutional rights of both the parent and child are involved." *Id.* And because the clinic's conduct—failing to notify or obtain consent from the parents—didn't "compel[] interference in the parent-child relationship," the parents failed to assert a protected "parental liberty interest." *Id.* at 262. To conclude otherwise, it explained, "would undermine the minor's right to privacy and exceed the scope of the familial liberty interest protected under the Constitution." *Id.*

Crucial to *Anspach*'s reasoning was the Sixth Circuit's earlier decision in *Doe* v. *Irwin*, 615 F.2d 1162 (6th Cir. 1980). *Anspach*, 503 F.3d at 262-63. In *Irwin*, a state-run clinic distributed contraceptives to minors without their parents' knowledge or consent. 615 F.2d at 1163. While the clinic hosted weekly information sessions about contraceptives and the importance of engaging in sexual activities responsibly, the clinic did not require minors to get parental consent to receive services at the clinic—even though they encourage minors to discuss sexual health with their parents. *Id.*

The district court enjoined the clinic's secret distribution of contraceptives to minors, reasoning that parental authority over their children overcomes a minor's countervailing privacy interest. *Id.* at 1166. But the Sixth Circuit reversed, finding that a parent's right over their child does not require the state to disclose its distribution of contraceptives to their minor child. *Id.* at 1169. It reached that result by unduly narrowing this Court's parental rights cases. *Irwin* reasoned that "[i]n each of the Supreme Court [parental rights] cases the state was either requiring or prohibiting some activity." *Id.* at 1168. And because the clinic imposed no compulsory requirements on parents or children here, *Irwin* concluded that the program did not "unconstitutional[ly] interfere[] with the plaintiffs' rights as parents." *Id.* at 1169.

The upshot of *Anspach* and *Irwin* was that state-run clinics could distribute contraceptives to minors without any parental involvement so long as their activities don't cross the line into coercion. *See, e.g.*, *Irwin*, 615 F.2d at 1168 ("In the absence of a constitutional requirement for notice to parents, it is clearly a

matter for the state to determine whether such a requirement is necessary or desirable in achieving the purposes for which the Center was established.").

Nor are the Third and Sixth Circuits the only lower courts to limit federal parental rights to cases involving state coercion. Both Massachusetts and New Jersey similarly limit parental rights. *See, e.g.*, *Curtis* v. *Sch. Comm.*, 652 N.E.2d 580, 586 (Mass. 1995) ("[E]xposure to condom vending machines … may offend the moral and religious sensibilities of the plaintiffs, [but] mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program."); *Planned Parenthood of Cent. N.J.* v. *Farmer*, 762 A.2d 620, 638 (N.J. 2000) (arguing that this Court's parental rights decisions "say nothing about a parent's right to prevent or even be informed about a child's exercise of her own constitutionally protected rights" (citation omitted)).

2. Two state supreme courts, including Montana, reached the same conclusion as the Third and Sixth Circuits: parental rights don't include a right to know about, and participate in, their minor child's medical decisions.

The Alaska Supreme Court considered a parental notification law substantially similar to Montana's in *Planned Parenthood of the Great Nw.* v. *State*, 375 P.3d 1122, 1130-31 (Alaska 2016). The law required abortionists to notify parents before performing abortions on unemancipated minors. *Id.* The court held that the law unconstitutionally discriminated between pregnant minors seeking an abortion and pregnant minors seeking to carry their pregnancy to term. *Id.* at

1143. And it enjoined the law under its state equal protection guarantee, casting aside parents' right to be notified of their minor child's major medical decisions: "Under its ruling today, *no* parental notification law recognizing parents' fundamental legal rights to notification of, much less meaningful involvement in, their minor daughters' decisions to have abortions will be upheld by this court under its strained jurisprudence defining minors' rights to equal protection." *Id.* at 1158 (Stowers, J., dissenting).

* * *

This state of affairs is unworkable. Parents shouldn't have to navigate a patchwork of conflicting federal and state laws and legal doctrines to exercise a fundamental federal right. Alaska, and now Montana, place abortion providers between a rock and a hard place: if they're sued in federal court, Ninth Circuit caselaw requires parental involvement, but if they're in Montana's state courts, parental involvement is foreclosed. To determine their legal duties to parents, they're left to guess whether they'll be sued in federal or state court.

Confusion will only grow until this Court intervenes. While states may experiment with their own constitutions, they may not do so in ways that undermine or eviscerate federal rights. But state experimentation in this area will continue to erode parents' rights until this Court steps in and defines the scope of those rights.

II. The Montana Supreme Court's decision is egregiously wrong, and it conflicts with this Court's precedent.

The Montana Supreme Court held that the Consent Act violates a minor's fundamental right to privacy because it "conditions a minor's right to obtain an abortion on parental consent unless a judicial waiver is obtained." Pet.App.2a, ¶1 (citing Mont. Const. art. II, §10). But in reaching this conclusion, the court elevated a minor's state constitutional rights over parents' federal constitutional rights, contradicting this Court's parental rights decisions. The court construed a minor's state right to privacy in a way that creates conflicts with parents' federal fundamental rights. But it sidestepped that conflict between parents' federal constitutional rights and a minor's state constitutional rights by artificially limiting parents' rights. The court also held that states may not pass laws to safeguard parents' federal constitutional rights if they burden a minor's state right to privacy.

1. Based on its read of art. II, §10 and art. II, §15, the court held that minors have the same fundamental rights as adults and the State may only pass minor-protective laws *if* it can "clearly show a compelling state interest" that "enhance[s] the *protection*" of minors. Pet.App.16a-19a, ¶¶20-21. By requiring minor-protective laws, like the Consent Act, to satisfy strict scrutiny, the court's decision creates conflict with parents' fundamental rights by depriving them of the information they need to participate in important decisions about their minor's medical care. *See, e.g.*, *Parham*, 442 U.S. at 602 ("fit" parents have fundamental

right to make medical decisions for their minor children); *Mann*, 907 F.3d at 1160-61 (same).

As this Court's pre-*Dobbs* cases show, these conflicts between parents' and minors' rights are avoidable. Those cases provided that notice and consent statutes properly balanced parents' and minors' federal fundamental rights by providing judicial bypass procedures similar to the procedure employed in the Consent Act. *See, e.g.*, *Matheson*, 450 U.S. at 409-10 (1981) (encouraging "unmarried pregnant minor[s] to seek the help and advice of her parents in making the very important decision" to have an abortion "further[s] constitutionally permissible end[s]" (quoting *Bellotti*, 443 U.S. at 640-41)); *Hodgson*, 497 U.S. at 486 (1990) ("[M]ost States have enacted statutes requiring … physician[s to] notify or obtain the consent of at least one … parent[] … before performing an abortion on a minor."). But the court's decision now undermines the Montana legislature's authority to enact measures designed to facilitate communication between a minor and their parents before a minor makes the important decision whether to get an abortion.

2. The Montana Supreme Court recognized that parents have a "fundamental right to parent," Pet.App.37a, ¶46 (citing *Troxel*, 530 U.S. at 65), but it found that the Consent Act impermissibly empowers parents to control a minor's fundamental right and "establishes conflict within the family unit," Pet.App.37a-38a, ¶¶46-47. To avoid a conflict between federal and state fundamental rights, the court held that parents' fundamental rights don't extend beyond a "minor's … fundamental right of privacy." Pet.App.38a, ¶48. Yet that contradicts this Court's

conclusion in *Parham* that parents' fundamental rights "includes the right … to make important medical decisions for their children." *Mann*, 907 F.3d at 1161 (citing *Parham*, 442 U.S. at 602).

To be sure, the court's bottom-line conclusion is defensible only if it found no conflict between parents' federal fundamental rights and minors' state fundamental rights. After all, examples of federal rights displacing conflicting state-created rights are legion. *See, e.g.*, *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 581-96 (2023) (Colorado public accommodations law violated First Amendment "compelled speech" protections); *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 762-75 (2018) (California statutory notice requirement for pregnancy clinics violated the First Amendment); *Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011) (California law banning the sale of violent video games to minors violated First Amendment). But in artificially avoiding a conflict between parents' and minors' fundamental rights, the court's decision joins the wrong side of the deepening split. *See supra* Sect.I.B.

3. Worse still, the court held that parents' rights were limited to "a right to parent free from state interference, not a right to enlist the state's powers to … make it more difficult for a minor to exercise their fundamental rights." Pet.App.38a, ¶48. States no doubt violate parents' fundamental rights when they pass laws that interfere with parents' ability to parent their children. But states may also pass laws that protect parents' rights. *E.g.*, *Deanda*, 96 F.4th at 756 (upholding Texas law granting parent "a right to consent to his minor children's medical care, including

whether they receive contraceptives"). And invalidating those reasonable measures with artificially heightened scrutiny also interferes with parents' ability to exercise their fundamental right to parent.

III. This petition presents an important federal question requiring this Court's guidance and is an excellent vehicle to answer it.

The question presented here is important, and this petition is an excellent vehicle for answering it for at least two reasons.

1. This case presents an ideal opportunity to clarify the scope of parents' fundamental rights to be informed of and to decline critical medical procedures, including those that take unborn life. Parents' fundamental rights include the right to make medical decisions for their minor children. *Mann*, 907 F.3d at 1161; *see also, e.g.*, *Benavidez*, 993 F.3d at 1150 (parents' right violated because "medical examinations took place without their notice, consent, or presence"); *Kanuszewski* v. *Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 403-04, 418 (6th Cir. 2019) (state law compelling blood sample collection from newborns without parental consent violated parents' rights).

Parents' rights to be informed about their child's medical procedures, to be sure, has limits. *See, e.g.*, *Parham*, 442 U.S. at 603, 606 (must provide "some kind of inquiry" before parents may institutionalize children for mental health care); *Doe ex rel. Doe* v. *Governor of N.J.*, 783 F.3d 150, 156 (3d Cir. 2015) (parents have no right to "demand that the State make available a particular form of treatment"); *Abigail All. for Better Access to Developmental Drugs* v. *von*

Eschenbach, 495 F.3d 695, 703, 706 (D.C. Cir. 2007) (en banc) (no right to use a drug the FDA declares unsafe or ineffective).

But the question presented here only asks this Court to confirm that parents have a right to know about, and participate in, their child's medical decisions. It does not ask the Court to determine whether parents' fundamental rights include the right to obtain experimental medical treatments for their child. *See, e.g.*, *L.W.* v. *Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023) (holding that parents have no fundamental right to obtain reasonably banned treatments for their children), *argued*, No. 23-477 (U.S. Dec. 4, 2024). And the right that Montana seeks to vindicate here—parents' right to know about, and participate in, their child's medical decisions—falls well within the core of parents' fundamental rights. *See, e.g.*, *Mann*, 907 F.3d at 1161. That should have been clear before *Dobbs*. *See, e.g.*, *Casey*, 505 U.S. at 895 (holding that parental notification and consent laws are "constitutional … based on the quite reasonable assumption that minors will benefit from consultation with their parents"). And it certainly is now. *See Dobbs*, 597 U.S. at 292 (holding that the federal constitution doesn't "confer a right to an abortion").

Outside the abortion context, state laws requiring parental notice or consent for minors' medical treatments are—and were before *Dobbs*—ubiquitous.[6] That

[6] *See also, e.g.*, Mont. Code Ann §41-1-402 (parental consent for medical services required unless the minor meets the qualifications of this section); Me. Rev. Stat. Ann. tit. 22, §1503 (same); Md. Code Ann., Health—Gen. §20-102 (similar); *see also, e.g.*, Ariz. Rev. Stat. §36-2271 (parental consent required for surgical

should come as no surprise given parents' longstanding rights to direct the care and custody of their minor children. *Troxel*, 530 U.S. at 65. And the Ninth Circuit's recent decisions in *Mann* and *Benavidez* reflect this commonsense approach. *Mann*, 907 F.3d at 1161 (medical examinations performed on minor children without parents' knowledge or consent violated parents' rights); *Benavidez*, 993 F.3d at 1150 (same).

But before *Dobbs*, federal courts often contorted ordinary legal rules and doctrines whenever the case "involv[ed] state regulation of abortion." *Dobbs*, 597 U.S. at 286 (citation omitted); *see also Whole Women's Health* v. *Hellerstedt*, 579 U.S. 582, 666 (2016) (Thomas, J., dissenting) (lamenting "the Court's troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue" (citation omitted)). That includes this Court's standards for facial challenges, third-party standing, *res judicata*, severability, constitutional avoidance, and First Amendment doctrines. *Dobbs*, 597 U.S. at 286-87 & nn.60-65. Some of the pre-*Dobbs* abortion distortion may be somewhat understandable—especially with this Court's precedent balancing parents' and minors' federal fundamental rights—but it no longer makes sense after *Dobbs*. *See* 597 U.S. at 231, 292 (holding that there is no federal constitutional right to an abortion).

Yet the Montana Supreme Court's decision stands as a clear example that abortion distortion still lingers after *Dobbs*. The lower court's haphazard construction

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procedures); Idaho Code §32-1015(3) (parent consent required for health care services).

of minors' right to privacy under the Montana Constitution places this right in unavoidable conflict with parents' right to participate in their child's medical decisions, yet it avoids that conflict by artificially limiting parents' fundamental rights. *Supra* Sect.II.2, State courts have freedom to experiment with state constitutional interpretation, but they have no freedom to manipulate the scope of parents' federal constitutional rights. *Kansas* v. *Carr*, 577 U.S. 108, 118 (2016) ("[S]tate courts may experiment … with their own constitutions," but they may not "experiment with our Federal Constitution" and "elude this Court's review[.]"). This Court should step in to provide guidance before this issue metastasizes and further erodes parents' fundamental rights.

2. This is an excellent vehicle to address the question presented. The record is fully developed, and the relevant legal issues have been briefed and decided on below and are ripe for review. The question presented is also outcome-determinative, as a finding that parents' fundamental right includes a right to know and participate in their minor children's important medical decisions, including decisions about whether to seek an abortion, would require reversal of the Montana Supreme Court's decision. Nor are there any lingering state law questions or disputed factual issues that could jeopardize this Court's ability to reach the merits of the federal question.

Not only is this an excellent vehicle, but this Court's review is necessary to ensure that parents aren't left to navigate a patchwork of federal and state jurisdictions to exercise a fundamental federal right. Its review is also necessary to provide clear guidance

to abortion providers on their legal duties to parents. As it stands, abortion providers are subject left with conflicting legal obligations to parents depending on whether they're sued in federal or state court. This confusion on the scope of parental rights and abortion providers' legal duties to parents will continue to grow until this Court intervenes. And state experimentation with the scope of a minor's state constitutional right to seek an abortion threatens to erode parents' federal fundamental rights. This Court's review and guidance is sorely needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AUSTIN KNUDSEN
Montana Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
peter.torstensen@mt.gov
(406) 444-2026

Counsel for Petitioners

JANUARY 2025

APPENDIX

TABLE OF APPENDICES

Page

Appendix A — Opinion of the Supreme Court of the State of Montana, filed August 14, 2024 .....1a

Appendix B — Order, No. DA 23-0272, Supreme Court of the State of Montana, filed May 30, 2023 .....50a

Appendix C — Opinion & Order on Cross Motions for Summary Judgment, Montana First Judicial District Court, Lewis and Clark County, filed February 21, 2023.....54a

Appendix D — Order Certifying Ruling for Immediate Appeal Pursuant to Rule 54(b), No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed March 15, 2023 .....113a

Appendix E — Excerpts from Appellants' Opening Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed October 10, 2023.....124a

Appendix F — Excerpts from Appellants' Reply Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed January 16, 2024.....135a

Appendix G — Defendants' Notice of Supplemental Authority, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed July 6, 2022.....143a

TABLE OF APPENDICES

Page

Appendix H — Excerpts from Defendants' Brief in Support of Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed December 29, 2016 . . . . . 148a

Appendix I — Excerpts from Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed February 17, 2017 . . . . . 151a

Appendix J — Parental Consent for Abortion Act of 2013, Mont. Code Ann. §§50-20-501–511 . . . . . 157a

Appendix A — Opinion of the Supreme Court of the State of Montana, filed August 14, 2024

IN THE SUPREME COURT
OF THE STATE OF MONTANA

Case No. DA 23-0272

2024 MT 178

PLANNED PARENTHOOD OF MONTANA AND SAMUEL DICKMAN, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs and Appellees,

v.

STATE OF MONTANA AND AUSTIN KNUDSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, IN HIS OFFICIAL CAPACITY, AND HIS AGENTS AND SUCCESSORS,

Defendants and Appellants.

Filed August 14, 2024,
Argued and Submitted March 6, 2024

APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. DDV-2013-407. Honorable Christopher D. Abbott, Presiding Judge

Appendix A

Justice Laurie McKinnon delivered the Opinion of the Court.

[¶1] This appeal requires the Court to consider Planned Parenthood's challenge under the Montana Constitution to a state statute, the Parental Consent for Abortion Act of 2013 (Consent Act), now codified at §§ 50-20-501-11, MCA.[1] The Consent Act conditions a minor's right to obtain an abortion on parental consent unless a judicial waiver is obtained. It imposes no corresponding limitation on a minor who seeks medical or surgical care otherwise related to her pregnancy or her child. We decide today that the classification created by the Legislature violates the fundamental right of a minor to control her body and destiny as guaranteed by Article II, Section 10, of the Montana Constitution, *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, and *Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798, without adequate justification from the State. The Consent Act, therefore, cannot be sustained against Plaintiffs' privacy and equal protection challenges. Because a minor's right to control her reproductive decisions is among the most fundamental of the rights she possesses, and because the State has failed to demonstrate a real and significant relationship between the statutory classification and the ends asserted, we hold that the Consent Act violates the Constitution of the State of Montana.

FACTUAL AND PROCEDURAL BACKGROUND

[¶2] In 1999, a district court issued an opinion and order in the First Judicial District, Lewis and Clark County,

1. The caption has been changed to reflect the current parties in this appeal.

holding that the Parental Notice of Abortion Act of 1995 unconstitutionally violated a minor's right to privacy and equal protection of the law. *Wicklund v. State*, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999). The State chose not to appeal the court's decision.

[¶3] In January 2013, the Parental Notice of Abortion Act of 2011 (Notice Act) became law following voter approval of Legislative Referendum 120 from the previous November. The Notice Act repealed the earlier 1995 law. The Legislature, however, enacted the Consent Act with an effective date of July 1, 2013, which repealed the Notice Act. Before the effective date of the Consent Act, these proceedings were initiated. Because the Attorney General consented to issuance of a preliminary injunction against the Consent Act, the law it repealed—the Notice Act—remained in effect. This case does not concern the Notice Act, which is currently being challenged in the District Court on constitutional grounds.

[¶4] On January 31, 2014, the District Court issued an opinion and order in these proceedings holding that because the State did not appeal the 1999 *Wicklund* decision, the State was collaterally estopped from defending the Notice and Consent Acts. On appeal, however, this Court concluded that issue preclusion did not prevent the State from defending the Consent and Notice Acts, because the laws were different from prior laws. *Planned Parenthood v. State*, 2015 MT 31, 378 Mont. 151, 342 P.3d 684. The matter was thus remanded for the court to determine the merits of the challenges. Due to a lengthy

series of judicial substitutions, recusals, and retirements, the matter was not decided until February 2023.

[¶5] Cross-motions for summary judgment were filed by Planned Parenthood and the State contending that there were no genuine disputes of material fact that needed to be resolved at trial, and that each was entitled to judgment as a matter of law. In a comprehensive, fifty-page opinion and order, the District Court entered summary judgment in favor of Planned Parenthood, concluding the Consent Act violated the Montana Constitution. After considering the evidence, it held there were no genuine disputes of material fact and determined that the Consent Act infringes on the right of privacy guaranteed in Article II, Section 10, of the Montana Constitution, and defined in *Armstrong*. The court held the Consent Act was not narrowly tailored to achieve the State's compelling interests, which the State identified as: (1) protecting minors from sexual offenses; (2) monitoring post-abortion and mental health trauma; (3) ensuring minors engage in fully informed decision-making; and (4) promoting parental rights. The court did not address Planned Parenthood's equal protection challenge. Regarding the Notice Act, the court determined that, while serving the same ends as the Consent Act, the "mechanics" of the Notice Act "are starkly different and much less onerous." The court determined there were factual questions in dispute regarding the Notice Act which were not amenable to resolution on summary judgment. The District Court thereafter determined to certify to this Court its decision relative to the Consent Act pursuant to Mont. R. Civ. P. 54(b). On May 30, 2023, this Court entered an order

allowing the appeal to proceed and held oral argument on March 6, 2024.[2]

[¶6] The Consent Act conditions a minor's right to obtain an abortion on parental consent unless a judicial waiver is obtained. The legislative findings provide the underlying rationale for the Consent Act:

> (1) The legislature finds that:
>
> (a) immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences;
>
> (b) the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;
>
> (c) capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;

2. The District Court did grant the State's motion for summary judgment with respect to one of Planned Parenthood's claims regarding the Notice Act: that the Notice Act violates the due process rights of physicians and staff because it imposes absolute liability for violations of their requirements without providing sufficient clarity as to what conduct is prohibited or required. However, that issue was not certified under Mont. R. Civ. P. 54(b).

(d) parents ordinarily possess information essential to a physician in the exercise of the physician's best medical judgment concerning the minor;

(e) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical care after the abortion; and

(f) parental consultation is usually desirable and in the best interests of the minor.

Section 50-20-502(1), MCA.

The legislative "purpose" of this part is to "further the important and compelling state interests" of:

(a) protecting minors against their own immaturity;

(b) fostering family unity and preserving the family as a viable social unit;

(c) protecting the constitutional rights of parents to rear children who are members of their household; and

(d) reducing teenage pregnancy and unnecessary abortion.

Section 50-20-502(2), MCA.

[¶7] Towards these ends, the Consent Act prevents a physician or physician assistant from performing an abortion on a minor unless the physician or physician assistant first obtains notarized written consent of a parent or legal guardian of the minor.[3] Section 50-20-504(1), MCA. The consent of a parent is invalid unless it is obtained in the manner and on the form prescribed by § 50-20-505, MCA. Section 50-20-504(2), MCA. Section 50-20-505, MCA, requires that the Department of Health and Human Services create a consent form to be used by the medical provider in obtaining the consent or waiver of the consent by a parent or legal guardian. The form must disclose the rights of the parent or legal guardian; the surgical or medical procedures that may be performed on the minor; and the risks and hazards associated with the procedure planned for the minor. The disclosures that must be made to the minor and parent include:

> (i) any surgical, medical, or diagnostic procedure, including the potential for infection, blood clots in veins and lungs, hemorrhage, and allergic reactions;
>
> (ii) a surgical abortion, including hemorrhage, uterine perforation or other damage to the uterus, sterility, injury to bowel or bladder, potential hysterectomy caused by a

3. Since enactment of the Consent Act in 2013, this Court decided *Weems* which expanded the scope of medical providers who could perform abortions beyond physicians and physician assistants. However, for purposes of accuracy, this Court will use the actual language contained in the 2013 Consent Act.

complication or injury during the procedure, and the possibility of additional procedures being required because of failure to remove all products of conception;

(iii) a medical or nonsurgical abortion, including hemorrhage, sterility, the continuation of the pregnancy, and the possibility of additional procedures being required because of failure to remove all products of conception; and

(iv) the particular procedure that is planned for the minor, including cramping of the uterus, pelvic pain, infection of the female reproductive organs, cervical laceration, incompetent cervix, and the requirement of emergency treatment for any complications.

Section 50-20-505(2)(d)(i)-(iv), MCA. These disclosures must be made to the minor regardless of whether a medication or surgical abortion is performed.

[¶8] The form must include a minor consent statement that the minor must sign which includes the following statements, each of which must be initialed by the minor:

(i) the minor understands that the physician or physician assistant is going to perform an abortion on the minor and that the abortion will end the minor's pregnancy;

> (ii) the minor is not being coerced into having an abortion, the minor has the choice not to have the abortion, and the minor may withdraw consent at any time prior to the abortion;
>
> (iii) the minor consents to the procedure;
>
> (iv) the minor understands the risks and hazards associated with the surgical or medical procedures planned for the minor;
>
> (v) the minor has been provided the opportunity to ask questions about the pregnancy, alternative forms of treatment, the risk of nontreatment, the procedures to be used, and the risks and hazards involved; and
>
> (vi) the minor has sufficient information to give informed consent.

Section 50-20-505(3)(a)(i)-(vi), MCA.

