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**Pro hac vice applications forthcoming*

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA and JOEY BANKS, M.D., on behalf of themselves and their patients,

Plaintiffs,

v.

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

Defendants.

DV-21-00999

Hon. Gregory R. Todd

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

"[T]he State of Montana has … power by which it can regulate for the health and safety of its citizens." *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133. Montana, like almost every state in the U.S., has long provided protections for women seeking the life-altering, life-ending action of abortion. The Legislature, in its role to protect the health, safety, and welfare of its citizens, has enacted regulations to help minimize the medical risks to mothers and ensure that women undergo the procedure only after being fully informed about the risks and consequences—including that abortion terminates the life of a human person.

This year, the State augmented these health-and-safety protections to guarantee that pregnant women (i) are not prescribed dangerous chemical abortion drugs without providing informed consent and being physically examined by a physician (HB 171), (ii) do not undergo risky late-term abortions in the sixth month of pregnancy or beyond (HB 136), and (iii) are offered an opportunity to see and hear an ultrasound of their child in their own womb (HB 140). These measures are presumed constitutional as a matter of law. *Duane C. Kohoutek, Inc. v. Mont. Dep't of Revenue*, 2018 MT 123, ¶ 14, 391 Mont. 345, 417 P.3d 1105.

Plaintiffs are abortion providers who profit from performing as many abortions as possible.[1] They seek to overturn these modest standard-of-care improvements, which embody the judgment of the citizens' elected legislators, and halt these duly enacted laws.[2] Relying on *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, Plaintiffs ignore that the Montana Supreme Court in that case held "that the right to health care is a fundamental privacy right, but only to the extent that it

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[1] *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2166 (2020) (Alito, J., dissenting) (noting the "blatant conflict of interest between an abortion provider and its patients" because "an abortion provider has a financial interest in avoiding burdensome regulations"); *see also Fact Sheet: Planned Parenthood's 2019–20 Annual Report*, Charlotte Lozier Institute (Feb. 23, 2021), bit.ly/38MW9jS (most recent annual report shows Planned Parenthood's income-over-expense profit of $69.7M).

[2] HB 136 passed the House 66-34 and the Senate 31-19. HB 140 passed the House 68-32 and the Senate 30-20. HB 171 passed the House 67-33 and the Senate 31-19.

protects an individual's right to obtain a particular *lawful* medical procedure." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 286 P.3d 1161 (emphasis in original). Soon after in *Wiser*, the Montana Supreme Court "circumscribed its holding in *Armstrong* [and] stated that 'it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right.'" *Id.*; *see also, e.g.*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992) (upholding 24-hour abortion waiting period and informed-consent requirements); *EMW Women's Surgical Ctr. v. Beshear*, 920 F.3d 421 (6th Cir. 2019) (upholding ultrasound requirement and mandatory abortion information); *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d 570 (same).

And *that*—the claim that these regulations impermissibly infringe upon fundamental rights because any abortion regulation must necessarily do so—is the meritless argument Plaintiffs lay before this Court in their attempt to obtain extraordinary injunctive relief. But because that must be wrong, because the State may enact modest and reasonable measures to advance the health, safety, and welfare of pregnant women contemplating or obtaining abortions, and because these laws do so within constitutional bounds, Plaintiffs' preliminary injunction motion must fail.

PLAINTIFFS' BURDEN ON PRELIMINARY INJUNCTION

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citing *Troglia v. Bartoletti*, 152 Mont. 365, 370, 451 P.2d 106 (1969)). It is warranted only when it "prevents further injury or irreparable harm." *Yockey v. Kearns Props. LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185 (affirming denial of preliminary injunction); *Smith v. Ravalli Cnty. Bd. of Health*, 209 Mont. 292, 295, 679 P.2d 1249, 1251 (1984) (affirming denial of preliminary injunction when "appellants had not shown irreparable harm would occur if the injunctions were not issued"). "If a preliminary injunction will not accomplish its limited purposes, then it should not issue." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73 (cleaned up).

Courts may issue preliminary injunctions under five, disjunctive

circumstances. MCA § 27–19–201. Plaintiffs argue two are present here and entitle them to an injunction: (1) "it appears that the applicant is entitled to relief," and (2) "it appears the commission or continuance of some act during litigation would produce a great or irreparable injury to the applicant." *Id.* Plaintiffs are wrong.

To satisfy the first standard under § 27-19-201(1), an applicant must show a "likelihood of success on the merits" and that "the applicant would suffer harm which could not be adequately remedied after a trial on the merits." *M.H. v. Montana High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239 (1996); *See also Sandrock*, 2010 MT 237; *Doe v. Cmty. Med. Ctr.*, 2009 MT 395, 353 Mont. 378, 221 P.3d 651 (discussing *Cole v. St. James Healthcare*, 2008 MT 453, 348 Mont. 68, 199 P.3d 810).