[¶9] The consent form must also include a parental consent statement that a parent or legal guardian must sign which includes the following statements, each of which must be initialed by the parent or legal guardian:

> (i) the parent or legal guardian understands that the physician or physician assistant who signed the physician declaration statement . . . is going to perform an abortion on the minor that will end the minor's pregnancy;

> (ii) the parent or legal guardian had the opportunity to read the consent form or had the opportunity to have the consent form read to the parent or legal guardian;
>
> (iii) the parent or legal guardian had the opportunity to ask questions of the physician or physician assistant or the agent of the physician or physician assistant regarding the information contained in the consent form and the surgical and medical procedures to be performed on the minor;
>
> (iv) the parent or legal guardian has been provided sufficient information to give informed consent.

Section 50-20-505(3)(b)(i)-(iv), MCA.

[¶10] The consent form must include a physician declaration that the physician or physician assistant is required to sign, declaring that:

> (i) the physician or physician assistant or the agent of the physician or physician assistant explained the procedure and contents of the consent form to the minor and a parent or legal guardian of the minor and answered any questions; and
>
> (ii) to the best of the physician's or physician assistant's knowledge, the minor and a parent

> or legal guardian of the minor have been adequately informed and have consented to the abortion.

Section 50-20-505(3)(c)(i)-(ii), MCA.

[¶11] The signature page of the consent form must be notarized, and it must include "an acknowledgment by the parent or legal guardian affirming that the parent or legal guardian is the minor's parent or legal guardian." Section 50-20-505(3)(d), MCA. A parent or legal guardian must provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor." Section 50-20-506(1), MCA. A physician or physician assistant must "retain the completed consent form and [accompanying documents] in the minor's medical file for 5 years after the minor reaches 18 years of age, but in no event less than 7 years." Section 50-20-506(2), MCA. "A physician or physician assistant receiving documentation under this section shall execute for inclusion in the minor's medical record an affidavit stating: 'I, (insert name of physician or physician assistant), certify that according to my best information and belief, a reasonable person under similar circumstances would rely on the information presented by both the minor and the minor's parent or legal guardian as sufficient evidence of identity and relationship.'" Section 50-20-506(3), MCA.

[¶12] Consent may be waived if the provider certifies in the minor's medical record that a medical emergency exists and there is insufficient time to provide consent, or it may

be waived by a parent in a notarized writing. Section 50-20-507, MCA. The Consent Act provides that any person performing an abortion without notarized parental consent that complies with the disclosure requirements in § 50-20-504, MCA, or that does not comply with the form issued by the Department of Health and Human Services, "shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both." Section 50-20-510(1), MCA. "On a second or subsequent conviction, the person shall be fined an amount not less than $500 or more than $50,000 and be imprisoned in the state prison for a term of not less than 10 days or more than 5 years, or both." Section 50-20-510(1), MCA. Further, the failure to obtain the required consent "is prima facie evidence in an appropriate civil action for a violation of a professional obligation." Section 50-20-510(2), MCA.

[¶13] The Consent Act also contains what is colloquially referred to as a judicial bypass procedure. Section 50-20-509, MCA. An unemancipated minor may petition the youth court for a waiver of parental consent. The court must appoint counsel for the minor and may additionally appoint a guardian ad litem. The minor must demonstrate that she is competent to decide whether to have an abortion and that there is evidence of either (1) physical abuse, sexual abuse, or emotional abuse of the minor by one or both parents or legal guardian; or (2) it is not in the minor's best interests to have parental consent. A minor receiving an adverse ruling may appeal to this Court.

Appendix A

STANDARD OF REVIEW

[¶14] This Court "review[s] an entry of summary judgment de novo." *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604 (citing *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704). "Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Albert*, ¶ 15; M. R. Civ. P. 56(c)(3). De novo review requires this Court to determine whether a district court's conclusions of law are correct and 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.

[¶15] "This Court's review of constitutional questions is plenary." *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88. "A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which we review to determine whether the conclusion is correct." *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 16, 312 Mont. 257, 60 P.3d 381.

[¶16] Statutes are presumed to be constitutional, and we regard that presumed constitutionality as a high burden to overcome. *Hernandez v. Bd. of County Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (citing *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800). The challenging party bears the burden of proving the statute is unconstitutional. *Molnar v. Fox*, 2013 MT

132, ¶ 49, 370 Mont. 238, 301 P.3d 824. "Separately, we have also recognized that 'legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis,' which necessarily shifts the burden to the State to demonstrate that the legislation is 'justified by a compelling state interest and [is] narrowly tailored to effectuate only that compelling interest.'" *Weems*, ¶ 34, quoting *Armstrong*, ¶ 34. "While the analysis of a statute pertaining to fundamental rights will generally require a strict scrutiny review that ultimately shifts the burden, we still begin our review with the same principle: statutes are presumed to be constitutional." *Weems*, ¶ 34.

DISCUSSION

[¶17] The State argues that the Consent Act furthers the State's interest in protecting minors from sexual victimization by adult men, enhancing minors' psychological and physical wellbeing by having informed parents who can monitor post-abortion complications and provide helpful medical history, and protecting minors from rash or poorly reasoned decisions that often result from a minor's underdeveloped decision-making capacity. The State also argues that Parents have a fundamental right to direct the care, custody, and control of their children. The State maintains that the Consent Act's judicial bypass provision adequately respects a minor's right of privacy and access to abortion.

[¶18] Planned Parenthood maintains the Consent Act violates both the equal protection and right of privacy clauses of the Montana Constitution. First, noting that the

State did not mention *Armstrong* or *Weems* in its opening brief, Planned Parenthood argues that this Court has recognized in those decisions that every Montanan has a fundamental right of privacy to seek abortion care from a qualified health care provider of her choosing, absent clear demonstration by the State of a medically acknowledged, bona fide health risk. Planned Parenthood further argues that the Consent Act creates two classes of minors—those who seek abortions and those who choose to carry their pregnancies to term. Because the Consent Act infringes upon a minor's fundamental right to access abortion and the State has not met its burden of demonstrating the Consent Act is narrowly tailored to meet one or more of its compelling state interests, Planned Parenthood maintains the Consent Act is an unconstitutional infringement of a minor's rights of privacy and equal protection.

[¶19] Resolving this dispute requires us to consider three constitutional provisions: (1) the Rights of Persons Not Adults; (2) the Right of Privacy; and (3) the Equal Protection Clause. Montana's Constitution affords significantly broader protections than the federal constitution. *Weems*, ¶ 35 (citing *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d 112, 121 (1997)). Two of the broader protections not found in the federal constitution implicated here are the minors' rights provision and the right of privacy. We address first the minors' rights provision and right of privacy and then turn to the equal protection clause.

Appendix A

A. Rights of Persons Not Adults.

[¶20] These proceedings involve the rights of minors. The United States Supreme Court has explained:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood v. Danforth, 428 U.S. 52, 74, 96 S. Ct. 2831, 2843, 49 L. Ed. 2d 788 (1976). Montana provides minors added assurance that they possess the same constitutional rights as adults through our constitutional provision that specifically establishes minors possess the same constitutional rights as adults. Further, that provision is contained within Article II—Montana's Declaration of Rights, a position within Montana's constitutional framework that establishes those rights Montana holds are fundamental.

[¶21] Article II, Section 15, of the Montana Constitution, entitled Rights of Persons Not Adults, states:

> The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

Thus, "[i]n contrast to the federal constitution, the Montana Constitution specifically compares the rights of

children with those of adults . . . [and] recognizes that the State's interest in protecting children may conflict with their fundamental rights." *In re C.H.*, 210 Mont. 184, 202, 683 P.2d 931, 940 (1984). We observed in *In re C.H.*, that the comments to the Bill of Rights Committee indicate an "intent to extend fundamental rights to children and to afford constitutional protection to those rights with that one exception." *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. The comments provide:

> The committee adopted, with one dissenting vote, this statement explicitly recognizing that persons under the age of majority have all the fundamental rights of the Declaration of Rights. The only exceptions permitted to this recognition are in cases in which rights are infringed by laws designed and operating to enhance the protection for such persons. The committee took this action of recognition of the fact that young people have not been held to possess basic civil rights. Although it has been held that they are 'persons' under the due process clause of the Fourteenth Amendment, the Supreme Court has not ruled in their favor under the equal protection clause of that same amendment. What this means is that persons under the age of majority have been accorded certain specific rights which are felt to be a part of due process. However, the broad outline of the kinds of rights young people possess does not yet exist. *This is the crux of the committee proposal: To recognize that persons under the*

> *age of majority have the same protections from governmental and majoritarian abuses as do adults. In such cases where the protection of the special status of minors demands it, exceptions can be made on clear showing that such protection is being enhanced.*

In re C.H., 210 Mont. at 202-03, 683 P.2d at 940 (quoting Committee Report, Vol. II, 634-36 (1971-72) (emphasis added)). We have, therefore, held that pursuant to Article II, Section 15, "minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II." *In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (1997). *See In re J.W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 498 P.3d 211 ("Montana youths are constitutionally guaranteed the same fundamental rights as adults."). We have explained that "if the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors." *S.L.M.*, 287 Mont. at 35, 951 P.2d at 1373. We clarify today, however, that minors do not have *more* or *enhanced rights* in comparison to adults; rather, Article II, Section 15 provides that minors have the *same* fundamental rights as adults under Article II, which may be infringed only when the State can clearly show a compelling state interest "which enhance[s] the *protection* of such persons." Article II, Section 15 (emphasis added). In *S.L.M.*, we stated that the legislature must not only show a compelling state interest "but must also show that the exception is designed to enhance the rights of minors." *S.L.M.*, 287 Mont. at 35, 951 P.2d at 1373. This

was incorrect because the demonstration that is required is the enhancement of the *protections* provided minors, not *rights*. We therefore repudiate our statement without otherwise disturbing the holding in *S.L.M.* Thus, as explained by the Bill of Rights Committee, "persons under the age of majority have all the fundamental rights of the Declaration of Rights. The only exceptions permitted to [t]his recognition are in cases in which rights are infringed by laws designed and operating to enhance the protection for such persons." *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940 (quoting Committee Report, Vo. II, 634-36). That, in turn, requires a "clear showing that such protection is being enhanced." *In re C.H.*, 210 Mont. at 203, 683 P.2d at 940.

B. A Minor's Right to Privacy.

[¶22] The right of privacy is explicitly guaranteed in Montana's Constitution and is a fundamental right. Article II, Section 10, of the Montana Constitution provides:

> Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

In both *Armstrong* and *Weems*, we acknowledged the expansiveness of the right of privacy in Montana's Constitution:

> [I]t is clear from their debates that the delegates intended this right of privacy to be expansive—

> that it should encompass more than traditional search and seizure. The right of privacy should also address information gathering and protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.

Weems, ¶ 35; *Armstrong*, ¶ 33. "[U]nder Montana's Constitution, the right of individual privacy—that is, the right of personal autonomy or the right to be let alone—is fundamental." *Gryczan*, 283 Mont. at 455, 942 P.2d at 125; *Weems*, ¶ 36. "It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan*, 283 Mont. at 455, 942 P.2d at 125; *Weems*, ¶ 36. The Montana Constitution guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health, in partnership with a chosen health care provider free from governmental interference. The right of privacy contained in the Montana Constitution protects a woman's right to procreative autonomy. *Weems*, ¶ 36; *Armstrong*, ¶ 14. "Decisions about whom to trust with 'intimate invasions of body and psyche,' such as those involved in health care, must be the individual's decision, and state regulation must be based on protecting citizens from actual health risks." *Weems*, ¶ 37 (citing *Armstrong*, ¶¶ 58-59).

[¶23] Not every restriction on the provision of medical care impermissibly infringes on the right to privacy. We have explained that the right of privacy to make health care choices guarantees access to a health care provider who has been determined competent by the medical community and licensed to perform the service. *Wiser v. State*, 2006 MT 20, ¶ 16, 331 Mont. 28, 129 P.3d 133. Similarly, we explained in *Montana Cannabis Industry Ass'n v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (*MCIA*), that the right of privacy does not include an affirmative right of access under "the new medical marijuana framework" because plaintiffs, there, could not "seriously contend that they have a fundamental right to medical marijuana when it is still unequivocally illegal under the Controlled Substances Act." *MCIA*, ¶ 32.

[¶24] We conclude that minors, like adults, have a fundamental right to privacy, which includes procreative autonomy and making medical decisions affecting his or her bodily integrity and health in partnership with a chosen health care provider free from governmental interest. *Weems*, ¶ 36, *Armstrong*, ¶ 14. Decisions about "intimate invasions of body and psyche" must be an individual's decision, in this case, a minor's decision. *Weems*, ¶ 37, *Armstrong*, ¶¶ 58-59. The Consent Act infringes upon a minor's fundamental right to privacy because it conditions a minor's obtaining an abortion on parental consent or obtaining a judicial waiver, something a minor choosing to carry her pregnancy to term would not have to do.

[¶25] Since the right of privacy is explicit in the Declaration of Rights, it is a fundamental right. For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict scrutiny analysis; that is, "the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶ 34; *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. Applying strict scrutiny necessarily requires that the burden shift to the State to demonstrate, first, that the legislation is justified by a compelling state interest. *Weems*, ¶ 34. Second, the State must demonstrate that the legislation is narrowly tailored to effectuate only that compelling interest. Finally, the State must make a "clear showing that [a minor's] protection is being enhanced." *In re C.H.*, 210 Mont. at 203, 683 P.2d at 940. Mindful that statutes are presumed constitutional, and before turning to whether the State has met its burden to show justification for a limitation on a minor's right of privacy, we consider the equal protection clause within the context of a minor's right of privacy and the minors' rights provision.

C. A Minor's Right to Equal Protection.

[¶26] Pursuant to the Fourteenth Amendment to the United States Constitution, and Article II, Section 4, of the Montana Constitution, no person shall be denied equal protection of the laws. The guarantee of equal protection is a fundamental right contained in Article II which extends to minors by virtue of Article II, Section 15, "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the

law must receive like treatment." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211 (quoting *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192). "When analyzing an equal protection claim, the Court follows a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Goble*, ¶ 28.

[¶27] We must first identify the classes involved and determine whether they are similarly situated. *In re C.H.*, 210 Mont. at 198, 683 P.2d at 938. "The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Goble*, ¶ 29. It is necessary for a similarly situated class to be identified because "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Goble*, ¶ 29 (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995)). Thus, two groups are similarly situated if they are equivalent in all relevant respects other than the factor (here, the Consent Act) constituting the alleged discrimination. *Goble*, ¶ 29. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 27, 325 Mont. 148, 104 P.3d 445; *Oberson v. USDA*, 2007 MT 293, ¶¶ 19-20, 339 Mont. 519, 171 P.3d 715.[4]

4. A plaintiff also may bring a "class of one" equal protection claim, not applicable here. "Briefly stated, when 'state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a class of one equal protection claim by demonstrating that it has been intentionally treated differently

[¶28] Planned Parenthood maintains, and we agree, that the Consent Act creates a class of pregnant minors who want to obtain an abortion and a class of pregnant minors who do not want an abortion. For purposes of an equal protection analysis, both classes are composed of persons who are similarly situated for equal protection purposes—minors who are pregnant. Here, the classification discriminates against minors who choose a particular type of medical care—an abortion—because the Consent Act applies only to them; it infringes upon only those minors who choose to exercise their fundamental right to make medical judgments about their body in conjunction with a chosen health care provider absent governmental interference. Thus, the factor needing to be isolated is the Consent Act. We acknowledge there are perhaps other classifications which could indicate a minor's right to equal protection was violated by the Consent Act. However, here, the salient classification relates to the unavailability, unless a parent consents, of medical care which presents no bona fide health risk to minors. The *unavailability* of medical care to minors seeking an abortion *unless* they have parental consent and the *availability* of medical care to minors carrying their pregnancy to term *without* parental consent is the primary distinguishing feature of the Consent Act.

[¶29] The second step in addressing an equal protection claim is determining the appropriate level of scrutiny to apply to the challenged legislation. If the legislation in

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from others similarly situated and that there is no rational basis for the difference in treatment.'" *B.Y.O.B., Inc. v. State*, 2021 MT 191, ¶ 38, 405 Mont. 88, 493 P.3d 318 (citations omitted).

question infringes upon a fundamental right, we must apply strict scrutiny. *S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371. We have already determined that the Consent Act infringes on a minor's fundamental right of privacy. Minors, including pregnant minors, have a fundamental right of personal autonomy. Once a fundamental right is implicated, we must apply a strict scrutiny analysis to determine whether the State has met is burden of demonstrating a compelling state interest sufficient to justify its unequal treatment of a class and whether the Consent Act is narrowly tailored to effectuate only that compelling interest. *S.L.M.*, 287 Mont. at 34, 951 P.2d at 1372. We also must determine, as with the right of privacy, whether such an infringement is consistent with the mandates of Article II, Section 15, that it enhance the protection of minors. Here, the classification discriminates against minors who choose to have an abortion because only they have their right to privacy infringed. Clearly under Article II, Section 15, minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II, including the right of privacy. Thus, if the legislature seeks to carve out exceptions to the guarantee of equal protection, it must not only show a compelling state interest but must also show that the exception is designed to enhance the protections of minors.

D. Application of Strict Scrutiny to a Minor's Rights of Privacy and Equal Protection.

[¶30] The State proposes four compelling interests that justify the Consent Act: (1) protecting minors from sexual

victimization; (2) protecting minors' psychological and physical wellbeing, (3) protecting minors from their own immaturity, and (4) promoting parental rights. Although not all the State's asserted compelling interests involve a medically acknowledged, bona fide health risk, the State continues to assert that abortion is "fraught with major psychological, medical, and safety implications"; "[a]bortion is an invasive surgical procedure with serious medical risks . . . that include perforation or damage to the uterus, cervix, or another nearby organ; excessive bleeding or hemorrhage, requiring blood transfusion; infection introduced into the uterus from the cervix or vagina; and 'incomplete abortion.'" To the extent any of the State's compelling interests are premised upon a contention that abortion care presents a medical health risk, we may easily dispose of such a contention by relying on *Weems*. We begin by noting several of our conclusions in *Weems* that abortion care is safe and presents relatively minimal health risk and, in doing so, dispose of any of the State's claimed compelling state interests which might be premised upon abortion care presenting a medically acknowledged, bona fide health risk.

[¶31] In *Weems* we considered whether limiting access to abortion care by preventing Advanced Practice Registered Nurses (APRNs) from performing abortions violated a person's fundamental right to access abortion care guaranteed by Montana's constitutional right of privacy. In concluding such a limitation was unconstitutional, we said the following about whether abortion care presented a medically acknowledged, bona fide health risk:

The record is devoid of any evidence that APRNs providing abortion care present a medically acknowledged, bona fide health risk to Montana women. The State's argument is detached from the overwhelming evidence presented to the District Court that abortion care is one of the safest forms of medical care in this country and the world, and that APRNs are qualified providers. The State's reasoning rests on a faulty foundation: it puts aspiration abortions in the category of "surgery" because "instruments" are used to remove "human tissue"; because an aspiration abortion is "surgery" it has all the attendant risks of surgery—hemorrhaging, infection, post-operative care, and monitoring; because abortion is "surgery" it should not be treated any differently than other elective surgery, which occurs in a clinic or hospital; because it is surgery it is not safe unless done where emergency backup is in place and where clinicians who can perform "surgery" are present. This reasoning would exclude APRNs from performing abortion care because, as the State posits, post-abortion care might be beyond what APRNs are capable of handling or authorized to do. Finally, at oral argument, the State represented that APRNs also should not perform medication abortions because complications from a medication abortion could lead to surgery. Therefore, according to the State, APRNs would not be authorized to

> dispense mifepristone or misoprostol.
>
> . . .
>
> The overwhelming evidence amassed in the District Court record established that abortion care is one of the safest procedures in this country and the world. Complication rates from abortion are similar to or lower than other outpatient procedures. When complications do occur, they are usually minor and easily treatable—normally at home or in an outpatient setting. Abortions remain one of the safest procedures when performed collectively by health care providers, including APRNs.

Weems, ¶¶ 46, 48. The State has failed entirely to address *Weems*; indeed, the State has not mentioned *Weems* and this Court's conclusions and analysis in any of its briefing, despite *Weems* being significant precedent for resolving this challenge.[5] Further, there is nothing in the record in these proceedings produced by the State which differs materially from the record evidence in *Weems* or demonstrates that abortions present a medically acknowledged, bona fide health risk. Having disposed of any compelling state interest which might relate to protecting individuals from a medically acknowledged, bona fide health risk, we now turn to some of the other arguments the State makes to justify the Consent Act.

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5. We note the State made only a passing reference to *Armstrong* in its Reply Brief.

Appendix A

1. Protecting Minors from Sexual Victimization.

[¶32] Citing *New York v. Ferber*, 458 U.S. 747, 757, 102 S. Ct. 3348, 3354, 73 L. Ed. 2d 1113 (1982), the District Court concluded the State correctly identified the protection of children from sexual exploitation and abuse as a compelling state interest. However, as the District Court also noted, "[t]he State must do more, however, than cite a compelling state interest: it must demonstrate that the Consent Act is 'necessary to promote' this compelling state interest." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386. Under strict scrutiny, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, 106 S. Ct. 1842, 1850, 90 L. Ed. 2d 260 (1986). "A statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020). The District Court had no difficulty determining the Consent Act was not narrowly tailored to achieve the compelling state interest of protecting minors from sexual victimization. We agree.

[¶33] In Montana, minors under the age of 18 but older than 16 may consent to sexual intercourse. Section 45-5-501(1)(b)(iv), MCA. Thus, many minors who seek abortions will be over 16 years of age because they are the ones lawfully allowed to consent, are nearer emancipation, and may be more likely to engage in consensual sexual intercourse. The State, however, presented little specific evidence relative to this large population of minors affected by the Consent Act. Further, the State has

failed to logically connect and justify how the Consent Act prevents victimization of minors even when teen pregnancy is the product of an assault. All the Consent Act does is permit the parent to refuse consent to a pregnancy that has already occurred. Thus, the Consent Act does not accomplish the State's asserted purpose of preventing the victimization of children from sexual assault and does not make it more likely that the sexual crime will be detected and punished.

[¶34] This becomes more apparent when we assess the Consent Act within the context of other measures more specifically and aptly designed to enhance the protection of children. Montana has a mandatory reporting law that requires medical providers to promptly report any sexual abuse they know or suspect to be occurring. Section 41-3-201, MCA. A provider's violation of the mandatory reporting law can result in civil liability and criminal sanctions of up to five years in prison and $10,000 in fines. Section 41-3-207(3), MCA. As noted by the District Court, whether the Consent Act is in effect or not, providers must report evidence of sexual abuse to the State. The record is devoid of any evidence that the Consent Act provides enhanced protection over mandatory reporting laws, especially given that (1) some minors are being abused by their parents, and (2) a judicial waiver under the Consent Act does not require reporting.

[¶35] The Consent Act's imposition of onerous and burdensome requirements designed to prevent evasion of the parental consent requirement by requiring notarization, government identification, proof of parentage,

and a physician affidavit do not meaningfully assist in the prevention of sexual victimization of minors nor do they prevent the evasion of parental notice requirements. Mandatory reporting laws are an example of legislation that *does* advance the State's compelling interest of protecting minors from victimization. On this record, the State has failed to "clearly and convincingly" demonstrate that the Consent Act is narrowly tailored to serve only the State's compelling interest of protecting minors from sexual abuse and exploitation. *Weems*, ¶ 45; *Armstrong*, ¶ 62; *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940.

2. Protecting Minors' Psychological and Physical Wellbeing.

[¶36] The State contends that the Consent Act will ensure that, if a minor has an abortion, a parent or someone will be there to monitor for post-abortion complications and mental health trauma. States have an undisputed, compelling interest in "safeguarding the physical and psychological wellbeing of a minor." *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S. Ct. 1691, 1696, 109 L. Ed. 2d 98 (1990). The question, though, is whether the Consent Act is narrowly tailored to serve the State's compelling interest.

[¶37] As we recognized in *Weems*, "abortion care is exceedingly safe" and "is one of the safest forms of medical care in this country and the world." *Weems*, ¶¶ 1, 46. Abortion care does not present a medically acknowledged, bona fide health risk to minors or adult women, and the State has not offered clear and convincing evidence in this case that minor patients are not treated for complications

when they occur or that minors fail to follow-up on post-abortion care. We also held in *Weems* that the evidence overwhelmingly demonstrated delaying access to abortion care—as compliance with the onerous procedures of the Consent Act would cause, particularly in rural areas—increases the risk of abortion care and could foreclose the option of obtaining an abortion altogether. *Weems*, ¶ 43. The State has not presented any evidence that refutes this.

[¶38] The American Medical Association and the American Academy of Pediatrics, and other medical organizations, are opposed to parental consent laws. They have concluded that forced parental involvement is more likely to deter minors from seeking care and has no medically valid purpose. These medical organizations cite recent long term studies that have found those who obtained wanted abortions had a similar or better mental health outcome than those who were denied a wanted abortion. Moreover, the evidence establishes that receiving an abortion does not increase the likelihood of developing symptoms associated with depression, anxiety, post-traumatic stress, or suicidal ideation, compared to those who continue a pregnancy. *See Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 762 A.2d 620, 636 (N.J. 2000) ("[Y]oung women do not suffer greater psychological problems than the young women who carry their pregnancies to term.") Importantly, requiring parental consent allows parents to prevent the abortion from ever taking place, but it does not require the parent to provide any assistance, support, medical care, counseling, or monitoring for a minor who has chosen to obtain an abortion. Nor is it inevitable that a parent who consents to an abortion will provide such help.

[¶39] The abortion decision differs in many ways from other decisions that may be made during minority. As the District Court explained, "the means by which a woman's body nurtures and develops an embryo into a human child with which she will have a lifelong bond—is unique among all medical conditions," as is the decision to terminate a pregnancy.

> [T]he decision whether to continue or terminate her pregnancy has . . . a substantial effect on a pregnant minor's control over her personal bodily integrity, has . . . serious long-term consequences in determining her life choices, is . . . central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and (unlike many other choices) *is a decision that cannot be postponed until adulthood*.

American Academy of Pediatrics v. Lungren, 16 Cal. 4th 307, 337, 66 Cal. Rptr. 2d 210, 940 P.2d 797, 816 (1997) (emphasis in original). There are few situations in which denying a minor the right to make an important decision will have consequences so grave, permanent, and indelible.

> It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will.

Hodgson v. Minnesota, 497 U.S. 417, 475, 110 S. Ct. 2926, 2958, 111 L. Ed. 2d 344 (1990) (Marshall, J., concurring in part and dissenting in part).

[¶40] The Consent Act is not narrowly drawn to serve the purpose of monitoring mental health trauma or post-abortion complications.

3. Protecting Minors from Their Own Immaturity.

[¶41] The State asserts that it has a compelling interest in protecting minors from their own immaturity and that minors engage in fully informed decision-making. We agree. The State has a special, indeed compelling, interest in the health, safety, and welfare of its minor citizens.

[¶42] Although recognizing the State's compelling interest, we are nonetheless tasked with deciding whether the Consent Act narrowly effectuates that interest. Here, the weakness in the State's argument is that the Consent Act singles out only minors seeking an abortion, and not those who choose to carry their pregnancies to term. The State's argument is illogical: minors who choose to carry their pregnancies are not at risk of making an immature decision, while those choosing abortion must be protected against their immaturity. In Montana, minors are empowered to consent to various parenting-related services without their own parents' or guardians' consent—including the "prevention, diagnosis, and treatment" of pregnancy. Section 41-1-402(2)(c), MCA. While the Consent Act prevents a minor from obtaining an abortion without parental consent, contrarily, a minor

"has the right to relinquish all rights to that minor parent's child and to consent to the child's adoption" without obtaining parental consent. Section 42-2-405(1), MCA. Minors can consent to many types of health care, including pregnancy-related care, but abortion is singled out.[6]

> It is particularly difficult to reconcile defendants' contention—that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional or psychological health—with . . . statutory provisions authorizing a minor who has given birth to consent, on her own, to the adoption of her child. The decision to relinquish motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place.

Lungren, 16 Cal. 4th at 353, 940 P.2d at 827 (citations omitted).

[¶43] The Consent Act bestows upon parents what has been described as a "veto power" over their minor's abortion decisions, effectively shifting a portion of the minor's fundamental right to parents. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 583, 2007 Alas. LEXIS 141,**17. "In practice, under the [Consent Act] it

6. Though the State refers to other statutes that require a parent's consent or involvement, the relevant inquiry here are the statutes pertaining to a minor's decisions when the minor occupies the position of parent or prospective parent.

is no longer the pregnant minor who ultimately chooses to exercise her right to terminate her pregnancy, but that minor's parents. And it is this shifting of the locus of choice—this relocation of a fundamental right from minors to parents—that is constitutionally suspect." *Planned Parenthood of Alaska*, 171 P.3d at 583.

[¶44] Importantly, the District Court held:

> The problem with the Consent Act is that it does not provide minors with resources, counseling, and guidance to help them navigate this choice; rather (except in cases of a granted judicial bypass or other exception), it takes the choice away from them, giving it instead to their parent or guardian. The various consent forms required by the Consent Act do assure that a discussion takes place about the risks of the abortion, but the discussion called for by the consent forms is unidirectional: it does not include anything requiring a discussion about the consequences and risks of carrying a pregnancy to term, consequences that will vary from case to case based on the circumstances of the expectant mother. Thus, the required form does not ensure that parent and child are provided with the pros and cons of both abortion and carrying a child to term to make a fully informed decision; rather, the form assures only that they have been provided with one side of one possible decision: the "risks and hazards" of an abortion.

The Consent Act "guarantees no more than a one-way conversation and 'allows parents to refuse consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests.'" *Planned Parenthood of Alaska*, 171 P.3d at 585.

[¶45] Given these considerations, we conclude the Consent Act is not narrowly tailored to advance only the compelling purpose of protecting minors from their immaturity.

4. Promoting Parental Rights.

[¶46] The State argues the Consent Act "protects parents' long-recognized fundamental rights in the custody, care, and control of their children." Parents do have a fundamental right to parent. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). As the District Court held, the promotion of healthy families is undoubtedly a compelling state interest. But not all families are healthy, and the Consent Act empowers parents who do not make decisions in their children's best interest to control an important fundamental right of their child. The consent requirement empowers the parent to take the decision about whether to have an abortion or carry the child from the minor and goes far beyond merely facilitating family involvement and guidance, and potentially establishes conflict within the family unit.

[¶47] It is difficult to conclude that providing a parent with unilateral, veto power over a minor's exercise

of a fundamental right, made in conjunction with the minor's care provider, will strengthen the family unit. Such veto power is unlikely to enhance parental control or strengthen the family unit where the minor and nonconsenting adult are obviously in conflict and the family structure is fractured, even beyond the existence of the mere pregnancy itself. Where a minor seeks an abortion and that decision is vetoed by a parent, the family *fundamentally* is in conflict.

[¶48] The State's parental rights argument is unpersuasive given the minor's own fundamental right of privacy and because the minors' rights provision expressly affirms the rights of minors except when necessary to enhance a minor's *own* protection—not the protection of a parent. Further, any parental right that exists within this framework is a right to parent free from state interference, not a right to enlist the state's powers to gain greater control over a child or to make it more difficult for a minor to exercise their fundamental rights. *See Farmer*, 762 A.2d at 638 (The State may not interfere with a parent's upbringing of a child, but it does not follow from such a proposition that parents have a right to enlist state support to prevent or even be informed about a child's exercise of her own constitutionally protected rights.)

[¶49] Based on the foregoing, we conclude the Consent Act burdens a minors' fundamental right of privacy and creates a classification between minors who choose an abortion and those choosing to carry their pregnancy to term. Only minors who choose an abortion have their right of privacy infringed. We further conclude the State has

failed to present adequate justification, supported by clear and convincing evidence, that the Consent Act is narrowly tailored to further only a compelling state interest in the protection of minors.

[¶50] The evidence establishes, with no genuine dispute of fact, that abortion care is one of the safest forms of medical care available in this country and the world. Medical risks for abortion are considerably lower than for pregnancy and childbirth, and, in general, adolescents show no substantial psychological effects from abortion. The consequences of not being able to terminate an unwanted pregnancy can be decidedly more traumatic and severe than for obtaining an abortion. Adolescent mothers may not be able to complete high school and will remain dependent on family, a partner, and unable to take care of themselves. Adolescent mothers who choose to continue their pregnancy are free to do so without any requirement of parental consent. But the minor who is presumed by the Consent Act to be too immature to decide about having an abortion will, if she continues her pregnancy, become the mother of an infant, fully responsible for the infant's life and for decisions about infant's medical care and upbringing.

E. Judicial Waiver.

[¶51] The State attempts to save the Consent Act by arguing that the judicial waiver provision "guarantees that any minor who should obtain an abortion without parental oversight can do so." However, the judicial waiver provision cannot remedy the maladies of the Consent Act, which is not narrowly tailored to accomplish

a compelling State interest, because the provision, itself, singles out minors who choose to have an abortion and introduces unnecessary stress, delay, and potential increase in the risk of abortion and inability to obtain an abortion altogether. The judicial waiver provision will introduce delay into the decision of whether to obtain an abortion, which could increase the chances of having to obtain an abortion later in pregnancy and thus, increase the possibility that a minor may not be able to receive a safe and legal abortion. The necessary process to obtain a judicial waiver forces delay in care which can increase stress and cost—especially if delay takes a more affordable option, such as medication assisted abortion, off the table.

[¶52] As discussed, minors have a fundamental right to privacy and equal protection. In complete contravention of these rights, the judicial waiver procedure requires a minor to file a petition disclosing her private medical information—her pregnancy—to appear in court and subject herself and her competency to the scrutiny of strangers. It requires the minor to tell multiple people—the judge, her attorney (if any), court personnel—very personal details about her life and to be questioned about deeply personal matters. Thus, forcing minors to go to court to access abortion care compromises a minor's fundamental right to privacy—which includes the right to make medical judgments in partnership with a chosen health care professional free from governmental interference.

[¶53] For minors who seek an abortion but choose not to seek parental consent, the judicial waiver vests a different adult—the judge, rather than the parent—with veto power. A similar veto power does not exist for a minor who decides to continue, rather than terminate, her pregnancy—these minors retain their privacy, including the right to procreative autonomy.

[¶54] The legal system is intimidating, confusing, and difficult to access, even for those who have legal representation and do not have time-sensitive legal problems. These complications are made worse for those with time-sensitive medical conditions who begin the process without counsel. Even if a minor obtains accurate information as to the process—which is certainly not guaranteed—the minor faces other hurdles such as missing school, work, and other activities; lack of transportation, legal counsel, and financial resources; and taking time to prepare and file a judicial waiver petition, appear in court, and adequately present her position. Minors with the least financial resources and the greatest access impediments, face greater challenges in seeking a timely judicial waiver. These financial and logistical barriers may be even more pronounced for indigenous and marginalized people.

[¶55] The judicial waiver provision thus cannot save the Consent Act, a statute which infringes upon a minor's fundamental right and is not narrowly tailored to serve a compelling state interest. There is no state interest that the judicial waiver provision serves other than attempting to save the Consent Act. We conclude that the judicial

waiver provision of the Consent Act does not enhance protections for minors who choose to exercise their right to obtain an abortion; rather, it delays their access to medical care which we have determined they have a constitutional right to obtain.

CONCLUSION

[¶56] The Consent Act conditions a minor's right to obtain an abortion on parental consent unless a judicial waiver is obtained. It imposes no corresponding limitation on a minor who seeks medical or surgical care otherwise related to her pregnancy or her child. The State responds that its substantial interests in protecting minors from victimization, protecting minors' psychological and physical wellbeing, protecting minors from their own immaturity, and promoting the rights of parents to raise their children justify this differential treatment and the infringement on a minor's right of privacy. We decide today that the classification created by the Legislature violates the fundamental right of a minor to control their body and destiny, *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, and *Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798, without adequate justification from the State, and cannot be sustained against Plaintiffs' privacy and equal protection challenges. Further, we conclude that the Consent Act does not enhance the protection of minors under Article II, Section 15, of the Montana Constitution. We emphasize that our decision is not based on, nor do we presume to answer, the profound questions about the moral, medical, and societal implications of abortion. At the end of the day, those questions are left to the woman

who must decide for herself. We also acknowledge that the State has a substantial interest in preserving the family, protecting minors, and protecting the rights of parents to raise their children. However, when weighed against the right of a minor to make the most intimate and personal decision of whether to carry a child to term, the interests expressed by the State must be furthered by and substantially related to the legislation itself, and the legislation must be narrowly tailored to meet only those legitimate legislative goals. A minor's right to dignity, autonomy, and the right to choose are embedded in the liberties found in the Montana Constitution. Because a minor's right to control her reproductive decisions is among the most fundamental of the rights she possesses, and because the State has failed to demonstrate a real and significant relationship between the statutory classification and the ends asserted, we hold that the Consent Act violates the Constitution of the State of Montana.

/S/ LAURIE MCKINNON

We Concur:

/S/ JAMES JEREMIAH
/S/ SHEA INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ ELIZABETH A. BEST
District Court Judge Elizabeth A. Best
Sitting for Chief Justice Mike McGrath

Justice Jim Rice, specially concurring.

[¶57] I concur with the ultimate holdings of the Court, including the holding that the Consent Act fails to sustain strict scrutiny review and thus violates Plaintiffs' right to privacy under Article II, Section 10, of the Montana Constitution, which the Constitution extends to minors. *See* Mont. Const. Art. II, § 15; *Matter of J.W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 498 P.3d 211; *In re C.H.*, 210 Mont. 184, 202, 683 P.2d 931, 940 (1984). I also agree that the Consent Act violates equal protection, but I disagree with the analysis employed by the Court in that regard, and I write separately to address several concerns.

[¶58] First, the Court mentions the long delay that occurred in this case because of "a lengthy series of judicial substitutions, recusals, and retirements." Opinion, ¶ 4. These occurrences do not excuse the judiciary's failure to address this case in a timely fashion. The District Court was forthcoming about the problem, detailing the processing turns and presiding judge turnovers that resulted in this case being passed along like a hot potato and delaying resolution for almost *eight years* after this Court's remand in 2015. The District Court acknowledged that "the case went dark" despite the multiple submission notices the State filed to remind presiding judges about the need for resolution. I appreciate Judge Abbott's diligence when the case finally landed on his court's doorstep, but, overall, the judiciary's handling of this case was unacceptable. While perhaps no single individual or court bears all the blame, the public's confidence in the judiciary rests on the expectation that the courts will faithfully

execute judicial duties. The public deserves better than what occurred in this case, and courts must do better.

[¶59] I agree with the Court's effort to clarify our prior holding in *In re S.L.M.*, 287 Mont. 23, 951 P.2d 1365 (1997). The Court first states, in regard to Article II, Section 15, of the Montana Constitution, that "minors do not have *more* or *enhanced* rights in comparison to adults." Opinion, ¶ 21 (emphasis in original). In *In re S.L.M.*, we had stated:

> Clearly under Article II, Section 15, minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II. Furthermore, *if the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors.*

In re S.L.M., 287 Mont. at 25, 951 P.2d at 1373 (emphasis added). Notably, the District Court cited this language and relied upon it. However, the holding is clearly contrary to the plain language of Article II, Section 15, which states that "persons under 18 years of age" are entitled to the fundamental rights set forth in Article II "unless specifically precluded by laws which enhance the protections of such persons." Thus, without engaging in a full analysis of the point, I concur with the Court's statement in Footnote 3 that *In re S.L.M.*'s holding in this

regard "was incorrect" and is "repudiate[d]," such that it should not be cited or relied upon in the future.

[¶60] Turning to the equal protection issue, I would not, as a threshold matter, reach this issue because the Court is already declaring the Consent Act to be unconstitutional on the basis of the right to privacy under Article II, Section 10 of the Montana Constitution, and it is thus unnecessary to the outcome of the challenge to the Act for the Court to reach and address an additional constitutional issue. "[C]ourts should avoid constitutional issues whenever possible." *350 Mont. v. State*, 2023 MT 87, ¶ 25, 412 Mont. 273, 529 P.3d 847; *State v. Johnson*, 2023 MT 143, ¶ 8 n.1, 413 Mont. 114, 533 P.3d 335.[1] However, out of a concern regarding the Court's equal protection analysis for purposes of our future jurisprudence, I will address the merits.

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1. *See also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 2313, 213 L. Ed. 2d 545 (2022) (Roberts, C.J., concurring) ("Following that 'fundamental principle of judicial restraint' . . . we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 423, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue . . . . *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (declining to address the claim that a constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument.)").

[¶61] The Court explains that we analyze equal protection claims in a three-step process: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." Opinion, ¶ 26 (quoting *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211); *see also Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192. Addressing the first step, the Court defines the relevant classes created by the Consent Act as "pregnant minors who want to obtain an abortion and . . . pregnant minors who do not want an abortion." Opinion, ¶ 28. It is this designation of the classes under the first step with which I disagree.

[¶62] The Court correctly notes that a similarly situated class is one that is "equivalent in all relevant respects other than the factor constituting . . . the alleged discrimination," and that the "goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." Opinion, ¶ 27. However, in this case challenging the Consent Act, which regulates youth access to abortion, pregnant minors who are not seeking an abortion are not "equivalent in all relevant respects" to pregnant minors who are seeking an abortion. The group not seeking an abortion does not interact with the Consent Act at all. For purposes of the equal protection analysis, the mere existence of the Consent Act cannot "create" a class to whom it could never apply, i.e., women completing

their pregnancy, and therefore that group is not the result of a legislative classification. Instead, the two groups of pregnant minors are created by the different personal choices those groups have made. Consequently, the classes utilized by the Court are not created by the Consent Act, because the Act has no application to the group not seeking an abortion, and the Court's determination that "the factor needing to be isolated is the Consent Act" is incorrect.

[¶63] Rather, the proper distinction created by the Consent Act is between minors seeking an abortion and adults seeking an abortion. In brief, the distinction is one of age. The plain language and purpose of the Consent Act make this distinction clear. As the Court notes, the Consent Act "conditions a *minor's* right to obtain an abortion on parental consent unless a judicial waiver is obtained." Opinion, ¶ 1 (emphasis added). The Act provides a process for obtaining parental consent for a minor's abortion that involves numerous steps and complications. However, the day the minor turns 18 years old, all of the conditions imposed by the Act disappear, and the now 18-year-old person may obtain an abortion without satisfying these requirements. The Act thus exempts from its requirements adult women seeking an abortion. As the Court correctly explains, similarly situated classes are equal in all relevant respects, except for the factor constituting the facially discriminatory aspect of the law at issue. The Consent Act does not seek to regulate abortion *per se*, but instead seeks to establish the conditions that must be satisfied for *a minor* to obtain an abortion, and to exempt an adult

from the conditions. Thus, the distinguishing "factor" of the legislative classification at issue is age. The groups are similarly situated because they are both comprised of women who are seeking abortions, and are treated differently on the basis of their age. This is also a more appropriate designation of classes for this particular case, involving application of Article II, Section 15.

[¶64] Having concluded that the relevant legislative classification is one based on age, I would next move to a determination of the appropriate level of review. *Goble*, ¶ 28. Typically, facial discrimination based on age is subject to rational basis review. *Jaksha v. Butte-Silver Bow Cnty.*, 2009 MT 263, ¶ 20, 352 Mont. 46, 214 P.3d 1248. However, the regulation at issue here involves the right to seek an abortion, which we have deemed a fundamental right of privacy. *Armstrong*, ¶ 42. Therefore, strict scrutiny review must apply to the Consent Act. *See S.L.M.*, 287 Mont. at 34, 951 P.2d at 1372. Consequently, I agree with the Court that the Act is not narrowly tailored to satisfy the State's stated compelling interests.

[¶65] I concur in the Court's judgment.

/S/ JIM RICE

Appendix B — Order, No. DA 23-0272, Supreme Court of the State of Montana, filed May 30, 2023

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 23-0272

PLANNED PARENTHOOD OF MONTANA AND PAUL FREDERICK HENKE, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs and Appellees,

v.

STATE OF MONTANA AND AUSTIN KNUDSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, IN HIS OFFICIAL CAPACITY, AND HIS AGENTS AND SUCCESSORS,

Defendants and Appellants.

Filed May 30, 2023

ORDER

The State of Montana has filed a notice of appeal from the First Judicial District Court's February 21, 2023, Opinion and Order on Cross Motions for Summary Judgment in that Court's Cause No. DDV-2013-407. The appeal is from an order certified as final by the District Court pursuant to M. R. Civ. P. 54(b).

Appendix B

The District Court's summary judgment order granted judgment to Plaintiffs and Appellees Planned Parenthood of Montana and Paul Frederick Henke declaring unconstitutional Montana's Parental Consent for Abortion Act of 2013, 2013 Mont. Laws 307 (Consent Act). In the same order, the court denied Plaintiffs' motion for partial summary judgment on the Parental Notice of Abortion Act, 2011 Mont. Laws 307 (Notice Act), and set a trial on the privacy and equal protection claims pertaining to that Act. On the parties' motions for certification, the District Court certified as final its ruling on the Consent Act. The court did not certify that portion of its order denying Plaintiffs summary judgment with respect to the Notice Act.

Pursuant to M. R. App. P. 4(4)(b), we have reviewed the District Court's certification order for compliance with M. R. App. P. 6(6). That rule allows a court to direct entry of final judgment on an otherwise interlocutory order "only upon an express determination that there is no just reason for delay, pursuant to M. R. Civ. P. 54(b)." The rule further requires the court, "in accordance with existing case law, [to] articulate in its certification order the factors upon which it relied in granting certification[.]" As set forth in *Roy v. Neibauer*, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980), the factors this Court normally considers regarding a Rule 54(b) certification include: (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 set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of computing claims, expense, and the like. "[A]ll or some of the above factors may bear upon the propriety of the order granting a Rule 54(b) certification" in a particular case. *Roy*, 188 Mont. at 87, 610 P.2d at 1189.

We require a certifying district court to "marshall [sic] and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated." *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 16, 317 Mont. 413, 417, 77 P.3d 531 (citing *Roy*, 188 Mont. at 87, 610 P.2d at 1189). In certifying its partial summary judgment order, the District Court thoroughly considered 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. With respect to the Consent Act, it concluded that there was no just reason for delay, and the judgment should be certified for immediate appeal. The court discussed each factor and explained its rationale for concluding that an immediate appeal of the Consent Act bears little risk that appellate review will be reduced to an advisory opinion, cause unwarranted duplication, or be frustrated by the ongoing litigation in the District Court related to the Notice Act. The court further stated,

> Certification partially accommodates the long delay in this case and vindicates the public policy in timely disposition of constitutional questions. In short, this Court concludes that this is indeed the "infrequent harsh case" where

> there is no just reason for delay and that it is in the interest of sound judicial administration and public policy to certify the Court's order enjoining the Consent Act for immediate appeal.

The court explained further why its denial of partial summary judgment on the Notice Act did not warrant certification for immediate appeal.

Upon review, we conclude that the court's certification order complies with the requirements of Rule 6(6) and our case law interpreting certification orders under Rule 54(b).

IT IS THEREFORE ORDERED that this appeal may proceed.

The Clerk is directed to provide copies of this Order to all counsel of record.

DATED this 30th day of May, 2023.

/s/_____

/s/_____

/s/_____

/s/_____

/s/_____

Justices

Appendix C — Opinion & Order on Cross Motions for Summary Judgment, Montana First Judicial District Court, Lewis and Clark County, filed February 21, 2023

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No.: DDV-2013-407

PLANNED PARENTHOOD OF MONTANA AND SAMUEL DICKMAN, 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.

Filed February 21, 2023

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

For nearly a half century, the United States Constitution was recognized by the United States Supreme Court as guaranteeing pregnant women a constitutionally protected liberty interest in bodily

autonomy that included the decision whether to carry a child to term or to earlier terminate the pregnancy. *Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood v. Casey,* 505 U.S. 833 (1992). That recognition is no more. *Dobbs v. Jackson Women's Health Org.,* __ U.S. __, 142 S. Ct. 2228 (June 24, 2022).

And yet, as the United States Supreme Court observed just one day prior to the *Dobbs* decision: "Within wide constitutional bounds, States are free to structure themselves as they wish." *Berger v. N Carolina State Conf. of the NAACP,* __ U.S. __, 142 S. Ct. 2191, 2197 (June 23, 2022). The Montana Constitution charts just such a course: unlike its federal counterpart, it expressly recognizes a fundamental right to individual privacy. Mont. Const. art. II, § 10. For over two decades, the Montana Supreme Court has interpreted this right to privacy to include a right to personal autonomy over the decision whether to keep or terminate a pregnancy prior to viability. *Armstrong v. State,* 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The right recognized by the Montana Supreme Court sweeps more broadly than the federal right that was previously recognized in *Roe* and *Casey. See Armstrong,* ¶ 41.

Now before the Court are two statutes: one, enacted by the people, requiring parental notice prior to an abortion, and the other, enacted by the legislature, requiring parental consent. Whether these are popular or wise measures or reflect sound public policy is not for this Court to decide, for the legislature (or the people, in cases of initiative and referendum) holds the power

to make law. Mont. Const. art. V, § 1. Rather, this Court is asked to do something different: to decide whether these statutes irreconcilably conflict with the Montana Constitution. Whenever a governmental action—be it executive, legislative, or judicial—is alleged to infringe on a fundamental right guaranteed by the Constitution, the question of whether it indeed does so falls "emphatically" within "the province and duty of the judicial department to say what the law is," and, when "two laws conflict with each other," to "decide on the operation of each." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Brown v. Gianforte*, 2021 MT 149, ¶ 56–62, 404 Mont. 269, 488 P.3d 548 (discussing the *pre-Marbury* underpinnings of the power of judicial review). This Court must therefore exercise the judicial power the Montana Constitution confers on it and decide whether these laws are in impermissible tension with the Constitution. Mont. Const. art. VII, § 1.

The specific posture of this case is on cross-motions for summary judgment, meaning the parties contend that there are no genuine disputes of material fact that need to be resolved at trial, and both sides claim they are entitled to judgment as a matter of law. Plaintiffs Planned Parenthood of Montana and Samuel Dickman, M.D. (collectively, Planned Parenthood) are represented by Tanis M. Holm (argued).[1] Defendant the State of Montana (the State) is represented by Thane Johnson, Brent Mead, Kathleen L. Smithgall (argued), Thane

1. Planned Parenthood has previously been represented on the briefs by Alice Clapman, Richard Muniz, and Eric E. Holm, all of whom have withdrawn from this action during its pendency.

Johnson, and Emily Jones.[2] The motions are fully briefed, and oral argument was held on June 10, 2022. The motions are ripe for decision.

For the reasons that follow, Planned Parenthood's motion for summary judgment will be granted to the extent it seeks a declaration that the Montana's parental consent statute is unconstitutional, and the motion will be denied with respect to its claim that the parental notice statute is unconstitutional. Regarding the latter, the Court concludes there are genuine disputes of material fact that preclude summary judgment. The Court will therefore set a trial on the constitutionality of the parental notice statute.

BACKGROUND

Keeping with a long Montana tradition of suspicion of governmental interference in the lives of ordinary Montanans, in 1972 the people adopted the current Montana Constitution, one of the youngest state constitutions in the United States. The 1972 Constitution departs from its 1889 forebear in many respects while greatly expanding individual rights beyond those recognized in the United States Constitution. Among other innovations, the 1972 Constitution includes an express declaration of rights, including an express right to individual privacy not found in the United States Constitution. In 1999, the Montana

2. The State has previously been represented on the briefs by Dale Schowengerdt, Patrick M. Risken, and David M.S. Dewhirst, all of whom have withdrawn from this action during its pendency.

Supreme Court held that this guarantee embraces a woman's "right to seek and to obtain a. . . pre-viability abortion, from a health care provider of her choice." *Armstrong v. State,* 1999 MT 261, ¶ 75, 296 Mont. 361, 989 P.2d 364.

As has been true nearly everywhere on the divisive question of abortion, *Armstrong*—while perhaps the most significant word on abortion regulation in Montana—has not marked the final word on the subject. *Armstrong* does not foreclose all state regulation of abortion. Thus, from time to time the State has sought to adopt measures regulating abortion. Two of those efforts are at issue today: (1) the Parental Notice of Abortion Act of 2011, LR-120, 2011 Mont. Laws 307, and (2) the Parental Consent for Abortion Act of 2013, HB 391, 2013 Mont. Laws 307.

1. Parental Notice of Abortion Act of 2011

The Parental Notice of Abortion Act of 2011 (the Notice Act) became law in January 2013 following voter approval—by a substantial margin—of Legislative Referendum 120 the previous November. This law requires that medical care providers give "actual notice" to a parent or legal guardian at least forty-eight hours before performing an abortion on an unemancipated minor under the age of sixteen. Notice must be given "directly in person or by telephone." Mont. Code Ann. § 50-20-223(1) (2011). If, after "reasonable effort," actual notice is not possible, the physician must give notice by certified mail to the parent's "usual place of residence." *Id.* §§ 50-20-224, -225 (2011). Unless an exception applies, performing an

abortion without notice subjects the provider to criminal prosecution for a misdemeanor and civil liability in the form of "an appropriate civil action for violation of a professional obligation." *Id.* § 50-20-235 (2011). Because failure to give notice is "presumed to be actual malice," providers who perform abortions without giving notice could be subject to punitive damages. *Id.*

The Notice Act has three exceptions. First, no notice is required if there is a medical emergency and insufficient time to provide notice. *Id.* § 50-20-228(1). A "medical emergency" is defined by statute:

> "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of the woman's pregnancy to avert the woman's death or a condition for which a delay in treatment will create serious risk of substantial and irreversible impairment of a major bodily function.

Id. § 50-20-223(4) (2011).

Second, a parent or guardian may waive the notice requirement in writing. *Id.* § 50-20-228(2) (2011).

Third, parental notice can be waived by a court in a sealed proceeding commonly known as a judicial bypass. A judicial bypass is a legal proceeding in which a minor receives a judicial order from a youth court allowing

them to receive an abortion without notifying a parent. The strictest confidentiality is observed: the minor may file pseudonymously, the court file is sealed, the court's findings of fact and conclusions of law are sealed, and any appeal and resulting Supreme Court decision are sealed. *Id.* § 50-20-232 (2011); *see also In re Meghan Rae,* Cause No. DA 14-005 (unpublished)[3]. The minor is also entitled to assignment of counsel by the Office of the State Public Defender. Mont. Code Ann. § 50-20-232(2) (2011). The youth court's findings must be issued within forty-eight hours of the petition being filed. *Id.* § 50-20-232(3) (2011).

Under the judicial bypass procedure, the youth court "shall issue" an order waiving the notice requirement if: (1) "the court finds that the petitioner is competent to decide whether to have an abortion"; (2) "there is evidence of physical abuse, sexual abuse, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian"; or (3) the court finds that "notification of a parent or guardian is not in the best interests of the petitioner." *Id.* § 50-20-232(4),(5). The petitioner must establish one of these bases for waiver by a preponderance of the evidence. *Meghan Rae,* DA 14-005, ¶ 13. In *Meghan Rae,* the Supreme Court held that a minor should be deemed competent "if the minor is sufficiently mature and well-informed" to decide to have an abortion, and

3. This is a sealed document found in the record at Ex. 2 to Pat Risken's Dec. 29, 2016, Declaration (Dkt. 133). Because the case name is an obvious pseudonym and the Court cannot conceive of any means by which this could lead to discovery of the minor's identity nine years after the fact, the Court sees no apparent harm in using the name of the case as it was captioned.

that any evaluation of maturity and competence "must be made on an individual, case-by-case basis, rather than according to any arbitrary measure such as age." *Meghan Rae,* ¶ 11 (citing *Belotti v. Baird,* 443 U.S. 622, 643–644 & n.23 (1979)).

The Notice Act also prevents a parent, guardian, or any other person from "coerc[ing]" a minor to have an abortion. Mont. Code Ann. § 50-20-229 (2011). To coerce a minor under the statute is to "restrain or dominate the choice of a minor female by force, threat of force, or deprivation of food or shelter." *Id.* § 50-20-223(2) (2011). Coercion subjects the offending person to criminal penalties that, upon multiple convictions, can constitute a felony punishable by up to five years in prison and a $50,000 fine. *Id.* § 50-20-235(3) (2011). The coercion provisions do not, however, similarly prohibit a parent, guardian or other person from coercing a minor to carry a pregnancy to term. Rather, if the minor chooses to carry to term and their parent or guardian refuses to provide financial support, the minor is considered emancipated and eligible for public assistance benefits. *Id.* § 50-20-229 (2011).

The Notice Act is not the legislature's first attempt at providing for parental notice. In 1995, the legislature enacted the similarly named Parental Notice of Abortion Act, 1995 Mont. Laws 469, Mont. Code Ann. §§ 50-20-201-215 (the 1995 Act). Planned Parenthood challenged that statute in this Court, and this Court held the law unconstitutional. *Wicklund v. State,* ADV-1997-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Ct. Feb. 11, 1999).

The State did not appeal. The 1995 Act is quite similar to the Notice Act, but it also contained some substantive differences. *See Planned Parenthood of Mont. v. State,* 2015 MT 31, ¶ 16, 378 Mont. 151, 342 P.3d 684 [*PPMT I*]. Unlike the Notice Act, the 1995 Act applied to all minors under the age of 18, and it required the minor to establish a basis for a judicial bypass by "clear and convincing evidence." *PPMT I*, ¶ 16.

The Notice Act repealed the 1995 Act. *See* 2011 Mont. Laws 307, § 12. The Consent Act likewise repealed the Notice Act. *See* 2013 Mont. Laws 307, § 14. Because this Court has preliminarily enjoined the Consent Act in its entirety, however, the Notice Act has been in effect since 2013.

2. Parental Consent for Abortion Act of 2013

In 2013, the legislature enacted House Bill 391, the Parental Consent for Abortion Act of 2013 (the Consent Act), now codified at Mont. Code Ann. §§ 50-20-501 through -511. The Consent Act is significantly more restrictive than the Notice Act. For one, the statute requires that the provider obtain notarized and written consent from a parent or legal guardian. Mont. Code Ann. § 50-20-505(1). Not only that, but consent must be executed by a form adopted by the Department of Public Health and Human Services that includes the following:

> (a) any information that a physician or physician assistant is required by law to provide to the minor and the rights of the minor;

(b) the rights of the parent or legal guardian;

(c) the surgical or medical procedures that may be performed on the minor;

(d) the risks and hazards related to the procedures planned for the minor, including but not limited to the risks and hazards associated with:

(i) any surgical, medical, or diagnostic procedure, including the potential for infection, blood clots in veins and lungs, hemorrhage, and allergic reactions;

(ii) a surgical abortion, including hemorrhage, uterine perforation or other damage to the uterus, sterility, injury to the bowel or bladder, a potential hysterectomy caused by a complication or injury during the procedure, and the possibility of additional procedures being required because of failure to remove all products of conception;

(iii) a medical or nonsurgical abortion, including hemorrhage, sterility, the continuation of the pregnancy, and the possibility of additional procedures being required because of failure to remove all products of conception; and

(iv) the particular procedure that is planned for the minor, including cramping of the uterus,

> pelvic pain, infection of the female reproductive organs, cervical laceration, incompetent cervix, and the requirement of emergency treatment for any complications.

Mont. Code Ann. § 50-20-502(2). The minor must sign a consent statement on the form that further includes the following:

> (i) the minor understands that the physician or physician assistant is going to perform an abortion on the minor and that the abortion will end the minor's pregnancy;
>
> (ii) the minor is not being coerced into having an abortion, the minor has the choice not to have the abortion, and the minor may withdraw consent at any time prior to the abortion;
>
> (iii) the minor consents to the procedure;
>
> (iv) the minor understands the risks and hazards associated with the surgical or medical procedures planned for the minor;
>
> (v) the minor has been provided the opportunity to ask questions about the pregnancy, alternative forms of treatment, the risk of nontreatment, the procedures to be used, and the risks and hazards involved; and

> (vi) the minor has sufficient information to give informed consent.

Id. § 50-20-502(3)(a). Each of these points must be separately initialed by the minor. The consenting parent or guardian, too, must sign (and separately initial) a parental consent statement including the following:

> (i) the parent or legal guardian understands that the physician or physician assistant who signed the physician declaration statement provided for in subsection (3)(c) is going to perform an abortion on the minor that will end the minor's pregnancy;
>
> (ii) the parent or legal guardian had the opportunity to read the consent form or had the opportunity to have the consent form read to the parent or legal guardian;
>
> (iii) the parent or legal guardian had the opportunity to ask questions of the physician or physician assistant or the agent of the physician or physician assistant regarding the information contained in the consent form and the surgical and medical procedures to be performed on the minor;
>
> (iv) the parent or legal guardian has been provided sufficient information to give informed consent.

Id. § 50-20-502(3)(b). And finally, the physician must sign a statement declaring that:

> (i) the physician or physician assistant or the agent of the physician or physician assistant explained the procedure and contents of the consent form to the minor and a parent or legal guardian of the minor and answered any questions; and
>
> (ii) to the best of the physician's or physician assistant's knowledge, the minor and a parent or legal guardian of the minor have been adequately informed and have consented to the abortion; and

Id. § 50-20-502(3)(c).

The Consent Act has stringent identification requirements that extend beyond the experience (familiar to most) of producing an ID and insurance card at the doctor's office. Rather, the Consent Act requires the parent or guardian to sign a notarized acknowledgment that they are indeed the parent or legal guardian of the minor, *id.* § 50-20-502(3)(d), and to provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor," *id.* § 50-20-506(1). The physician must then execute another affidavit that they are satisfied that "a reasonable person under similar circumstances would rely on the information presented by both the minor and the minor's parent or legal guardian

as sufficient evidence of identity and relationship." *Id.* § 50-20-506(3).

Like the Notice Act, providers who perform an abortion without navigating the foregoing hurdles are subject to civil and criminal penalties. With the Notice Act, however, a physician was subject to misdemeanor penalties for failure to give notice; by contrast, under the Consent Act, a second or subsequent violation of the consent requirements is a felony punishable by up to five years in prison and a $50,000 fine. The Consent Act contains substantively identical exceptions, judicial bypass, and coercion provisions as the Notice Act.

3. Procedural History

While the Notice Act has been in effect since 2013, the Consent Act has never been in effect. Voters approved the Notice Act—which had a January 1, 2013, effective date—in the 2012 general election. During the session that winter, however, the legislature passed the Consent Act, repealing the Notice Act, and having an effective date of July 1, 2013. Before the effective date of the Consent Act, this action was brought, and the Attorney General consented to issuance of a preliminary injunction against the Consent Act. Because the Consent Act was enjoined, the law it repealed, the Notice Act, remained in effect.

As this Court detailed last year, this case then began a long and arduous journey to decision. This case was originally assigned to the Hon. Mike Menahan. After he recused himself, the State moved to substitute this Court's

predecessor, the Hon. James P. Reynolds, and then the Hon. Kathy Seeley declined jurisdiction. The Hon. Jeffrey Sherlock assumed jurisdiction and granted summary judgment for Planned Parenthood on January 31, 2014, holding that because the State did not appeal the 1999 *Wicklund* decision—striking down the 1995 Notice Act—the State was collaterally estopped from defending the Notice and Consent Acts. The State appealed, and roughly a year later, the Montana Supreme Court reversed. *PPMT I,* ¶¶ 15–26.

Back on remand, before briefing was completed, Judge Sherlock retired in December 2015, and was replaced with the Hon. Deann Cooney, who was defeated for election in 2016 in favor of the Hon. Mike McMahon. Judge McMahon assumed office in 2017, and Planned Parenthood moved to substitute him. Because this left no judges in the district who had not recused themselves, been substituted, or declined jurisdiction, the case was assigned to an out-of-county judge. Two months after Judge McMahon was substituted, in March 2017, the Hon. Karen Townsend agreed to assume jurisdiction.

At the time Judge Townsend assumed jurisdiction, briefing on the instant motions was not complete. A month before she assumed jurisdiction, Plaintiff Dr. Paul Henke had passed away. This prompted a new motion to dismiss on mootness grounds, filed May 22, 2017, and yet another round of briefing. All briefing was completed and the State filed a notice of submittal on August 11, 2017.

In April 2018, Judge Townsend ruled on the motion to dismiss on mootness grounds, giving Planned Parenthood

a month to substitute a party for Dr. Henke. Planned Parenthood timely moved to substitute Dr. Joey Banks for Dr. Henke.

At this point, however, the case went dark. No orders were issued on any pending motions between May 18, 2018, and Judge Townsend's retirement in August 2019. The State filed a reminder of submittal on January 10, 2019, and nothing significant happened in the case until the State filed a second reminder of submittal on December 22, 2021. This prompted the case to be reassigned from Judge Townsend to the undersigned, now the only non-recused, non-substituted judge in the district. The State filed a motion to dissolve the preliminary injunction February 14, 2022, the Court held a hearing on April 26, 2022, and the Court denied the motion on April 29, 2022. Oral argument on the merits of the cross-motions for summary judgment was held June 10, 2022. After *Dobbs* was decided two weeks later, the State filed a notice of supplemental authority. The case is now fully submitted, and a decision is needed to advance the litigation so the parties can take this case to the judicial forum that will have the final word: the Montana Supreme Court.[4]

4. It had been the Court's intention to decide this case by the end of 2022. This has been complicated by, among other things, the size and complexity of the summary judgment record, the *Dobbs* decision, and the pendency of the preliminary injunction appeal in *Planned Parenthood of Mont. v. State,* 2022 MT 157, 409 Mont. 378, 515 P.3d 301, in which, as the Court understands it, the State asked for *Armstrong* to be overruled. Nevertheless, the Court fell short of its goal, and the Court apologizes to the parties for the delay.

Appendix C

STANDARDS

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is not genuine issue as to any material fact" and the moving party it entitled to judgment as a matter of law. Mont. R. Civ. P 56(c). When "evaluating cross motions for summary judgment, this Court must evaluate each party's motion on its own merits." *Meadow Lake Estates Homeowners Ass'n v. Shoemaker,* 2008 MT 41, ¶ 25, 341 Mont. 345.

On a motion for summary judgment, the moving party bears the "initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Roe v. City of Missoula,* 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (quoting *Corporate Air v. Edwards Jet Ctr.,* 2008 MT 283, ¶ 24, 345 Mont. 336, 190 P.3d 1111). If the moving party also bears the burden at trial, the movant must affirmatively "present facts that would support [the finder of fact] finding in its favor" and that "there is no basis upon which the jury could find for the nonmoving party." *Cabral v. State Farm Fire & Cos. Co.,* 582 F. Supp. 3d 701, 707 (D. Ariz. 2022). By contrast, where the party moving for summary judgment does *not* bear the burden at trial, then the initial burden is satisfied merely by "showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986).

If the movant satisfies this initial burden of suggesting the absence of a genuine dispute of material fact, then

the burden "shifts to the nonmoving party to establish that a genuine issue of material fact does exist." *Roe,* ¶ 14 (quoting *Corporate Air,* ¶ 24). To satisfy this burden, the non-movant "must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Motarie v. N. Mont. Joint Refuse Disposal Dist.,* 274 Mont. 239, 242, 907 P.2d 154, 156 (1995).

A dispute of fact is genuine if "based on the record, reasonable jurors could reach different conclusions as to a particular material fact." *Meadow Lake Estates,* ¶ 25. To assess whether a genuine dispute of fact exists, "all reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposed summary judgment." *Motarie,* 274 Mont. at 242, 907 P.2d at 156. Bare denial does not raise a genuine dispute of material fact. *Sherrard v. Prewett,* 2001 MT 228, ¶ 15, 306 Mont. 511, 36 P.3d 378.

Finally, the determination whether a genuine dispute of material fact exists must be viewed "through the prism of the substantive evidentiary burden" at trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254 (1986). This case involves a challenge to the constitutionality of two statutes. "Statutes enjoy a presumption of constitutionality." *City of Billings v. Albert,* 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. Thus, the party challenging a statute must establish its unconstitutionality beyond a reasonable doubt, and any doubt that exists must be resolved in favor of the statute's validity. *Powell v. State Comp. Ins.* Fund, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

Appendix C

DISCUSSION

Planned Parenthood contends that the parental involvement statutes are unconstitutional because they violate the right to privacy, deny minors seeking an abortion the equal protection of the laws, and violate doctors' rights to due process. Because the two acts differ substantially in the degree of parental involvement required and the burden placed on a minor who intends to terminate her pregnancy, the two acts must be considered separately. The Court concludes that there is no genuine dispute of material fact with respect to the Consent Act, and that Planned Parenthood is entitled to judgment as a matter of law on its claim that the Consent Act impermissibly infringes on the right to privacy as established in *Armstrong*. By contrast, the Court concludes genuine disputes of material fact exist with respect to the claims that the Notice Act violate the right to privacy or to equal protection of the laws, thus precluding summary judgment.

1. The Parental Consent to Abortion Act of 2013

Article II, Section 10 of the Montana Constitution provides:

> **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const. art II, § 10. Planned Parenthood contends that the Consent Act impermissibly infringes on the individual privacy rights of minors seeking an abortion.

Appendix C

A. *Armstrong* and the Right to Privacy

Any discussion of the Consent Act's constitutionality must begin with the leading decision on the right to privacy as it relates to abortion, *Armstrong v. State,* 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The Court knows that the State has elsewhere expressed its misgivings with *Armstrong. See Planned Parenthood v. State,* 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301 [*Planned Parenthood 2022].* The Court also acknowledges the State's argument to this Court that *Dobbs* has "eviscerated *Armstrong's* central rationale." (Def.'s Not. Supp. Auth., Dkt. 287 at 2.) This Court, however, is not the forum for engaging with these arguments. As a trial court, this Court must not only apply controlling decisional authority, but it must apply that authority *faithfully. See United States v. Dupree,* 57 F.4th 1269, 2023 U.S. App. LEXIS 1183, at *26–*27 (11th Cir. Jan. 18, 2023) (Grant, J., concurring in the judgment); *In re Search Warrant No. 5165,* 470 F. Supp. 3d 715, 735 (E.D. Ky. 2020) (a lower court's job is to "interpret and apply those precedents [of the Supreme Court] as faithfully as possible"); *Ganley v. Jojola,* 402 F. Supp. 3d 1021, 1095 n. 38 (D.N.M. 2019) ("as a district court, the Court is bound to apply faithfully and honestly controlling. . . precedent."); *Catoosa County v. Rome News Media, LLC,* 825 S.E. 2d 507, 515 n.53 (Ga. Ct. App. 2019) ("When dealing with binding vertical precedent, a court has no room to decide how much weight or value to give each case." (quoting Bryan A. Garner, et al., *The Law of Judicial Precedent* 155)); *Williams v. Homeland Ins. Co.,* 18 F. 4th 806, 821 (5th Cir. 2021) (Ho, J., concurring) ("Lower courts don't have license to adopt a cramped

reading of a case in order to functionally overrule it."); *NLRB v. Int'l Ass'n of Structural, Ornamental, & Reinforcing Iron Workers, Local 229,* 974 F.3d 1106, 1117 (9th Cir. 2020 (Bumatay, J., dissenting from denial of rehearing *en banc*) (lower courts may not "create 'razor-thin distinctions' to evade precedent's grasp" (quoting Josh Blackman, *Originalism and State Decisis in the Lower Courts,* 13 NYU J.L. & Liberty 44, 51 (2019))). Thus, whatever the State's position on *Armstrong* may be, this Court's duty is to interpret *Armstrong* faithfully, to follow its logic wherever it naturally leads, and to resist any temptation to retcon its holding to fit any preconceived objective or outcome.

The Montana Supreme Court has repeatedly characterized the individual privacy guarantee in Article II, Section 10 as "one of the most stringent protection[s] of its citizens' right to privacy in the country." *State v. Burns,* 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992); *see also Mont. Human Rights Div. v. City of Billings,* 199 Mont. 434, 439, 649 P.2d 1283, 1286 (1982) (citing David Gorman, *Rights in Collision: the Individual Right of Privacy and the Public Right to Know,* 39 Mont. L. Rev. 249, 251 (1978)). Many of the cases decided under Article II, Section 10 deal with informational privacy, that is, "the ability to control access to information about oneself." *Human Rights Div.,* 199 Mont. at 440, 649 P.2d at 1287. The right to individual privacy, however, also includes decisional or autonomous privacy, that is, "the right to be let alone," a concept the Montana Supreme Court has recognized since at least 1952. *See Welsh v. Roehm,* 125 Mont. 517, 523, 241 P.2d 816, 818 (1952). The delegates to

the Convention described this autonomous component of the right to privacy as "the most important right of them all" and as a means of erecting a "semipermeable wall of separation between individual and state." 5 Mont. Const. Convention, Verbatim Tr. at 1681 (Mar. 7, 1972) (Del. Campbell).

Beginning with *Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (1997), the Montana Supreme Court has expressly held that Article II, Section 10 "protects individual or personal-autonomy privacy as a fundamental right by its placement in the Declaration of Rights." 283 Mont. at 451, 942 P.2d at 123. At the same time, the court has also recognized that Article II, Section 10 does not apply to all regulations that interfere with individual freedom of action, but only those matters that implicate "personal autonomy." *See Gryczan,* 283 Mont. at 450, 942 P.2d at 122–123 (citing *Town of Ennis v. Stewart,* 247 Mont. 355, 807 P.2d 179 (1991) (distinguishing between a privacy right in consensual sexual activity between adults and an asserted privacy interest in a homeowner's use of an individual well instead of hooking up to a municipal water system). *Armstrong* recognized that defining the scope of personal autonomy is challenging but declined to specifically define the concept, stating instead that the scope of personal autonomy must be:

> as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government—as in *Gryczan*—and as broad as are the State's ever innovative attempts

> to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Armstrong, ¶ 38.

In *Armstrong,* the Supreme Court applied these principles to find that personal-autonomy privacy includes "the right of each individual 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." *Armstrong,* ¶ 39. It held that "a woman's right to obtain a pre-viability abortion [is] part and parcel of her right of personal/procreative autonomy." *Armstrong,* ¶ 45. This includes "a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation." *Armstrong,* ¶ 49.

Importantly, *Armstrong* concerned neither a ban on abortion nor a direct restriction on whether or under what circumstances a person may obtain one. Rather, *Armstrong* involved a challenge to a law that merely regulated *who may perform* abortions: the statute at issue prohibited physician assistants from performing abortions. *See Armstrong,* ¶ 3. The court resolved this first by recognizing that personal autonomy necessarily encompasses autonomy over the care of one's own body: "[E]ach individual is the sovereign of his or her own body." *Armstrong,* ¶ 57. Because many aspects of medical care—

including abortion—require reliance on the expertise of health care providers, the court reasoned that individuals have a privacy interest in "how and by whom a specific medical procedure is to be performed." *Armstrong,* ¶ 59. By interfering with "an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so" without a compelling interest to justify the interference, the statute impermissibly infringed on the right to privacy. *Armstrong,* ¶ 62.

B. Applicability of the *Armstrong* Right to Minors

Armstrong unambiguously establishes a person's fundamental right to autonomy over their own body, including a woman's right to decide whether to keep or terminate a pregnancy. Infringement on that right is justified, if at all, only upon demonstration by the State that the infringement is "narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Mont. v. Missoula County Pub. Schs.,* 2022 MT 153, ¶ 10, 409 Mont. 330, 514 P.3d 1062; *Planned Parenthood 2022,* ¶ 20; *Armstrong,* ¶ 34; *Mont. Democratic Party v. Jacobson,* 2022 MT 184, ¶¶ 18–19, 410 Mont. 114, 518 P.3d 58 (rights set forth in the Article II Declaration of Rights are fundamental rights, the infringement of which is subject to strict scrutiny). The Montana Supreme Court has expressly rejected the less-stringent "undue burden" standard adopted by the United States Supreme Court in *Casey. Armstrong,* ¶ 41.

This case, however, does not involve the rights of adults, but rather the rights of minors. Whether under federal law or state law, "minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth,* 428 U.S. 52, 74 (1976). In most circumstances, children's rights are "virtually coextensive with that of an adult." *Bellotti v. Baird,* 443 U.S. 622, 634 (1979) (plurality). Nevertheless, there is no controversy in recognizing that children are *not* adults, and that their unique characteristics and needs must be considered in constitutional analysis: "The unique role in our society of the family. . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* This is because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* Additionally, it is well-established that our society recognizes parents—and not the State—as the primary source of authority over children and reserves in them a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their] child." *Snyder v. Spaulding,* 2010 MT 151, ¶ 19, 357 Mont. 34, 235 P.3d 578.

Nevertheless, despite the broad authority of parents, "children are not simply chattels belonging to the parent, but have fundamental interests that may diverge from the interests of the parent." *Am. Acad. of Pediatrics v. Lungren,* 940 P.2d 797, 815–816 (Cal. 1997) (quoting *In re Jasmon O.,* 878 P.2d 1297, 1307 (Cal. 1994)); *In re Estate of C.K.O.,* 2013 MT 72, ¶ 21, 369 Mont. 297, 297 P.3d 1217

("[W]hile parents have a fundamental right to parent their children, that right is not absolute, especially if there is a conflict of interest between the parents and the children."). Thus, parents do not have the right to direct litigation on behalf of their child where a conflict of interest exists between parent and child. *C.K.O.*, ¶ 21. Similarly, a parent cannot waive the fundamental rights of a minor accused of a criminal act without the minor's concurrence. *See, e.g.*, Mont. Code Ann. §§ 41-5-331 (youth required to agree to waiver of *Miranda* rights); 41-5-1413 (right to counsel must be waived by youth *and* parent); 41-5-1502 (jury trial on demand of youth *or* parent).

Just as parents are limited in their interference with other fundamental rights personal to their child, they are similarly limited with respect to decisions intimately affecting the child's own body. Abortion proponents and opponents alike would probably agree on this much: just as pregnancy—the means by which a woman's body nurtures and develops an embryo into a human child with which she will have a lifelong bond—is unique among all medical conditions, the decision whether to keep or terminate a pregnancy is similarly *sui generis.* For one, the law has recognized that abortion "destroys what [prior decisions] call 'potential life' and what the law. . . regards as the life of an 'unborn human being.'" *Dobbs,* 142 S. Ct. at 2258. But at the same time:

> [T]he decision whether to continue or terminate her pregnancy has. . . a substantial effect on a pregnant minor's control over her personal bodily integrity, has. . . serious long-term

> consequences in determining her life choices, is. . . central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and (unlike many other choices) *is a decision that cannot be postponed until adulthood*[.]

Lungren, 940 P.2d at 816 (emphasis in original). Likewise, the United States Supreme Court has stated:

> The abortion decision differs in important ways from other decisions that may be made during minority. . . . The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. [Unlike the decision to marry], [a] pregnant adolescent. . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> Moreover, the potentially severe detriment facing a pregnant woman, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria

> for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

Bellotti, 443 U.S. at 642–643 (internal citations omitted).

Thus, the keep/terminate decision cannot be equated with other circumstances where the law routinely regulates a minor's freedom of action, including curfews, tattoos, marriage, schooling, or other forms of medical care. Minors can abstain from consuming alcohol or getting a tattoo with little effect on their futures, but the same cannot be said of keeping a pregnancy or having an abortion. Though they are weightier and more enduring, even poor decisions in marriage and schooling can be undone. By contrast, there are few decisions with higher or longer-lasting stakes in life than whether to become

or stay pregnant, and even fewer (if any) with equally profound spiritual, physical, mental, social, and economic considerations. The complexity of the dilemma only reinforces its individuality and therefore its place at the core of personal privacy.

Unless one of the exceptions is satisfied, the Consent Act requires a minor (and her medical provider) to transfer this responsibility to her parents. Autonomy over one's own body—the principle that one is "sovereign over [one's] bodily territory"—can be denied "by the withholding of the physical treatment [the patient requests]." *Armstrong,* ¶ 53 (quoting 3 Joel Feinberg, *Harm to Self,* at 53 (1986)). The *Armstrong* court, quoting *Andrews v. Ballard,* 498 F. Supp. 1038, 1047 (S.D. Tex. 1980), elaborated:

> Medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.

Armstrong, ¶ 54. The impact of pregnancy or an abortion on the person who must live with the decision and directly bear the consequences is no less great because that

person is a minor. One cannot reasonably dispute that the Consent Act—requiring the minor to surrender consent to an abortion to another unless an exception applies—implicates a minor's personal autonomy over medical care of their own body at least as much as a law merely restricting the types of providers whom she may see for that care. Thus, the Consent Act interferes with the minor's right to privacy.

C. Applicability of the Minors' Rights Clause

The right to privacy guaranteed by Article II, Section 10 is not the only relevant constitutional right. The parties also debate the meaning of Article II, Section 15, the minor's rights clause of the Constitution. It provides:

> **Rights of persons not adults.** The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

Mont. Const. art II, § 15. This provision generally guarantees that minors are "afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II." *In re S.L.M.,* 287 Mont. 23, 35, 951 P.2d 1365 (1997).[5] It is not

5. Most of the cases interpreting and applying Article II, Section 15 concern matters of juvenile justice. Nothing in its text, however, confines itself to questions of criminal procedure, and to the contrary, Article II, Section 15 has always been understood to

an independent source of rights, but rather operates by expressly incorporating the Declaration of Rights in the same way the Due Process Clause of the Fourteenth Amendment incorporates (most) of the federal Bill of Rights. Rebecca Stursberg, *Still-in-Flux: Reinterpreting Montana's Rights-of-Minors Provision,* 79 Mont. L. Rev. 259, 266 (2018) (student comment). Thus, because the right to privacy is a "fundamental right of [Article II]," Article II, Section 15 makes clear that minors generally enjoy the same right to privacy that adults do. *See Pengra v. State,* 2000 MT 291, ¶ 8, 302 Mont. 276, 14 P.3d 499 (applying Article II, Section 15 to find minors have the same informational privacy rights as adults).

The State, however, emphasizes the last sentence of Article II, Section 15, which refers to "laws which enhance the protection of" minors. The State argues that the Consent Act is such a law, and so the Court should not apply strict scrutiny to the Consent Act, but the Court should rather engage in a balancing of the State's interest in the protection of the minor with the minor's interest in personal autonomy. This argument, however, would require this Court to treat Article II, Section 15 not as a measure to *enhance* the rights of minors, but instead as a grant of legislative authority to *diminish* the rights of minors. And this reading cannot be squared with either the original understanding of Article II, Section 15 or the Supreme Court cases applying and interpreting it.

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apply outside that context as well. *See In re J.C.,* 2008 MT 127, ¶ 35, 343 Mont. 30, 183 P.3d 22 (relying in part on Article II, Section 15 to justify adoption of harmless error standard in appeals of parental rights terminations); *Pengra v. State,* 2000 MT 291, ¶ 8, 302 Mont. 276, 14 P.3d 499 (privacy rights of minors).

Appendix C

When the Bill of Rights Committee of the 1972 Constitutional Convention drafted and proposed the Declaration of Rights, it relied heavily on a thoroughly researched report prepared by staffer Rick Applegate. *See* Rebecca Stursberg, *Still-in-Flux: Reinterpreting Montana's Rights-of-Minors Provision,* 79 Mont. L. Rev. 259, 261 (2018) (student comment). At the time of Applegate's study, "no area of the law [was] in greater flux than that of kids' legal rights." Rick Applegate, *Mont. Const. Convention, Report No. 10: Bill of Rights,* at 301 (1971).[6] Decisions had been inconsistent and there was "not even a broad outline of the types of rights young people possess." In Applegate's report, he explored numerous court decisions affording youths differential treatment with respect to their rights in criminal proceedings and in schools, particularly in the realm of free expression. *Id.* at 301–304; Stursberg, 79 Mont. L. Rev. at 262–263.

Applegate's description of the inconsistency with which minors were treated equally to adults made its way into the Bill of Rights Committee Report at the Convention. The Report explained, in describing the draft of Article II, Section 15:

> The committee adopted, with one dissenting vote, this statement explicitly recognizing that persons under the age of majority have all the fundamental rights of the Declaration of Rights. . . The committee took this action

6. Available: https://scholarworks.umt.edu/montanaconstitution_docs/35/.

> in recognition of the fact that young people have not been held to possess basic civil rights. Although it has been held that they are 'persons' under the due process clause of the Fourteenth Amendment, *the Supreme Court has not ruled in their favor under the equal protection clause of that same amendment*. . . This is the crux of the committee proposal: to recognize that persons under the age of majority have the *same* protections from governmental and majoritarian abuses as do adults. In such cases where the protection of the special status of minors demands it, exceptions can be made on a clear showing that such protection is being enhanced.

2 Mont. Const. Cony. Proceedings, at 635–636 (Feb. 23, 1972) (emphasis added). Put more succinctly, the minors' rights clause was meant to "make sure that this Constitution and this Bill of Rights does apply to all citizens regardless of age." 5 Mont. Const. Conv. Proceedings, Verbatim Tr. at 1750 (Mar. 8, 1972) (Del. DaHood). On the Convention floor, Delegate Lyle Monroe reiterated the committee report commentary and expanded that the intent of the provision was to clarify and expand the rights of minors, not to limit them:

> What this section is attempting to do is to help young people to reach their full potential. Where juveniles have rights at this time, we certainly want to make sure that those rights and privileges are retained, and whatever

> rights and privileges might be given to them in the future, we also want to protect them.

5 Mont. Const. Convention, Verbatim Tr. at 1750 (Mar. 8, 1972). The delegates further clarified that the provision was not intended to regulate the relationship between parent and child, but rather between the child and the State. *Id.* at 1751 (Del. DaHood) ("We are not, in this situation affecting in any way the relationship of parent and child or of guardian and ward with respect to someone under the age of majority.").

In the public sphere, debates over ratification also understood Article II, Section 15 as a rights-enhancing measure. Gerard Neely, a critic of the new Constitution, stating that although the provision did not hold that "the rights of young persons under the age of majority are identical with those adults," the provision addressed "how the limits of control may be drawn so as *not to infringe on the child's right to grow in freedom* in accordance with the spirit of civil liberties embodied in the constitution." Gerard Neely, *The Bill of Rights: Analysis*, Con Con Newsletter at 6–7 (Mar. 10, 1972) (emphasis added).[7] A prominent delegate and Montana State University political scientist, Richard Roeder, stated in a newspaper supplement he authored that Article II, Section 15 "extend[ed] to those under 18 the procedural safeguards

7. These materials can be located in the University of Montana Alexander Blewett III School of Law's archival materials on the Constitution's ratification. Available: https://www.umt.edu/law/library/montanaconstitution/default.php.

and rights extended adults" and that it "stresses that when society proceeds on the assumption that minors need special treatment in the legal process it must also be careful not to abridge other rights." Richard Roeder, 1972 Mont. Const. Newspaper Supp. 2.

Thus, in *In re S.L.M.,* 287 Mont. 23, 951 P.2d 1365 (1997), the Montana Supreme Court affirmed the original understanding of Article II, Section 15 as a rights-enhancing guarantee for minors. *S.L.M.* involved a challenge to the constitutionality of the Extended Jurisdiction Prosecution Act, which permitted certain juvenile delinquents to be sentenced both in youth court and adult criminal court. The court stated that Article II, Section 15 "must be read in conjunction with the guarantee of equal protection found in Article II, Section 4" because "one of the primary purposes of Article II, Section 15 was to remedy the fact that minors had not been accorded full recognition under the equal protection clause of the United States Constitution." *S.L.M.,* 287 Mont. at 34–35, 951 P.2d at 1372. The court continued, saying that if the legislature seeks to "carve exceptions to this guarantee" of full recognition under the Equal Protection Clause, "it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors." *Id.* at 35, 951 P.2d at 1373. In the equal protection context, the court clarified, a classification impacting a fundamental right held by a minor based on age is not subject to rational basis review, but strict scrutiny. *See id.* at 36, 951 P.2d at 1373.

Appendix C

From these authorities, several key principles emerge:

First, Article II, Section 15 has two functions: (1) to expressly incorporate the Declaration of Rights and apply it to minors; and (2) to operate as an equal protection guarantee specific to classifications based on minority, not unlike what the proposed federal Equal Rights Amendment would have done for classifications based on sex or gender had it been ratified. Whereas federal law emphasizes the differences between minors and adults to find them not similarly situated for equal protection purposes, Article II, Section 15 provides that minors are presumptively similarly situated to adults when fundamental rights are implicated, except when the classification results from a law specifically designed and operating to enhance the protection of minors.

Second, Article II, Section 15 is rights-expanding. The Convention debate makes clear that the "laws which enhance the protection of" minors provision is a narrow exception to a broad presumption that minors enjoy the same fundamental rights as adults. Thus, Article II, Section 15 cannot be invoked to justify greater infringement on a minor's rights than would be tolerated if Article II, Section 15 had never been adopted. Thus, upon a showing that a law otherwise violates a minor's fundamental rights, the State cannot use Article II, Section 15 as an escape clause to evade application of the appropriate tier of scrutiny.

As discussed above, *see* Section B, *supra,* there are no decisions more intimately personal and impactful on

a pregnant minor than the decision whether to keep or terminate that pregnancy. If the right to trial by jury, the right to counsel, and the privilege against self-incrimination are so personal and impactful on a minor that the State cannot transfer those decisions from child to parent, the same logic requires the same result for the even more personal and more impactful decision whether to carry an unborn child to term where, as here, the courts have expressly recognized this decision as part of a fundamental right. Because this would be so whether Article II, Section 15 had been adopted or not, the State cannot rely on Article II, Section 15 as a mechanism for denying or limiting that right.

Thus, the State's proposed balancing test cannot be a correct statement of the law. Indeed, *S.L.M.* made that much clear: to justify an infringement on a fundamental right, the State "must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors." *S.L.M.,* 287 Mont. at 35, 951 P.2d at 1373. The plain text of Article II, Section 10 similarly calls for application of strict scrutiny: "[t]he right of individual privacy. . . shall not be infringed without the showing of a compelling state interest." And the foregoing discussion of Article II, Section 15 suggests that the "laws which enhance the protection of such persons" proviso is better understood as coming into play when the contention is that minors are similarly situated to adults for equal protection purposes with respect to a particular law. That is not the contention here.

The closest the State comes to supporting its balancing test theory is *In re C.H.,* 210 Mont. 184, 683

P.2d 931 (1984)—in particular, the court's statement there that "a juvenile's right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated." *C.H.,* 210 Mont. at 203, 683 P.2d at 941. This statement, however, must be read in context. First, this statement was made in the context of addressing the "supervision, care, and rehabilitation" of youthful *offenders*—that is, youths who have been adjudicated as delinquents for having engaged in criminal acts. A holding directed at an offender whose freedom has been lawfully constrained following adjudication for the commission of a wrongful act says little about the rights of those not so adjudicated. Second, despite this seemingly sweeping statement, *C.H.* applied the same basic analysis that *S.L.M.* did: it held that because a minor's fundamental interests were involved, the court must look for a "compelling state interest sufficient to warrant such an infringement"—in other words, the court conducted a strict scrutiny analysis, if not in so many words. *C.H.,* 210 Mont. at 202, 683 P.2d at 940. Rather than being read as a call for a balancing test, then, *C.H.* is better read as merely recognizing that the State's interest in "the supervision, care, and rehabilitation" of youthful offenders is a compelling state interest countervailing the liberty interests of the youth. Indeed, to read *C.H.* any other way would be to defeat the purpose of Article II, Section 15, by converting a rights-expanding guarantee into a rights-constricting provision.

In short, the natural and logical upshot of *Armstrong's* recognition of a personal autonomy right to seek pre-viability abortions within the right to privacy is that minors, too, have this right. Thus, by requiring minors to

secure the consent of a parent or guardian (except where an exception applies), the Consent Act implicates a minor's personal autonomy and therefore her fundamental right of individual privacy.

D. Application of Strict Scrutiny

Because the Consent Act invades the right to individual privacy as recognized in *Armstrong,* it can only be justified, if at all, if it withstands strict scrutiny.

Strict scrutiny, the most stringent test that can be applied to a law implicating a constitutional right, "is seldom satisfied." *Butte Cmty. Union v. Lewis,* 219 Mont. 426, 431, 712 P.2d 1309, 1312 (1986). Strict scrutiny requires the State to show that the challenged measure is "narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Mont. v. Missoula County Pub. Schs.,* 2022 MT 153, ¶ 10, 409 Mont. 330, 514 P.3d 1062. The State proposes four compelling interests justifying the Consent Act: (1) "protecting minors from sex crimes and sex trafficking; (2) "ensuring that, if a minor decides to have an abortion, someone is there to monitor for post-abortion complications and especially mental health trauma"; and (3) "ensuring immature minors make fully informed decisions" and (4) "promoting family integrity." Each is examined in turn.

i. Protection of Children against Sexual Offenses

The State correctly identifies the protection of children from sexual exploitation and abuse as a compelling state

interest. *New York v. Ferber,* 458 U.S. 747, 757 (1982). The State must do more, however, than cite a compelling state interest: it must demonstrate that the Consent Act is "necessary to promote" this compelling state interest. *Driscoll v. Stapleton,* 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386.

Narrow tailoring requires that "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 280 (1986). "A statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *Imdb.com Inc. v. Becerra,* 962 F.3d 1111, 1125 (9th Cir. 2020). Additionally, if a less-restrictive alternative is available that would just as effectively advance the State's compelling interest, the State must use that alternative instead. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 582 (2001). Applying this standard, the Court has no difficulty concluding that the Consent Act is not narrowly tailored to achieve this compelling state interest.

First, unlike the Notice Act, the Consent Act applies to all unemancipated minors under the age of 18. In Montana, minors aged sixteen years or older may consent to sexual intercourse. *See* Mont. Code Ann. § 45-5-501(1)(b)(iv). Many—if not most—of the minors who seek abortions will be 16 or 17 years old. Because they can lawfully engage in consensual sexual intercourse, it is not inevitable that these minors are being sexually exploited. The State has presented substantial research on the subject of adolescent pregnancy, but little of it is specific to the case of minors

aged 16 years or older. To be sure, the concerns the State presents are quite real: women, especially young women, are too often the victims of domestic and sexual violence and coercion, and pregnancy and childbirth enhance their vulnerability to violence and coercion. (Def.'s SUF, ¶¶ 90–92, Dkt. 132 at 28–29; Pls.' SUF, ¶ 20, 43–44, 57 61, Dkt. 254 at 5–6, 9–10, 12.) These concerns, however, are also present for young adult women. Given this reality, the State has not justified why one rule should apply to a pregnant eighteen-year-old woman trapped in an abusive relationship with her twenty-five year-old boyfriend, but another more restrictive rule should apply to a pregnant seventeen-year-old teen whose child-to-be is fathered by her supportive eighteen-year-old fiancé.

Second, the Court considers whether the law is the "least restrictive means of achieving" the compelling state interest. Even in those cases where a teenage pregnancy is the product of a sexual assault or exploitation, all requiring parental consent accomplishes is to permit the parent to refuse consent to the early termination of that pregnancy that has already occurred. Requiring consent does nothing to make it more likely that a sexual crime will be detected or punished. And even if one accepts for sake of argument that the Consent Act has a deterrent effect on the would-be sexual offender who risks discovery when his victim seeks an abortion, *consent* is not the necessary ingredient to that effect.

And third, the Consent Act must be assessed in light of other measures designed to enhance protection of children from sexual abuse. On this point, the Court cannot ignore

the State's mandatory reporter law. Statute requires medical providers—with no exception for those providing abortions—to "promptly" report any sexual abuse that they know or suspect to be occurring. Mont. Code Ann. § 41-3-201. A provider who fails to do so can be held civilly liable. *Id.* § 41-3-207(1). Since 2019, a purposeful or knowing failure to report known or suspected sexual abuse or exploitation exposes the provider to criminal prosecution for a felony punishable by five years in prison and $10,000 in fines. *Id.* § 41-3-207(3). Thus, whether the Consent Act is in effect or not, healthcare providers must report evidence of sexual abuse to the State, and they can be held criminally and civilly liable if they refuse to do so.

In response, the State relies heavily on evidence in the record that, if construed in the light most favorable to the State, casts doubt on whether Planned Parenthood or other abortion providers always correctly follow the mandatory reporting statute. (Def.'s SUF, ¶¶ 47–50, 93–96[8].) Nevertheless, given the foregoing penalty structure,

8. The Court notes, for example, that if, as Planned Parenthood avers, DPHHS is training providers that reportable abuse only occurs when a parent or person responsible for the child's welfare commits or allows a sexual offense to take place, then DPHHS is providing incorrect advice. (Pls.' SDF, ¶ 50.) The mandatory reporting statute requires reporting of child abuse by "*anyone* regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare." Mont. Code Ann. § 41-3-201 (emphasis added). In fact, this was added by the legislature in 2011 to specifically "clarify[] that mandatory reporters of suspected child abuse must report abuse regardless of the identity of the abuser." *See* 2011 Mont. Laws 223 (bill title).

the State has not supplied any reason to believe that a provider who refuses to comply with mandatory reporting statutes in the face of stiff penalties that include possible incarceration as a felon would react differently in the face of the Consent Act. Although the necessity to obtain consent under the Consent Act would effectively require parents to be made aware of abuse as well, the same could be accomplished with a notice requirement. And in any event, unlike with doctors, parents are not mandatory reporters and it is not inevitable that they will, in fact, report sexual abuse.

The State, citing a single case from Ohio, argues that consent laws are necessary because "parental notice statutes can be evaded." (Def.'s Reply Br. Mot. Summ. J., Dkt. 175 at 6.) And perhaps they can in some cases. But at the very best, this might justify imposing *some* requirements designed to ensure that the person to whom a provider gives notice is indeed the minor's parent or guardian. It does not logically require the belt-and-suspenders approach of the Consent Act, which requires notarization *and* government identification *and* proof of parentage *and* a physician affidavit. These requirements are excessive to the stated purpose, they go well beyond the point of diminishing returns in limiting the potential for evasion of parental notice, and the administrative hurdles imposed on minors and parents alike are disproportionate to the asserted interest in verifying the parent or guardian's identities. And in any event, these layers of identification requirements still do not justify how a *consent* requirement (as opposed to an identification requirement) meaningfully advances this interest in preventing evasion of parental notice requirements.

In short, the Consent Act is not narrowly tailored to serve the State's compelling interest in protecting women and youths from sexual abuse and exploitation.

ii. Monitoring Post-Abortion Complications and Mental Health Trauma

The State next contends that parental consent "ensur[es] that, if a minor decides to have an abortion, someone is there to monitor for post-abortion complications and especially mental health trauma." (Def.'s Br. in Support of Mot. Summ. J., Dkt. 131 at 10.) There is undoubtedly a compelling state interest in "safeguarding the physical and psychological wellbeing of a minor." *Osborne v. Ohio,* 495 U.S. 103, 109 (1990). The question again, however, is whether the Consent Act is necessary to serve that interest here and narrowly drawn to that purpose.

As with the interest in preventing sexual exploitation, the Consent Act does not offer a close fit with the stated purpose. Regardless of whether parental *knowledge* would help parents monitor a minor for post-abortion complications or mental health trauma—a matter of dispute in this case—parental *consent* is wholly unnecessary to achieve that end. This is precisely demonstrated by the fact that the State offers the exact same interest for both parental involvement laws at issue here. Requiring parental consent allows the parent to prevent the abortion from taking place (except in case of emergency or judicial bypass), but it does not require the parent to provide any assistance, support, medical care, counseling, or monitoring for a minor who has chosen to

obtain an abortion. Nor is it necessary or inevitable that a parent who affirmatively consents to the abortion will provide such help. Thus, the Consent Act is not narrowly tailored to this purpose.

iii. Fully Informed Decision-making

The State contends that there is a compelling interest in ensuring minors engage in fully informed decision-making. The United States Supreme Court has repeatedly predicated its decisions on the established evidence that juvenile brains are fundamentally different from adult brains, and that the portions of the brain governing decision-making and behavior mature through early adulthood. (Defs.' SUF, ¶¶ 51–73, Dkt. 132 at 17–24); *see also Miller v. Alabama,* 567 U.S. 460, 471–472 (2012); *Steilman v. Michael,* 2017 MT 310, ¶¶ 14–17, 389 Mont. 512, 407 P.3d 313. Given the consistent and longstanding judicial reliance on this evidence in resolving other weighty constitutional questions, this Court would be hard-pressed to deny that as a general matter, juveniles are less capable than adults of appreciating the comparative advantages and risks of terminating a pregnancy or carrying a pregnancy to term, regardless of whether those considerations are cast in moral, religious, financial, social, emotional, or physical health terms. The Court thus agrees that the State has a compelling state interest here "in protecting minors from their own immaturity." *State v. Planned Parenthood,* 171 P.3d 577, 582 (Alaska 2007). The Court therefore turns to whether either statute is narrowly tailored to this interest.

Appendix C

The problem with the Consent Act is that it does not provide minors with resources, counseling, and guidance to help them navigate this choice; rather (except in cases of a granted judicial bypass or other exception), it takes the choice away from them, giving it instead to their parent or guardian. The various consent forms required by the Consent Act, do assure that a discussion takes place about the risks of the abortion, but the discussion called for by the consent forms is unidirectional: it does not include anything requiring a discussion about the consequences and risks of carrying a pregnancy to term, consequences that will vary from case to case based on the circumstances of the expectant mother. Thus, the required form does not ensure that parent and child are provided with the pros and cons of both abortion and carrying a child to term to make a fully informed decision; rather, the form assures only that they have been provided with one side of one possible decision: the "risks and hazards" of an abortion.

Not only does the Consent Act contain a bevy of forms to be signed, but as discussed above, it erects additional, burdensome identification requirements that go far beyond what is necessary to prevent a person who is not a parent or guardian from giving consent. Under the Consent Act, it is not enough for the parent to give consent documented in the physician's medical records, to sign a written consent, or even to execute a statement under penalty of perjury that they are the person's parent or legal guardian. *See* Mont. Code Ann. § 1-6-105 (permitting a declaration under penalty of perjury in lieu of notarization for most verified instruments). Rather,

the parent must have the written consent notarized. And even though notarization would ordinarily require some proof of identity, *see id.* § 1-6-105(1) (requiring notaries to determine "that the individual appearing before the notarial officer. . . has the identity claimed"), the Consent Act additionally requires the consenting parent or guardian to provide "government-issued proof of identity" *and* "written documentation that establishes that the parent or guardian" is indeed the lawful parent or guardian. Mont. Code Ann. § 50-20-506. By contrast, no similar requirements are imposed by law in the ordinary case where a parent's consent is required for medical care. *See* Mont. Code Ann. § 41-1-401. Requiring (a) notary, (b) government-issued ID, and (c) proof of parentage or guardianship not only goes beyond what is typically required to prove identity, but it will likely impose substantial burdens on those parents or guardians who do not have ready access to all three. Given that the abortion/carry-to-term decision is a time-sensitive one, this provision of the Consent Act renders an unnecessary barrier to effectuating the personal decision regarding continuation of the pregnancy. It alone renders the Act not narrowly tailored.

In concluding that the Consent Act is not narrowly tailored to serve the State's interest in promoting fully informed decision-making, the Court finds persuasive the Alaska Supreme Court's reasoning in *State v. Planned Parenthood of Alaska,* 171 P.3d 577 (2007). Like Montana, Alaska's Constitution recognizes an express right of privacy that its courts deem a fundamental right that reaches beyond that afforded by the United States

Constitution, and that includes a "fundamental right to reproductive choice." *Planned Parenthood of Alaska,* 171 P.3d at 581–582. *Planned Parenthood of Alaska* also involved a parental consent law that permitted a judicial bypass procedure. The law at issue there had some differences with the Consent Act here: among other things, it (1) applied to minors under 17, not all minors; and (2) it required only informed "consent in writing" without the various notarization and identification requirements of Montana's Consent Act. *Id.* at 580; *see also* Alaska Stat. §§ 18.16.020, 18.16.060 (2007). Like this Court, the Alaska Supreme Court agreed that protecting children from their own immaturity is a compelling state interest. The court nevertheless found its consent law unconstitutional because parental notification laws are necessarily a less-restrictive means of achieving the same ends. *Planned Parenthood of Alaska,* 171 P.3d at 583–584. It reasoned that the legislative goals advanced by Alaska's consent law were "no less likely to accompany parental notification than the parental 'veto power,'" and that the consent act's claimed benefits flowed not from the consent itself, but from "increased parental communication and involvement in the decision-making process." *Id.* at 584-585.

Although that court recognized that a consent law might "guarantee a conversation" in the sense that the minor has to speak to their parent to obtain consent, the only conversation it guarantees is a "one-way conversation," and that parents can "refuse consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests." *Id.* at 585.

Appendix C

In *Lungren,* the California Supreme Court invalidated its parental consent law under its state constitution's right to privacy. *Lungren,* 940 P.2d at 800. *Lungren* noted the circumstances where minors can consent to medical care, particularly regarding care related to pregnancy and adoption. *See id.* at 827. By comparison, minors in Montana can self-consent to all pregnancy related care except abortion and sterilization. Mont. Code Ann. §§ 41-1-402(2)(c), 41-1-405(4). Minors can self-consent to adoption. *Id.* §§ 42-2-301(6), 42-2-405. And minors who have borne a child can give consent to medical care for that child. *Id.* § 41-1-102(3). As the *Lungren* court explained:

> It is particularly difficult to reconcile defendants' contentions—that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional or psychological health—with. . . statutory provisions authorizing a minor who has given birth, to consent, on her own, to the adoption of her child. The decision to relinquish motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place.

Lungren, 940 P.2d at 827 (citations and quotation marks omitted). Montana law—which gives minors full autonomy to make decisions regarding pregnancy, childbirth, and parentage *except* in the case of abortion—suffers from a similar lack of fit to the stated objectives of the Consent Act.

And the California and Alaska Supreme Courts are not the only state high courts to agree. Florida invalidated a parental consent law in 1989, citing the same dynamic allowing pregnant minors to consent to any pregnancy-related care except abortion. *In re T W.*, 551 So. 2d 1186, 1195–1196 (Fla. 1989). And citing similar reasoning as that employed by the Alaska Supreme Court, the Washington Supreme Court invalidated a parental consent law because a "parental veto power where less restrictive means are available which can as well insure adequacy of reflection and consideration in a minor's abortion decision" meant the statute was not narrowly tailored. *State v. Koome,* 530 P.2d 260, 265 (Wash. 1975).

To be sure, the Consent Act contains a judicial bypass procedure that addresses some of these very issues: it provides a mechanism by which a minor who is demonstrably competent to make medical decisions for herself or who is a victim of abuse can avoid the consent requirement. This, however, does not change the fact that the Notice Act is necessarily a less restrictive alternative to the Consent Act, and it, too, contains a judicial bypass requirement. As the Alaska Supreme Court reasoned, "the inclusion of this judicial bypass procedure does not reduce the restrictiveness of the [Parental Consent Act] relative to a parental notification statute" because every state "to enact a parental notification regime has opted to include either a judicial bypass procedure similar to the [Parental Consent Act] procedure or an even more permissive bypass procedure." *Planned Parenthood of Alaska,* 171 P.3d at 584. Because a judicial bypass can also be employed for a parental notification law, its existence for the Consent Act does not render the statute narrowly tailored.

iv. Family Integrity

The State also cites "family integrity" as part of its asserted compelling state interest justifying these statutes. The promotion of healthy families is undoubtedly a compelling state interest. The Court observes, however, that not all families are healthy. Indeed, by permitting judicial bypasses for minors who are victims of abuse, the State implicitly recognizes that the compelling interest is not in preserving *all* families, but rather in preserving and promoting *healthy* families.

Nevertheless, regardless of the precise scope of "family integrity," the State cannot demonstrate that the Consent Act invariably promotes it. The consent requirement itself only has operative effect where the wishes of parent and child are in tension. In those situations, the consent requirement empowers the parent to take the decision about whether to keep or terminate a pregnancy from the minor. This goes beyond merely facilitating parental involvement and guidance, and instead establishes conflict between parent and child. Thus, the consent requirement has the potential to be *inimical* to family integrity and conducive to intrafamilial conflict. Because a notice requirement would facilitate parental involvement without setting up this tension, a consent requirement is not narrowly tailored to this purpose.

In sum, with respect to the Consent Act, Planned Parenthood has demonstrated the absence of genuine disputes of material fact and entitlement to judgment as a matter of law. The Consent Act infringes on the right

to individual privacy as articulated in *Armstrong,* and for the reasons given above, it is not narrowly tailored to achieve the State's compelling interests, particularly given the availability of less restrictive alternatives, including those found in the Notice Act. Accordingly, given the contours of the right to individual privacy established by the Constitution and prior decisions, the Court must find the Consent Act unconstitutional and unenforceable.

2. Parental Notification of Abortion Act of 2011

The constitutionality of the Notice Act presents a closer question. Although it serves the same ends as the Consent Act, its mechanics are starkly different and much less onerous.

To assess whether the Notice Act violates the privacy or equal protection rights of pregnant minors seeking abortions vis-à-vis pregnant minors seeking to carry to term, the Court must weigh disputed evidence from the parties about, among many other things: (a) the short- and long-term risks of an abortion vs. the short- and long-term risks associated with carrying a pregnancy to term; (b) the characteristics of pregnant youths both seeking an abortion and seeking to keep the pregnancy, including but not limited to the incidence of mental health problems and the incidence and effects on them of harmful or dysfunctional familial or romantic relationship; (c) the extent to which a parental notification statute enhances the actual likelihood of parents learning about a child's pregnancy or abortion intentions; (d) evidence bearing on the potential for parental notification to delay or

chill seeking either an abortion or timely prenatal care; (e) the prevalence of dysfunctional relationships and parents who disapprove of their child's decision to keep or terminate a pregnancy, and the effects on their child; (f) competing claims about how the dynamics of domestic violence intersect with decisions to terminate or keep a pregnancy; (g) evidence regarding the capacity of minors to apprehend the tradeoffs inherent in the keep/terminate decision without parental notification; and (h) the efficacy of judicial bypass procedures and extent to which they are a barrier to abortion access. Moreover, the parties have alleged their opponent's experts' opinions should be discounted to account for bias.

The foregoing present fact questions not amenable to resolution on summary judgment. *Fasch v. MK. Weeden Constr., Inc.,* 2011 MT 258, ¶ 17, 362 Mont. 256, 262 P.3d 1117 ("[A]t the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." (alteration in original)). Because the parties' respective claims turn on how these disputes of fact are resolved, the Court concludes that this is a case with a "genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586. Planned Parenthood, as the plaintiff in this matter, has not met its heavy burden of showing "there is no basis upon which the [finder of fact] could find for" the State. *Cabral,* 582 F. Supp. 3d at 707. Accordingly, the Court will deny the cross-motions for summary judgment to the extent they relate to the Notice Act.

3. Due Process

Despite the foregoing, the Court does grant the State's motion for summary judgment with respect to one of Planned Parenthood's claims regarding the Notice Act: that the Notice Act violates due process.

Planned Parenthood alleges that the Notice Act violates the due process rights of their physicians and staff because it imposes "absolute liability for violations of their requirements without providing sufficient clarity as to what conduct is prohibited or required." (Comp. ¶ 64, Dkt. 1 at 17–18.) The Court finds this claim to be without merit.

Planned Parenthood claims the Notice Act does not require proof of a *mens rea* and therefore violates due process. Planned Parenthood ignores, however, the effect of Mont. Code Ann. § 45-2-104, which provides that absolute liability may only be imposed if the "statute defining the offense *clearly indicates* a legislative purpose to impose absolute liability for the conduct described." (Emphasis added.) Otherwise, a person is only guilty of an offense if they act at least negligently, *id.* § 45-2-103(1), which requires proof of a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation," *id.* § 45-2-101(43). Thus, it is simply not the case that a doctor can be criminally convicted for a reasonable, good faith mistake of fact.

Additionally, a law is not void for vagueness if it (1) "provides a person of ordinary intelligence fair notice

that their contemplated conduct is forbidden" and (2) "provides an explicit standard for those who apply [the statute], or whether the law impermissibly delegates basic policy matters to police, judges, and juries for resolution on an ad hoc and subjective basis, risking arbitrary and discriminatory application." *State v. Christensen,* 2020 MT 237, ¶¶ 132, 137. The legislature is not required to define every term or minutely define every discrete instance of proscribed conduct. *See Christensen,* ¶ 134.

The Notice Act, however, is actually quite clear. The Notice Act defines a violation as performing an abortion without giving the notice as prescribed by the statute. It defines what constitutes notice and to whom notice should be given. The Court does not find Planned Parenthood to have raised a plausible claim that a medical provider would be confused about their obligations under this statute. Their due process claim is untenable as a matter of law.

4. Rule 54(b) certification

Finally, this Court believes this may be a case where its order permanently enjoining the Consent Act should be certified as final for purposes of appeal pursuant to Mont. R. Civ. P. 54(b). An order may be so certified upon an express determination that there is "no just reason for delay," a finding which requires the Court to consider and weigh multiple factors. Mont. R. App. P. 6(6); *Rogers v. Lewis and Clark County,* 2020 MT 230, ¶ 11, 401 Mont. 228, 472 P.3d 171; *Roy v. Neibauer,* 188 Mont. 81, 86–87, 610 P.2 1185, 1188–1189 (1980). The Court observes that in other states—most notably Alaska—challenges to

parental notice and parental consent laws have been brought separately and have involved somewhat different considerations. *See, e.g., State v. Planned Parenthood,* 171 P.3d 577 (Alaska 2007) (privacy challenge to parental consent law); *Planned Parenthood of the Great Northwest v. State,* 375 P.3d 1122 (Alaska 2016) (equal protection challenge to parental notice law). The Court is also very cognizant of the long wait the parties have faced in obtaining a district court decision. In the Court's view, there is a basic fairness argument with giving the State an opportunity for appellate review of the injunction against the Consent Act without having to wait for the factual determinations necessary to decide the Notice Act. And such an appeal would not upset the status quo because the Notice Act is not (and has never been) enjoined. Accordingly, the Court will direct the parties to brief the propriety of a Rule 54(b) certification of the Court's order.

CONCLUSION

Given the importance and passions underlying the debate over abortion, the Court is under no illusions that its decision today will be welcomed in all corners. A court's job, however, is not to please the masses; it is to, as best as it is able, to decide what the law is. Additionally, as a trial court, this Court cannot disregard, narrow, or sidestep controlling decisions of a superior tribunal. For the reasons set forth above, and in light of the prevailing interpretation of Article II, Section 10, and Article II, Section 15 of the Montana Constitution, the Court finds that its duty here is clear: it must declare the Consent Act to violate the right of individual privacy and save the

question of whether the Notice Act violates the rights of individual privacy or equal protection for trial. And, because the Consent Act is unconstitutional, Planned Parenthood is entitled to a permanent injunction against its enforcement.

Importantly, this Court's decision is not the final word. First, the Executive Branch has the opportunity to appeal this matter to the Montana Supreme Court, both to correct any errors the State believes this Court has made and if it chooses, to argue for any modification, limiting, or overruling of *Armstrong* and its progeny. Second, the Court has endeavored to ensure that this decision is made before the end of the current legislative session so that the Legislative Branch can determine whether it wishes to enact narrower or different laws that attempt to achieve its objectives in light of this Court's decision. And the people, of course, can weigh in via their rights to initiative or referenda. And this is how it should be. As this Court has attempted to emphasize in this and other cases, it is beyond the competence and role of the Court to pass judgment on the wisdom, popularity, or efficacy of any such legislative enactments; rather, this Court can only do its level best to declare the current state of the law. Nothing more, nothing less.

For the foregoing reasons,

IT IS ORDERED:

1. Planned Parenthood's Motion for Summary Judgment (Dkt. 252), filed December 29, 2016, is

GRANTED in part and **DENIED** in part as set forth in this Order.

2. The State's Motion for Summary Judgment (Dkt. 130), filed December 29, 2016, is **GRANTED** in part and **DENIED** in part as set forth in this Order.

3. The Court **DECLARES** that the Parental Consent for Abortion Act of 2013, 2013 Mont. Laws 307, impermissibly infringes on the right of individual privacy, guaranteed by Article II, Section 10 of the Montana Constitution.

4. The State of Montana and its agents, officers, employees, appointees, successors, and assigns are **PERMANENTLY ENJOINED** from enforcing, threatening to enforce, or otherwise applying the provisions of the Parental Consent for Abortion Act of 2013, 2013 Mont. Laws 307.

5. Count IV of the Complaint is **DISMISSED** with prejudice.

6. Within **fourteen days** of the date of this Order, the parties shall submit simultaneous briefs on the question whether the Court should certify its declaratory judgment and permanent injunction regarding the Consent Act as final pursuant to Mont. R. Civ. P. 54(b). The parties shall serve each other by email. If either or both parties choose to file a reply brief, they may do so within **seven** days.

7. On **March 10, 2023 at 1:30 p.m.**, the parties shall appear for a status conference to determine further proceedings in this matter.

DATED this 21st day of February 2023.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

Appendix D — Order Certifying Ruling for Immediate Appeal Pursuant to Rule 54(b), No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed March 15, 2023

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No.: DDV-2013-407

PLANNED PARENTHOOD OF MONTANA AND SAMUEL DICKMAN, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs,

v.

STATE OF MONTANA AND AUSTIN KNUDSEN, ATTORNEY GENERAL OF MONTANA, IN HIS OFFICIAL CAPACITY AND HIS AGENTS AND SUCCESSORS,

Defendants.

Filed March 15, 2023

ORDER CERTIFYING RULING FOR IMMEDIATE APPEAL PURSUANT TO RULE 54(B)

This case has been pending since May 30, 2013. On February 21, 2023, this Court granted Plaintiff Planned Parenthood's motion for summary judgment in part and entered an order permanently enjoining the Parental

Appendix D

Consent for Abortion Act of 2013, 2013 Mont. Laws 307 [Consent Act]. (Dkt. 301.) At the same time, the Court denied both parties' motions for summary judgment with respect to the Parental Notice of Abortion Act, 2011 Mont. Laws 307 [Notice Act], and set the privacy and equal protection claims pertaining to that law for trial. In that Order, the Court asked the parties to brief whether the Court's order enjoining the Consent Act should be certified for immediate appeal. The parties filed simultaneous briefs on that question on March 8, 2023, and at the March 13, 2023, status hearing, neither party indicated they intended to file a reply brief. The issue is therefore fully briefed and ready for decision. For the reasons that follow, the Court will certify its order permanently enjoining the Consent Act as a final judgment for purposes of appeal.

DISCUSSION

When the Court has decided some, but not all, issues in a case, the Court may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Mont. R. Civ. P. 54(b). This is a narrow exception to the general rule that only final judgments may ordinarily be appealed, and it is available only in the "infrequent harsh case" where the interests of justice require it. *See Roy v. Neibauer*, 188 Mont. 81, 85, 610 P.2 1185, 1188 (1980) (quoting *Panichella v. Penn. R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958)).

When considering whether to certify an order pursuant to Rule 54(b), this Court must consider:

> (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 set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Rogers v. Lewis & Clark County, 2020 MT 230, ¶ 11, 401 Mont. 228, 472 P.3d 171. The Court must weigh these and any other pertinent factors in light of three "guiding principles":

> (1) the burden is on the party seeking certification to convince the district court 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; and (3) the district court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

Rogers, ¶ 11. There must be an "express finding that there is no just reason for delay." *Rogers,* ¶ 13. And this Court "must clearly articulate its reasoning behind any factors set forth, so [the Supreme] Court has some basis for distinguishing between well-grounded orders and 'mere boiler-plate approval unsupported by the facts or an analysis of the law.'" *Rogers*, ¶ 11 (quoting *In re Marriage of Armstrong*, 2003 MT 277, ¶ 12, 317 Mont. 503, 78 P.3d 1203).

The State seeks certification only of the portion of the Court's order granting partial summary judgment for Plaintiffs and permanently enjoining the Consent Act. Planned Parenthood seeks certification of the entire order. The Court will address each separately in light of the principles set forth above.

A. Order Granting Summary Judgment re: Consent Act

The Court considers the *Roy* factors in turn:

1. Overlap of Adjudicated and Unadjudicated Claims

This case involves challenges to two discrete legislative enactments: the Notice Act, referred to the people in 2011 and approved by voters in 2012, and the Consent Act, enacted by the legislature in 2013.

There are some similarities between the challenges to the two acts. Both involve laws regulating access

to abortion by minors. Both raise privacy and equal protection claims grounded in the Montana Constitution (although this Court did not reach the equal protection issues in holding the Consent Act unconstitutional). Both share one common defense – now rejected by this Court – that the Minors' Rights Clause, Mont. Const. art. II, § 15, warrants application of a balancing test rather than a traditional analysis grounded in the tiers of scrutiny. Nevertheless, although the Court is mindful of the admonition that "[i]deally 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), the Court concludes that this factor favors certification.

This is a challenge to two discrete statutes. Despite the foregoing similarities, the laws have numerous material differences. The Consent Act directly regulates who may decide whether a minor can have an abortion; the Notice Act does not directly regulate the decision itself, but rather who is required to be informed of it. The Consent Act applies to all minors under 18; the Notice Act only applies to minors under sixteen. The Consent Act has numerous identification requirements not present in the Notice Act. Because the Notice Act is *per se* less restrictive than the Consent Act, more engagement with the factual record is necessary to resolve the challenge to the Notice Act. And while these two acts were challenged in the same action here – probably because of the close proximity of their effective dates – these types of challenges have been brought in separate actions elsewhere. *Compare Planned Parenthood of the Great N. W. v. State*, 375 P.3d

1122 (Alaska 2016) (constitutional challenge to Alaska's parental notification statute) *with State v. Planned Parenthood*, 171 P.3d 577 (Alaska 2007) (constitutional challenge to Alaska's parental consent statute).

The purpose of disfavoring certification of overlapping claims is the potential that doing so forces the appellate court to issue an advisory opinion on matters still pending in the trial court. The only complete legal overlap is in the general applicability of *Armstrong* – a matter of well-established law – and the State's arguments regarding the impact of Article II, § 15. With respect to the remainder of the constitutional claims, however, the two acts hit differently with respect to a minor's rights to privacy and equal protection because of their different mechanisms. Not only does the nature and degree of impact on those rights vary, but the differing requirements require a separate analysis of the tailoring of the acts to the State's asserted interests.

Here, a decision from the Supreme Court will not be merely advisory. First, the appeal is from an order permanently enjoining a legislative enactment. Any decision from the Supreme Court will necessarily have a concrete and real effect on the fate of that law regardless of the pendency of the Notice Act litigation. Second, as the State notes, the Supreme Court's decision on the Consent Act will function in this Court as a binding precedent not unlike *Armstrong*, the impending *Weems* decision, or any other Supreme Court opinion applying the Montana Constitution to other abortion regulations. In determining whether the Notice Act is constitutional, the Court will

have to apply that precedent, but it will not fundamentally alter the nature of the proceedings remaining in this Court unless the Supreme Court reverses on the basis that the Consent Act is constitutional (a holding that may well dictate the outcome of the Notice Act litigation). Thus, despite the presence of some overlap, the issues are sufficiently different that certification is favored.

2. Mootness Considerations

This factor favors 54(b) certification. This case has been pending for nearly a decade, and as such the remaining issues in this case are relatively well-defined. Because it is a constitutional challenge regarding a polarizing issue, it is exceedingly unlikely the parties will settle or that Planned Parenthood will voluntarily dismiss the action. Trial on this matter is not set to take place until February 2024, but even if this Court were to reach a decision on the Notice Act before the Supreme Court issued a decision on the Consent Act, there is no holding by this Court on the Notice Act that could conceivably moot the appeal regarding the Consent Act.

3. Duplication of Issues

This factor favors 54(b) certification. Because the Consent Act is the more restrictive of the two acts and has been resolved on summary judgment, there is no risk of duplication of issues. Any subsequent appeal of the Notice Act will necessarily be taken in light of the Supreme Court's decision on the Consent Act, leaving little likelihood of duplication.

4. Presence or Absence of Counterclaims and Offsets

This factor is not relevant; the parties here seek only equitable relief.

5. Miscellaneous Factors

In this case, it is the miscellaneous considerations that most heavily favor a Rule 54(b) certification. The Consent Act has lived in the legal twilight for nearly a decade, never held unconstitutional, but never in effect either. There is a strong public interest in having a definitive ruling on its constitutionality, something a trial court, by definition, cannot deliver. The parties have waited a long time to obtain a ruling from the courts on the Act. The State has also pointed out that the preliminary injunction it agreed to in 2013 on the premise that it would be temporary nearly became a *de facto* permanent injunction. As a matter of basic fairness, the State should be permitted to immediately challenge this Court's order enjoining the statute in perpetuity.

Additionally, due respect for the separation of powers and the political branches of government means that there is appropriately a presumption of constitutionality accorded to their enactments. *City of Great Falls v. Morris*, 2006 MT 93, ¶ 12, 332 Mont. 85, 134 P.3d 692. To judicially block a duly enacted statute is among the most solemn acts a court can undertake. The public has a strong interest in the timely adjudication of an order so enjoining a statute, and that interest would be frustrated by deferral

of the matter until the challenge of a discrete statute is finally resolved. Put differently, Planned. Parenthood, the State, and the public have awaited their day in court, and now that it has come with respect to at least one of the laws at issue, it is only fair to give them an opportunity to promptly challenge this Court's decision.

6. Balancing

The Court is mindful of the disfavor afforded to piecemeal appeals. As the foregoing review of the *Roy* factors demonstrates, however, an immediate appeal of the Consent Act bears little risk that appellate review will be reduced to an advisory opinion, cause unwarranted duplication, or be frustrated by the ongoing litigation in this Court. Certification partially accommodates the long delay in this case and vindicates the public policy in timely disposition of constitutional questions. In short, this Court concludes that this is indeed the "infrequent harsh case" where there is no just reason for delay and that it is in the interest of sound judicial administration and public policy to certify the Court's order enjoining the Consent Act for immediate appeal.

B. Order Denying Summary Judgment re: the Notice Act

Although the Court agrees that certification with respect to its grant of summary judgment for Plaintiffs regarding the Consent Act is appropriate, the Court reaches a different conclusion with respect to its holding denying summary judgment regarding the Notice Act.

Appendix D

Unlike the grant of summary judgment, which results in a permanent injunction of a statute, the denial of summary judgment does not have that effect, and indeed, it says nothing definitive about the Notice Act at all. So far, the Court has held only that there are disputes of material fact that need to be tried.

Moreover, the summary judgment record with respect to the Notice Act is interwoven with multiple motions *in limine* challenging the admissibility of expert and other witness testimony that relates to the motions for summary judgment. The Court did not find it necessary to resolve those to address the Consent Act, but the Supreme Court would have to address those motions *in limine* in the first instance to address the larger question whether there is a genuine dispute of material fact with respect to the Notice Act.

Finally, continuing in both courts on the Notice Act could result in the anomalous situation where a party wants to use information developed in reopened discovery to inform the pending appeal, raising the risk that the district court proceedings could derail the appeal. And unlike with a pending Consent Act appeal, a pending Notice Act appeal means that trial *cannot* be held until that appeal is decided because a trial accompanied by findings of fact will almost necessarily moot the issue on appeal: whether there were genuine disputes of material fact. Or, there may be duplicative appeals: the first appeal addressing whether there is a *dispute* of fact, and a second appeal based on the facts as the Court finally found them.

The first, second, and third *Roy* factors do not favor certification of the portion of this Court's prior order denying summary judgment. Likewise, the same delay considerations are not implicated as strongly because the Notice Act has never been enjoined and the Court has not made any definitive rulings regarding its constitutionality. Thus, certification of that portion of the Court's order denying summary judgment to Plaintiffs with respect to the Notice Act is not warranted.

Accordingly, the Court enters the following:

ORDER

Pursuant to Mont. R. Civ. P. 54(b) and Mont. R. App. P. 6(6), the Court certifies as final and directs entry of final judgment on the Court's February 21, 2023, Opinion and Order on Cross Motions for Summary Judgment (Dkt. 301), to the extent it grants in part Planned Parenthood's December 29, 2016, Motion for Summary Judgment and Permanent Injunction (Dkt. 252) and permanently enjoins the Consent Act.

DATED this 14th of March 2023.

/s/
CHRISTOPHER D. ABBOTT
District Court Judge

Appendix E — Excerpts from Appellants' Opening Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed October 10, 2023

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 23-0272

PLANNED PARENTHOOD OF MONTANA, *et al.*,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, *et al.*,

Defendants and Appellants.

Filed October 10, 2023

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Christopher Abbott, Presiding

APPELLANTS' OPENING BRIEF

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael D. Russell
Michael Noonan
Thane Johnson
Assistant Attorneys General

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Appendix E

MONTANA DEPT.
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

Attorneys for Appellants

Tanis M. Holm
310 Grand Av.
Billings, MT 59101
Phone: 406-259-9986
tholm@yellowstonelaw.com

Anjali Salvador*
123 William St., Floor 11
New York, NY 10038
Anjali.salvador@ppfa.org
Phone: 212-261-4602
**Admitted Pro Hac Vice*

Kyla Eastling*
Planned Parenthood
Federation of America
123 William St., Floor 9
New York, NY 10038
Phone: 212-541-7800
kyla.eastling@ppfa.org
**Admitted Pro Hac Vice*

Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Attorneys for Appellees

* * *

Appendix E

SUMMARY OF THE ARGUMENT

There is perhaps no issue that causes more division than abortion. But one thing on which nearly all sides of the issue agree is that it is a weighty decision, which should receive full and informed deliberation by those considering it. It should also be undisputed that minors do not possess the same maturity, cognitive development, and decision-making capacity as adults. Anyone who has had a teenager (or who has been a teenager, for that matter) knows that well enough.

And it is undisputed that minors in a healthy relationship with one or both parents would benefit from having a parent's help in deciding whether to have an abortion. But, sadly, it is also undisputed that, absent laws like the Consent Act, most minors will not involve their parents in their decision because of unrealistic fears about what their parents' reactions will be.

Montana adopted the Consent Act to require parental involvement in a minor's abortion decision, with a straightforward judicial bypass option for minors in a situation where parental involvement is not a reasonable option. It is not a novel idea: thirty-six other states have similar laws, and the United States Supreme Court has repeatedly held that it is a constitutional and even laudable policy judgment for states to make.

The Montana Constitution does not require a different result. The 1972 Constitutional Convention presumptively placed minors on equal footing with adults, but expressly

left room for the Legislature to circumscribe a minor's rights to enhance the minor's protection. Article II, Section 15 was also intended to promote families, not isolate children from their parents.

The District Court was wrong to conclude otherwise. The District Court's rationale creates an illogical legal test that elevates the rights of minors above the rights of adults. That same test calls into question longstanding laws that limit or abrogate the ability of certain minors to carry firearms unsupervised, to marry, or to work. The District Court's opinion further erodes the rights and role of parents in guiding children through difficult choices. The District Court's opinion leaves Montana's children more vulnerable, not more protected, and runs contrary to the text and meaning of the Montana Constitution. This Court should reverse the District Court.

The Consent Act constitutionally protects minors. The State entered evidence overwhelmingly supporting the need for the Consent Act to (1) protect minors from sexual victimization by adult men; (2) protect minors' psychological and physical wellbeing by having informed parents who can monitor post-abortion complications and provide helpful medical history; and (3) protect minors from rash or poorly reasoned decisions that often result from an adolescent's underdeveloped decisionmaking capacity. The Consent Act, through its judicial bypass provision, leaves open access to abortion for minors who are competent to make that choice, or for whom that choice is in their best interest. The Consent Act is a reasonable measure that protects vulnerable children in a vulnerable situation.

Appendix E

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY ADOPTED A STRICT SCRUTINY PLUS STANDARD FOR MINORPROTECTIVE LAWS UNDER ARTICLE II, SECTION 15 OF THE MONTANA CONSTITUTION.

Article II, Section 15 of the Montana Constitution recognizes "that the State's interest in protecting children may conflict with their fundamental rights." *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. Thus, a "[minor's] right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated." *Id.* at 203, 683 P.2d at 941. This Court reaffirmed that principle the first time it heard this case. *PPMT I*, ¶ 20 ("It is axiomatic that the younger a minor is, the more protection she may require."). This Court's understanding of Article II, Section 15 reflects the intent manifest from the provision's text and history: to vouchsafe fundamental rights to minors while preserving the State's ability to pass minor-protective laws.

But the District Court departed from all of this. It instead minted a brand-new rule: that Article II, Section 15 *always* requires the law to treat minors as adults, unless the law seeks to "enhance" minors' rights. To affirm that holding would not only (a) contravene the text and purpose of Article II, Section 15 and (b) disregard this Court's settled understanding of the provision—it would also upend crucial minor-protective laws that touch on fundamental rights. This Court must reverse.

C. The District Court's Analysis Ignored Parents' Fundamental Right To Direct The Care, Custody, And Control Of Their Children.

The District Court's analysis contained another fundamental flaw: it disregarded parents' fundamental rights to care for and supervise their children. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Constitutional law protects this longstanding tradition. The Fourteenth Amendment of the United States Constitution protects "the interests of parents in the care, custody, and control of their children[.]" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This Court, likewise, accepts it as "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interested protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59 (citing *Troxel*, 530 U.S. at 65); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19, 357 Mont. 34, 235 P.3d 578 (parents have a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their] child").

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7. The District Court did not seem to think that Planned Parenthood's involvement—or even the involvement of an adult boyfriend—in a minor's abortion decision also constituted "inference." *See generally* (Doc. 301).

Appendix E

In adopting Article II, Section 15, the Framers did not intend to upend the fundamental constitutional rights of parents to decide on the care, custody, and control of their child. Delegate DaHood explained that the provision would not "affect[] *in any way* the relationship of parent and child or of guardian and ward with respect to someone under the age of majority." 5 Convention Transcripts at 1751 (Del. DaHood) (emphasis added). Rather, the section's author explained, the provision would "*enhance* the proper parent-child relationships in Montana families and help strengthen the family unit." *See id.* at 1750 (Del. Monroe) (emphasis added). Thus, he affirmed the provision was "not upsetting anything" and was "not revolutionary by any means." *Id.* at 1752 (Del. Dahood).

But the District Court's application of Article II, Section 15 was "revolutionary" indeed. It framed the abortion decision as a "*conflict of interest* . . . between parent and child," and described parents' attempts to protect their children as "*interference*" with a "decision[] intimately affecting the child's own body." (Doc. 301 at 22) (emphasis added).[7] The District Court correctly observed that the decision to abort one's child "cannot be equated with other circumstances where the law routinely regulates a minor's freedom of action" because abortion is unparalleled in its "profound spiritual, physical, mental, social, and economic" dimensions. (Doc. 301 at 24.) From these premises, however, the District Court reached an unjustifiable conclusion. According to the District Court, the immensity of the abortion decision means that parents should have less of a role in guiding their minor children through it. (*Id.* at 22–25.) The District Court held that minors should be left to weigh this "complex[] dilemma" alone. (*Id.* at 24.)

That twist of logic is not what the Framers had in mind when they adopted Article II, Section 15. As explained, they intended the provision to "enhance" parent-child relationships. Montana law repeatedly conditions the fundamental rights of minors on the consent and supervision of parents or guardians. *E.g.*, Mont. Code Ann. § 40-1-213 (right to marry); Mont. Code Ann. § 41-1-402 (ability to consent to medical services); Mont. Code Ann. § 45-8-344 (right to bear arms). And the unique weight of the abortion decision is *even more* reason to involve parents in it. Even abortion proponents like Justice Powell and Justice Stevens had "little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 640–41 (1979) (opinion of Powell, J.); *see also Hodgson*, 497 U.S. at 486 (Stevens, J.) (quoting this portion of *Belotti*).

This Court should clarify that analysis of the Consent Act must account for parents' weighty fundamental rights, not dismiss those rights as "interference." (Doc. 301 at 22); *see also In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 ("constitutional rights of children cannot be equated with those of adults . . . because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing.") (emphasis added).

D. Article II, Section 15 Requires A Law To Balance Minors' Rights With The State's Interest In Protecting Them.

The correct legal standard balances the State's interest in protecting minors and empowering parents with minors' rights. First, the State must show that a law limiting minors' fundamental rights is intended to protect them. Mont. Const. art. II, § 15; 5 Convention Transcripts at 1751 (Del. Monroe). Second, the rights of minors must be balanced against the nature of the State's interest in protecting them. *See Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see also PPMT I*, ¶ 20 ("It is axiomatic that the younger a minor is, the more protection she may require."). Parental rights must also be taken into account. *See In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (noting "the importance of the parental role in child rearing") (emphasis added); *see also A.J.C.*, ¶ 31; Snyder, ¶ 19.

Federal precedent balances these competing interests by holding that parental consent laws are constitutionally valid if they allow minors to use a judicial bypass procedure. *See Casey*, 505 U.S. at 899 (collecting parental consent cases). And this Court has adopted the pre-*Dobbs* federal law framework for parental notice and consent statutes. *See In re Meghan Rae*, ¶ 11 (citing *Ohio v.*

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8. If this Court finds material facts in dispute, then remand for application of the proper standard would be appropriate. *Tonner v. Cirian*, 2012 MT 314, ¶ 19, 367 Mont. 487, 291 P.3d 1182.

Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990); *Hodgson*, 497 U.S. 417; *Matheson*, 450 U.S. 398; Belotti, 443 U.S. 622).

The District Court's novel test departed from this standard. Ordinarily, this Court remands to the District Court for review under the appropriate standard. *Wiser v. State*, 2006 MT 20, ¶ 25, 331 Mont. 28, 129 P.3d 133.[8] But, where, as here, this Court possesses all facts necessary to resolve the legal issues it may direct the District Court to enter summary judgment for the State. *Swank v. Chrysler Ins. Corp.*, 282 Mont. 376, 385, 938 P.2d 631, 637 (1997).

II. THE CONSENT ACT SATISFIES THE CORRECT CONSTITUTIONAL STANDARD.

The Consent Act easily survives the appropriate rights-balancing standard. The State established undisputed facts that the Consent Act protects minors and promotes parents' rights to care for their children. And the Act's robust judicial bypass provision adequately respects a minor's right to privacy. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (citation omitted); *Casey*, 505 U.S. at 899 (citation omitted). This Court should apply this standard and reverse.

A. The Consent Act Protects Minors Seeking An Abortion And Promotes' Parents' Fundamental Rights.

The Consent Act unquestionably protects minors and promotes parents' rights to the custody, care, and

supervision of their children. The District Court correctly found each of these protections qualified as compelling interests. "[T]he protection of children from sexual exploitation and abuse [is] a compelling state interest." (Doc. 301 at 33.) "There is undoubtedly a compelling state interest in safeguarding the physical and psychological wellbeing of a minor." (Doc. 301 at 37.) "[T]he State has a compelling interest here in protecting minors from their own immaturity." (Doc. 301 at 39.) "The promotion of healthy families is undoubtedly a compelling state interest." (Doc. 301 at 43.) The State backed each of these interests with substantial and undisputed evidence in the record.

* * *

4. The Consent Act promotes parents' fundamental rights.

Finally, the Consent Act protects parents' long-recognized fundamental rights in the custody, care, and control of their children. *See Troxell*, 530 U.S. at 65; *Snyder* ¶ 19. As explained, Article II, Section 15 of the Montana Constitution aims to [37] "enhance"—not diminish—"the proper parent-child relationships in Montana families and help strengthen the family unit." *Id.* at 1750 (Del. Monroe). Consistent with this constitutional tradition, the Consent Act ensures that parents can counsel their children through the uniquely consequential abortion decision. *Supra* SOF.Part.D.1–2 (detailing mental and physical health risks to minors). And that furthers the goal at the very heart of Article II, Section 15.

* * *

Appendix F — Excerpts from Appellants' Reply Brief, No. DA 23-0272, Supreme Court of the State of Montana, filed January 16, 2024

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 23-0272

PLANNED PARENTHOOD OF MONTANA, *et al.*,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, *et al.*,

Defendants and Appellants.

Filed January 16, 2024

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Christopher Abbott, Presiding

APPELLANTS' REPLY BRIEF

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael D. Russell
Michael Noonan
Thane Johnson
Assistant Attorneys General

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Appendix F

MONTANA DEPT.
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov
Attorneys for Appellants

Tanis M. Holm
COLTON & HOLM
310 Grand Av.
Billings, MT 59101
Phone: 406-259-9986
tholm@yellowstonelaw.com

Kyla Eastling*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William St., Floor 9
New York, NY 10038
Phone: 212-541-7800
kyla.eastling@ppfa.org
**Admitted Pro Hac Vice*

Anjali Salvador*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William St., Floor 11
New York, NY 10038
Anjali.salvador@ppfa.org
Phone: 212-261-4602
**Admitted Pro Hac Vice*
Attorneys for Appellees

Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

* * *

Appendix F

APPELLANTS' REPLY BRIEF

INTRODUCTION

The Montana Constitution, Montana law, and this Court's precedent recognize the basic truth that children are different from adults and require protection. Mont. Const. art. II, Section 15; *see also Steilman v. Michael*, 2017 MT 310, ¶ 14, 389 Mont. 512, 407 P.3d 313 ("children are constitutionally different from adults…"); *Planned Parenthood v. State*, 2015 MT 31, ¶ 20, 378 Mont. 151, 342 P.3d 684 ("*PPMT I*") ("It is axiomatic that the younger a minor is, the more protection she may require."); Mont. Code Ann. § 40-1-213 (requiring judicial and parental consent for a minor to exercise fundamental right to marry); Mont. Code Ann. § 41-1-405 (denying minors the ability to consent to sterilization); Mont. Code Ann. § 45-5-501 (minors under 16 cannot consent to sex). This basic truth is not a vestigial prejudice of a bygone era. It is scientific fact. Minors' brains lack the fully formed decision-making capability adults have. (Op.Br.6–7.)

This scientific reality underscores the need for the State to protect minors faced with significant choices. *In re C.H.*, 210 Mont. 184, 203, 683 P.2d 931, 941 (1984) ("the constitutional rights of children cannot be equated with those of adults … [because of] their inability to make critical decisions in an informed, mature manner…."); (Op.Br.6.). The State detailed the real and significant psychological, medical, and safety risks associated with abortion. (Op.Br.7–13.) The Consent Act ("Act") protects minors by ensuring parents know their child is

undergoing a procedure that carries serious risks. Mont. Code Ann. § 50-20-501 et seq.; (Op.Br.7–11, 33.) Given abortion providers' lack of follow-up care (Op.Br.7–11), parents may be the only ones observing their child for post-procedure complications. The State also showed the tragic reality of sexual violence in Montana. (Op.Br.11–13.) The Act—both through parental involvement and the judicial bypass procedure—helps detect sexual violence to protect Montana girls from repeated exploitation. (Op. Br.12–14.)

This Court must reject Appellees' (hereinafter, "PPMT") illogical retort that because abortion involves a more serious decision than marriage, sexual intercourse, or even sterilization, minors should be more isolated from their caregivers. (PPMT.Br.22.) Rather, it is precisely because abortion is so serious that "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 640–41 (1979) (Powell, J.). The Act protects minors' psychological and physical health, protects them from repeated sexual violence, and protects parents' fundamental right to direct their children's upbringing.

ARGUMENT

I. STRICT SCRUTINY DOES NOT APPLY TO THE ACT.

C. The Act Protects Parents' Fundamental Right To Direct Their Child's Care And Upbringing.

PPMT's misreading of the constitutional text also would eradicate parents' fundamental liberty interests. It is "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59. The Fourteenth Amendment of the United States Constitution protects the same interest. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). The delegates did not intend to erase this fundamental interest by adopting Article II, Section 15. (*See* Op.Br.27–28.) Indeed, "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti*, 443 U.S. at 640–41 (Powell, J.).

PPMT incorrectly uses negative legislative history to contradict the meaning of the United States and Montana Constitutions. *See Gryczan*, 283 Mont. at 451, 942 P.2d at 123 (rejecting use of negative legislative history to demonstrate delegates' intent); (PPMT.Br.21–22; *but see* Op.Br.26–29). The delegates clearly intended that Article II, Section 15 would not "affect[] in any way the relationship of parent and child or of guardian and ward

with respect to someone under the age of majority." 5 Conv. Tr. at 1751 (Del. Dahood); *see also id.* at 1750 (Del. Monroe) (explaining that the provision would "enhance the proper parent-child relationships in Montana families and help strengthen the family unit."). The delegates uniformly expressed Article II, Section 15's intent to preserve the rights of parents.

Many laws affecting a minor's privacy rights recognize the important role parents play in guiding children in making life-altering choices. Parents must consent to their minor's marriage. § 40-1-213. Children cannot waive their right to privacy and consent to a search of their home without parental consent. *See State v. Schwarz*, 2006 MT 120, ¶ 14, 332 Mont. 243, 136 P.3d 989. Parents must, generally, consent to medical care for their child. Mont. Code Ann. § 41-1-402.

Moreover, the Anglo-American tradition affirms the "primary role of the parents in the upbringing of their children[.]" *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19, 357 Mont. 34, 235 P.3d 578 (parents have a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their] child"). When it comes to abortion, however, the District Court and PPMT view this sacred relationship to be nothing but a "conflict of interest." (Doc. 301 at 22.) That unsupported view undercuts centuries of foundational natural law tenets and violates the text and intent of the Montana Constitution.

The District Court's dismissal of parental rights as a mere "conflict of interest" threatens to place Article II,

Section 15 at odds with the Fourteenth Amendment of the United States Constitution. *See Troxel*, 530 U.S. at 65. The Court must correct this. (Op.Br.28–29.)[1]

II. THE ACT SATISFIES THE CORRECT CONSTITUTIONAL TEST.

* * *

C. JUDICIAL BYPASS ADDRESSES CASES WHERE PARENTAL INVOLVEMENT IS INAPPROPRIATE.

PPMT argues repeatedly that the Act will expose minors to parental abuse. (PPMT.Br.7–9, 28–30, 38.) But the Act's judicial bypass provision guarantees that minors can obtain an abortion without parental consent when necessary. (Op.Br.37–39); Mont. Code Ann. §§ 50-20-503(3); -507; -509. "A minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired

1. The District Court and PPMT presume—contrary to the record—that pregnant minors reside in abusive or unsupportive households. (Doc. 301 at 43–44; PPMT.Br.7, 33–34; *but see* Doc. 146 ¶¶ 46–47 (PPMT's expert Pinto could not recall, even anecdotally, a single instance where a pregnant minor telling her parents her intention to obtain an abortion led to abuse. And Pinto relied on a single study that (thankfully) less than .5% of pregnant minors reside in a household with familial abuse.).) This false presumption preemptively denies parents their fundamental rights. For those rare cases when abuse exists, the Act's judicial bypass provision protects minors. (Op.Br.37–39.)

abortion would be in her best interests.'" *In re Meghan Rae*, Cause No. DA 14–005, ¶ 10 (quoting *Belotti,* 443 U.S. at 643–44). The Act's judicial bypass provision meets every jurisprudential requirement. *See id.* at ¶¶ 12–13.

PPMT's response muddies the facts. (PPMT.Br.36–38.)[5] First, PPMT acknowledges that it helps minors use judicial bypass in appropriate cases by connecting them to attorneys. (Doc. 146 ¶ 85; *contra* PPMT.Br.37.) Second, PPMT ignores that Montana's bypass provisions remove alleged procedural burdens because minors need not attend the hearings. (Op.Br.5; *contra* PPMT.Br.37–38.) Third, PPMT relies on disputed facts to establish that the waiver process imposes a burden. (PPMT.Br.8–9; 37–38; *infra* at IV.C.) Fourth, this Court already distinguished the case used by the District Court and PPMT on the appropriate evidentiary burden to be used. *PPMT I*, ¶ 22; *see also Alaska v. Planned Parenthood*, 171 P.3d 577, n.42 (Alaska 2007) (invalidating a parental involvement law that applied the higher "clear and convincing evidence" burden of proof). By ensuring minors can access abortion without parental consent in those rare cases when parental involvement is inappropriate, the Act's judicial bypass provision sufficiently protects minors' abortion rights. The District Court was wrong to find otherwise. This Court should reverse.

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5. PPMT eventually distills its arguments against the judicial bypass procedure to the point that because the Notice Act exists, the Act's bypass provision does not matter for tailoring. (PPMT. Br.38–39.) That fallacy ignores the loophole the Act is designed to close. (Op.Br.33–34.)

Appendix G — Defendants' Notice of Supplemental Authority, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed July 6, 2022

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

Cause No. DDV 2013-407

PLANNED PARENTHOOD OF MONTANA AND JOEY BANKS, 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.

Filed July 6, 2022

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants State of Montana and Attorney General Austin Knudsen respectively submit this Notice of Supplemental Authority.

Appendix G

On June 24, 2022, the Supreme Court of the United States published its decision in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. __ (2022) (attached as Exhibit A). *Doobs* overturned *Roe v. Wade,* 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992). *See Dobbs,* Op. at 79. Plaintiffs' arguments in this case rely on decisions in *Armstrong v. State,* 1999 MT 261,296 Mont. 361,989 P.2d 364 and *Wicklund v. State,* Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999),[1] locating a right to pre-viability abortion within Montana's Right to Privacy. *See* (Doc. 253 at 2). Both *Armstrong* and *Wicklund* rely on federal abortion jurisprudence that the Court in *Dobbs* held to be "egregiously wrong from the start." *Dobbs,* Op. at 6.

To be clear, the State's position remains unchanged. *Armstrong* doesn't grant minors an unrestricted right to pre-viability abortions. *See* (Doc. 131 at 6). *Armstrong,* therefore, need not be addressed by this Court for the State to prevail. *Dobbs*' overturning of *Roe,* however, renders Plaintiffs' reliance on *Armstrong* deeply suspect. Because *Dobbs* eviscerates *Armstrong*'s central rationale, Plaintiffs cannot succeed on their arguments—which rely principally upon *Armstrong.*

1. *Wicklund*'s discussion of the right to pre-viability abortion refers back to the district court's preliminary injunction order. That order can be found at *Wicklund v. State,* Cause No. ADV 97-671, 1998 Mont. Dist. LEXIS 227, at *5–7 (1st Jud. Dist. Feb. 13, 1998).

Appendix G

First, *Dobbs* rejected *Armstrong*'s supposition that *Roe*'s viability framework settled the personhood debate from a legal standpoint. *See Dobbs,* Op. at 49–53.

Second, *Dobbs* concluded that "no pre-*Roe* authority ... no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise" "show[s] that a constitutional right to abortion has any foundation, let alone a deeply rooted one, in this Nation's history and tradition." *Dobbs,* Op. at 35 (internal quotation marks and citations omitted); *see also id.* at Appendix B 103–04 (citing 1864 Terr. of Mont. Laws p.184).

Third, *Dobbs* made clear that "a right to abortion cannot be justified by a purported analogy to the rights recognized" in *Griswold v. Connecticut,* 381 U.S. 479 (1965) and other "contraception and same-sex relationships" cases—including *Eisenstadt v. Baird,* 405 U.S. 438 (1972)—, because "the right to abortion ... uniquely involves what *Roe* and *Casey* termed potential life." *Dobbs,* Op. 71–72, 49, 66.

Fourth, *Dobbs* explained that *Casey* "abandoned [*Roe's*] reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause." *Dobbs,* Op. at 55 (citing *Casey,* 505 U.S. at 846).

Fifth, *Dobbs* observed that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines." *Dobbs,* Op. at 62–63 (collecting such doctrines).

Sixth, *Dobbs* rejected that *Armstrong*'s viability line provides a workable judicial standard. *Dobbs,* Op. at 73; *see also id.* at 2–5 (Roberts, C.J., concurring in judgment).

Seventh, *Dobbs* reaffirmed that state laws regulating abortion are "health and welfare laws" that enjoy a strong presumption of validity. *Dobbs,* Op. at 77–78.

Eighth, *Dobbs* concluded that "[a]bortion presents a profound moral question" and that question should "return ... to the people and their elected representatives." *Dobbs,* Op. at 79; *see also id.* at 1–5 (Kavanaugh, J. concurring) ("In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process.").

Dobbs marks an obvious watershed in federal abortion jurisprudence. For the reasons stated, *Dobbs* eviscerates *Armstrong*'s rationale and, therefore, Plaintiffs' arguments in this case.

Given the Court's commitment to timely adjudication of the pending motions and the State's continued position that the laws under challenge don't implicate any right purportedly secured by *Armstrong,* the State doesn't request, but would be happy to provide, additional briefing.

DATED this 1st day of July, 2022.

Austin Knudsen
Montana Attorney General

David M.S. Dewhirst
Solicitor General

/s/ Brent Mead
Brent Mead
Assistant Solicitor General
Kathleen L. Smithgall
Assistant Solicitor General
Patrick M. Risken
Assistant Attorney General
Montana Department
of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
p. 406.444.2026
brent.mead2@mt.gov

Emily Jones
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Defendants

Appendix H — Excerpts from Defendants' Brief in Support of Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed December 29, 2016

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. DDV 2013-407

PLANNED PARENTHOOD OF MONTANA AND PAUL FREDRICK HENKE, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs,

v.

STATE OF MONTANA AND TIM FOX, ATTORNEY GENERAL OF THE STATE OF MONTANA, IN HIS OFFICIAL CAPACITY, AND HIS AGENTS AND SUCCESSORS,

Defendants.

Filed December 29, 2016

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * *

Appendix H

ARGUMENT

I. The Parental Involvement Laws Are a Constitutional Exercise of the Legislature's Authority to Protect Minors.

* * *

C. Neuropsychological and Behavioral Research Shows That Adolescents Lack Capacity for Fully Informed Decision-making.

* * *

Finally, these laws also promote the integrity of the family and protect the parental right to be involved in their minor child's decision making process. The Supreme Court has long held that it remains cardinal "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also* Hodgson *v. Minn.*, 497 U.S. 417, 444-45 (1990) ("the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest."); *id.* at 483 (O'Connor, J., concurring) (recognizing the "right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf.").

Appendix H

There is no doubt that not all parents will respond well to their daughter's pregnancy, and may even be unhelpful in her decision. But the fact that some parents may not respond well is not sufficient reason to doom the entirety of the parental involvement laws. *Hodgson*, 497 U.S. at 485-86 (Kennedy, J., concurring); *Matheson*, 450 U.S. at 424 (Stevens, J., concurring). For minors in such a situation, the judicial waiver is available, *see*, *supra*, next section.

* * *

Appendix I — Excerpts from Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, No. DDV-2013-407, Montana First Judicial District Court, Lewis and Clark County, filed February 17, 2017

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. BDV 2013-407

PLANNED PARENTHOOD OF MONTANA AND PAUL FREDRICK HENKE, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Plaintiffs,

v.

STATE OF MONTANA AND TIM FOX, ATTORNEY GENERAL OF THE STATE OF MONTANA, IN HIS OFFICIAL CAPACITY, AND HIS AGENTS AND SUCCESSORS,

Defendants.

Filed February 17, 2017

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Appendix I

INTRODUCTION

Planned Parenthood would have this Court believe that the Constitution grants minors all the fundamental rights that it grants adults, but that is wrong. The Constitution expressly limits the rights of minors: they have "all the fundamental rights of this Article unless specifically precluded by laws which enhance the[ir] protection." Mont. Const. art. II, § 15. Thus, under the Constitution's express language, the Legislature is authorized to enact laws that enhance the protection of minors, and these enactments do not intrude upon a minor's constitutional rights; rather, they are part and parcel of the rights that minors have.

To be clear, this case is not about the constitutionality of abortion. It is not about whether a minor has a right to an abortion. And, contrary to Planned Parenthood's spin, this is not a case involving the infringement of fundamental rights and various levels of constitutional scrutiny. The issue in this case is simply whether the Legislature can require a minor child to obtain parental consent before having an abortion. Stated differently, the issue is whether a law requiring parental involvement before having an abortion is a law that enhances the protection of minors. If it is, then it is constitutional under Mont. Const. art. II, § 15. As set forth below, parental consent enhances the protection of minors by protecting minors from victimization by sexual predators, protecting them from psychological and medical complications, and protecting them from making a rash decision because of their undeveloped decision-making capacity, which

the Montana Supreme Court has already recognized as a matter of law. They also protect the integrity of the family and the rights of parents to protect and foster the best interests of their children. This Court should deny Planned Parenthood's motion for summary judgment.

* * *

IV. The Parental Involvement Laws do not give parents a veto power because the judicial waiver protects minors who cannot consult their parents.

Planned Parenthood argues that the Parental Involvement Laws give parents a "veto" power over the minor's abortion decision, and that the laws will threaten minor's safety. But the evidence does not support Planned Parenthood's arguments. Parents do not have a veto power over a minor's abortion decision because minors always have the option to seek a judicial waiver. But that does not mean that the decision should not be made with consultation with a parent, where possible. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision, *Planned Parenthood v. Danforth,* 428 U.S. 52, 74 (1976), it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota,* 497 U.S. 417, 444-45 (1990). The Court has thus held that a judicial waiver process like Montana's protects a minor from being subject to a parent's veto. *Id.*

Moreover, Planned Parenthood's unsupported allegations that minors will be subject to abuse because of the parental involvement laws ignores reality. Although minors may-fear that their parents will react poorly, studies show that seldom actually happens. For example, a leading study reports that 55 percent of minors thought that parents would be angry with them, 18 percent thought that parents would make them leave home, 14 percent feared that parents would force them to have the baby, and 6 percent feared that they would be beaten. *Henshaw,* Table 5, *Risken Decl.,* Ex. 13. But the reality was much different. A statistically insignificant percentage, meaning .5 percent or less, actually suffered physical abuse or were forced to leave home. None reported being forced to have the baby. Even Planned Parenthood's expert testified that minors "have an exaggerated fear of the reactions of authority figures, especially their parents, to unexpected and unwelcome news." SOF 58.

But Planned Parenthood attempts to leverage those *fears* as a basis to declare the laws unconstitutional. That makes no sense, and Planned Parenthood's arguments are notably lacking any factual support. For example, Planned Parenthood gives no concrete examples of minors being forced to leave home, being forced to have a child, or being abused after telling a parent about their pregnancy, or attempting to self-induce an abortion rather than telling their parents. *See* Pls. Summ. J. Br. at 19. Their experts could not cite any concrete examples either. The lack of any concrete examples is significant, given that a majority of the states have had these laws in place for decades. If examples existed, Planned Parenthood would be able to cite them. Fear mongering is not evidence.

It certainly does not support undermining the integrity of the family or discounting the parental rights at issue in parental involvement laws, even if some parents may respond poorly. For minors in that situation, a judicial waiver is always an option. But as the United States Supreme Court has recognized, that some parents may not respond ideally to the news that their minor daughter is pregnant is not sufficient reason to declare all such laws unconstitutional. "That some parents 'may at times be acting against the best interests of their children' ... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Hodgson v. Minnesota,* 497 U.S. at 494-95. Indeed, although Planned Parenthood tends to belittle the rights of parents to be involved in their children's abortion decision, the Supreme Court has recognized that the right has both constitutional and commonsense proportions:

> But an additional and more important justification for state deference to parental control over children is that "[the] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925). "The duty to prepare the child for 'additional obligations' ... must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972). This affirmative

> process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

Bellotti v. Baird, 443 U.S. at 637-38.

There is no doubt that some cases may be tougher than others. A minor who is nearly 18 may be more competent than a 15-year-old in deciding whether to have an abortion without parental involvement. But the judicial bypass recognizes that fact, and the courts take into account age and maturity in deciding to grant a bypass. Thus, someone who is almost 18 would have a lighter burden to prove that she is sufficiently well-informed and mature to decide herself.

In sum, Montana's well-crafted judicial waiver sufficiently protects minors who are unable to consult their parents, which fully complies with the constitutional standard that the United States Supreme Court has developed.

* * *

Appendix J — Parental Consent for Abortion Act of 2013, Mont. Code Ann. §§50-20-501–511

50-20-501, MCA

50-20-501 Short title.

This part may be cited as the "Parental Consent for Abortion Act of 2013".

50-20-502, MCA

50-20-502 Legislative purpose and findings.

(1) The legislature finds that:

(a) immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences;

(b) the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;

(c) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom ofan abortion are not necessarily related;

(d) parents ordinarily possess information essential to a physician in the exercise of the physician's best medical judgment concerning the minor;

(e) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical care after the abortion; and

(f) parental consultation is usually desirable and in the best interests of the minor.

(2) The purpose of this part is to further the important and compelling state interests of:

(a) protecting minors against their own immaturity;

(b) fostering family unity and preserving the family as a viable social unit;

(c) protecting the constitutional rights of parents to rear children who are members of their household; and

(d) reducing teenage pregnancy and unnecessary abortion.

50-20-503, MCA

50-20-503 Definitions.

As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Coerce" means to restrain or dominate the choice of a minor by force, threat of force, or deprivation of food and shelter.

(2) "Consent" means a notarized written statement obtained on a form and executed in the manner prescribed by 50-20-505 that is signed by a parent or legal guardian of a minor and that declares that the minor intends to seek an abortion and that the parent or legal guardian of the minor consents to the abortion.

(3) "Emancipated minor" means a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-1-503.

(4) "Medical emergency" means a condition that, on the basis of the good faith clinical judgment of a physician or physician assistant, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of the woman's pregnancy to avert the woman's death or a condition for which a delay in treatment will create serious risk of substantial and irreversible impairment of a major bodily function.

(5) "Minor" means a pregnant female under 18 years of age who is not an emancipated minor.

(6) "Physical abuse" means any physical injury intentionally inflicted by a parent or legal guardian on a minor.

(7) "Physician" means a person licensed to practice medicine under Title 37, chapter 3.

(8) "Physician assistant" means a person licensed pursuant to Title 37, chapter 20, who provides medical services under the supervision of a physician.

(9) "Sexual abuse" has the meaning provided in 41-3-102.

50-20-504, MCA

50-20-504 Consent of parent or legal guardian required.

(1) Except as provided in 50-20-507, a physician or physician assistant may not perform an abortion on a minor unless the physician or physician assistant or the agent of the physician or physician assistant first obtains the notarized written consent of a parent or legal guardian of the minor.

(2) The consent of a parent or legal guardian of the minor is invalid unless it is obtained in the manner and on the form prescribed by 50-20-505.

50-20-505, MCA

50-20-505 Consent form — disclosure — requirements for validity.

(1) The department of public health and human services shall create a consent form to be used by physicians, physician assistants, or their agents in obtaining the consent of a parent or legal guardian as required under 50-20-504 or in obtaining the waiver of the consent of a parent or legal guardian as provided for in 50-20-507.

(2) The form must disclose but is not limited to the following:

(a) any information that a physician or physician assistant is required by law to provide to the minor and the rights of the minor;

(b) the rights of the parent or legal guardian;

(c) the surgical or medical procedures that may be performed on the minor;

(d) the risks and hazards related to the procedures planned for the minor, including but not limited to the risks and hazards associated with:

(i) any surgical, medical, or diagnostic procedure, including the potential for infection, blood clots in veins and lungs, hemorrhage, and allergic reactions;

(ii) a surgical abortion, including hemorrhage, uterine perforation or other damage to the uterus, sterility, injury to the bowel or bladder, a potential hysterectomy caused by a complication or injury during the procedure, and the possibility of additional procedures being required because of failure to remove all products of conception;

(iii) a medical or nonsurgical abortion, including hemorrhage, sterility, the continuation of the pregnancy, and the possibility of additional

procedures being required because of failure to remove all products of conception; and

(iv) the particular procedure that is planned for the minor, including cramping of the uterus, pelvic pain, infection of the female reproductive organs, cervical laceration, incompetent cervix, and the requirement of emergency treatment for any complications.

(3) The form must include:

(a) a minor consent statement that the minor is required to sign. The minor consent statement must include but is not limited to the following points, each of which must be initialed by the minor:

(i) the minor understands that the physician or physician assistant is going to perform an abortion on the minor and that the abortion will end the minor's pregnancy;

(ii) the minor is not being coerced into having an abortion, the minor has the choice not to have the abortion, and the minor may withdraw consent at any time prior to the abortion;

(iii) the minor consents to the procedure;

(iv) the minor understands the risks and hazards associated with the surgical or medical procedures planned for the minor;

(v) the minor has been provided the opportunity to ask questions about the pregnancy, alternative forms of treatment, the risk of nontreatment, the procedures to be used, and the risks and hazards involved; and

(vi) the minor has sufficient information to give informed consent.

(b) a parental consent statement that a parent or legal guardian is required to sign. The parental consent statement must include but is not limited to the following points, each of which must be initialed by a parent or legal guardian:

(i) the parent or legal guardian understands that the physician or physician assistant who signed the physician declaration statement provided for in subsection (3)(c) is going to perform an abortion on the minor that will end the minor's pregnancy;

(ii) the parent or legal guardian had the opportunity to read the consent form or had the opportunity to have the consent form read to the parent or legal guardian;

(iii) the parent or legal guardian had the opportunity to ask questions of the physician or physician assistant or the agent of the physician or physician assistant regarding the information contained in the consent form and the surgical and medical procedures to be performed on the minor;

(iv) the parent or legal guardian has been provided sufficient information to give informed consent.

(c) a physician declaration that the physician or physician assistant is required to sign, declaring that:

(i) the physician or physician assistant or the agent of the physician or physician assistant explained the procedure and contents of the consent form to the minor and a parent or legal guardian of the minor and answered any questions; and

(ii) to the best of the physician's or physician assistant's knowledge, the minor and a parent or legal guardian of the minor have been adequately informed and have consented to the abortion; and

(d) a signature page for a parent or legal guardian of the minor that must be notarized and that includes an acknowledgment by the parent or legal guardian affirming that the parent or legal guardian is the minor's parent or legal guardian.

50-20-506, MCA

50-20-506 Proof of identification and relationship to minor — retention of records.

(1) A parent or legal guardian of a minor who is consenting to the performance of an abortion on the minor shall provide the attending physician or physician

assistant or the agent of the physician or physician assistant with government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor.

(2) A physician or physician assistant shall retain the completed consent form and the documents provided pursuant to subsection (1) in the minor's medical file for 5 years after the minor reaches 18 years of age, but in no event less than 7 years.

(3) A physician or physician assistant receiving documentation under this section shall execute for inclusion in the minor's medical record an affidavit stating: "I, (insert name of physician or physician assistant), certify that according to my best information and belief, a reasonable person under similar circumstances would rely on the information presented by both the minor and the minor's parent or legal guardian as sufficient evidence of identity and relationship."

50-20-507 MCA

50-20-507 Exceptions.

Consent is not required under 50-20-504 if:

(1) the attending physician or physician assistant certifies in the minor's medical record that a medical emergency exists and there is insufficient time to provide consent;

(2) consent is waived, in a notarized writing, by the person entitled to give consent; or

(3) consent is waived under 50-20-509.

50-20-508 MCA

50-20-508 Coercion prohibited.

A parent, a legal guardian, or any other person may not coerce a minor to have an abortion. If a minor is denied financial support by the minor's parents, legal guardian, or custodian because of the minor's refusal to have an abortion, the minor must be considered an emancipated minor for the purposes of eligibility for public assistance benefits. The public assistance benefits may not be used to obtain an abortion.

50-20-509 MCA

50-20-509 Procedure for judicial waiver of consent.

(1) The requirements and procedures under this section are available to minors whether or not they are residents of this state.

(2) A minor may petition the youth court for a waiver of the requirement for consent and may participate in the proceedings on the minor's own behalf. The petition must include a statement that the minor is pregnant and is not emancipated. The court may appoint a guardian ad litem for the minor. A guardian ad litem is required to maintain

the confidentiality of the proceedings. The youth court shall advise the minor of the right to assigned counsel and shall order the office of state public defender, provided for in 2-15-1029, to assign counsel upon request.

(3) Proceedings under this section are confidential and must ensure the anonymity of the minor. All proceedings under this section must be sealed. The minor may file the petition using a pseudonym or using the minor's initials. All documents related to the petition and the proceedings on the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the minor. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the requirement for consent is waived.

(4) If the court finds that the minor is competent to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent or legal guardian.

(5) The court shall issue an order authorizing the minor to consent to an abortion without the consent of a parent or legal guardian if the court finds that:

(a) there is evidence of physical abuse, sexual abuse, or emotional abuse of the minor by one or both parents, a legal guardian, or a custodian; or

(b) the consent of a parent or legal guardian is not in the best interests of the minor.

(6) If the court does not make a finding specified in subsection (4) or (5), the court shall dismiss the petition.

(7) A court that conducts proceedings under this section shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained.

(8) The supreme court may adopt rules providing an expedited confidential appeal by a minor if the youth court denies a petition. An order authorizing an abortion without the consent of a parent or legal guardian is not subject to appeal.

(9) Filing fees may not be required of a minor who petitions a court for a waiver of the requirement for consent or who appeals a denial of a petition.

50-20-510 MCA

50-20-510 Criminal and civil penalties.

(1) A person convicted of performing an abortion in violation of 50-20-504 shall be fined an amount not to

exceed $ 1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. On a second or subsequent conviction, the person shall be fined an amount not less than $ 500 or more than $ 50,000 and be imprisoned in the state prison for a term of not less than 10 days or more than 5 years, or both.

(2) Failure to obtain the consent required under 50-20-504 is prima facie evidence in an appropriate civil action for a violation of a professional obligation. The evidence does not apply to issues other than failure to obtain the consent of a parent or legal guardian. A civil action may be based on a claim that the failure to obtain consent was the result of a violation of the appropriate legal standard of care. Failure to obtain consent is presumed to be actual malice pursuant to the provisions of 27-1-221. This part does not limit the common-law rights of parents.

(3) A person who coerces a minor to have an abortion is guilty of a misdemeanor and upon conviction shall be fined an amount not to exceed $ 1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. On a second or subsequent conviction, the person shall be fined an amount not less than $ 500 or more than $ 50,000 and be imprisoned in the state prison for a term of not less than 10 days or more than 5 years, or both.

(4) A person not authorized to grant consent under 50-20-504 who signs a consent form provided for in 50-20-505 is guilty of a misdemeanor.

Appendix J

50-20-511 MCA

50-20-511 Construction.

Nothing in this part may be construed as creating or recognizing a right to abortion. It is not the intention of this part to make lawful an abortion that is currently unlawful.