As for § 27-19-201(2), simply alleging harm is not enough. Plaintiffs must show there is a likelihood of irreparable injury. *See Driscoll*, 2020 MT 247; *Pinnacle Gas Res.*, 2009 MT 12 (upholding a district court's finding of likelihood of irreparable harm under § 27-19-201(2)); *Cole v. St. James Healthcare*, No. DV-07-44, 2007 Mont. Dist. LEXIS 675, *27 (Mont. Dist. Ct., 2nd Jud. Dist. June 1, 2007) (considering § 27-19-201(2) and finding a strong likelihood that the party would suffer a "substantial or irreparable injury"). Here Plaintiffs argue that this standard is satisfied because the challenged laws impinge the right to an elective abortion.

Although a *complete* loss of a constitutional right may constitute an irreparable injury, a reasonable regulation of a constitutional right does not enjoy this same presumption. Every government regulation has some impact on rights; the question is whether that impact rises to the level of an impermissible impingement. So when determining whether the challenged laws will cause some irreparable harm under § 27-19-201(2), the Court must necessarily consider whether Plaintiffs have shown a likelihood that those laws impermissibly violate abortion rights. *See Driscoll*, ¶ 14 (requiring a showing plaintiff will suffer harm or injury); *BAM Ventures*, 2019 MT 67 (relief is authorized when it appears continuing the act in question would produce irreparable injury). Essentially, both standards require the same analysis: whether Plaintiffs are likely to succeed on the merits.

The Montana Supreme Court has cautioned that "[i]n considering whether to

issue a preliminary injunction on any of the grounds enumerated in § 27-19-201 … the court must exercise its discretion only in furtherance of the limited purpose of preliminary injunctions to preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Davis*, ¶¶ 23–25 (citation omitted). Here, *denial* of injunctive relief is necessary to preserve the status quo and minimize harm.

The "status quo" is the "last actual, peaceable, [un]contested condition" preceding the controversy at issue. *Id*. ¶ 24 (quoting *Porter v. K & S P'ship*, 192 Mont. 175, 181, 627 P.2d 836 (1981)). Preserving the status quo does not mean that anytime the State enacts a new law someone disagrees with, they may run to the courts and obtain an injunction to preserve the "status quo." *Cf. Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("And what is at issue here is … plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher"); *see also* 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p 129 (2d ed. 1995) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."). Indeed, here, there was a contested condition prior to HBs 136, 171, and 140: namely, the Legislature recognized deficiencies in our existing health-and-safety abortion laws that disserved the State and its citizens. Hence, the new laws.

A preliminary injunction preserves the "status quo" only when the applicant initially establishes an apparent entitlement to a legal right that would be irreparably injured. *See* MCA § 27–19–201; *Citizens for Balanced Use*, ¶¶ 11–12. Plaintiffs have established neither.

The other limited purpose of a preliminary injunction is to "minimize the harm to all parties." *Porter*, 192 Mont. at 183. As shown below, this includes harm to the State, pregnant women, and preborn human persons—all of whom will be harmed if these health-and-safety laws are enjoined, even temporarily.

ARGUMENT

I. Plaintiffs fail to meet the standard for preliminary injunction.

1. Plaintiffs lack standing.

Plaintiffs assert claims only on behalf of hypothetical, unidentified women. MPI 2 n.1 (alleging that the laws violate the rights of unnamed, unknown Montana women who "are or may become pregnant in the future"). They pretend to assert some claims on behalf of themselves, MPI 2–3, but these too are thinly veiled attempts to assert the rights of women who have declined to bring suit themselves. Normally, this lack of "injury in fact" would defeat standing and deprive the Court of jurisdiction. *See Baxter Homeowners Ass'n, Inc. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145 ("[T]he plaintiff generally must assert her own legal rights and interests."); *Heffernan*, 2011 MT 91, ¶ 32 ("[A] court lacks power to resolve a case brought by a party without standing—i.e., a personal stake in the outcome—because such a party presents no actual case or controversy.").

But not in abortion cases. The Montana Supreme Court created a special rule: when statutes "directly interdict the normal functioning of the physician–patient relationship by criminalizing certain procedures," abortion providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion …." *Armstrong*, ¶¶ 12–13; *Weems v. State*, 2019 MT 98, ¶¶ 12–14, 395 Mont. 350, 440 P.3d 4. Because HBs 136 and 171 impose criminal penalties for noncompliance, *Armstrong* appears applicable to Plaintiffs' challenges to those laws. Many reasons counsel against any further application of this *sui generis* rule.[3] But for now, *Armstrong* controls.

[3] Two stand out: First, *Armstrong* relied upon federal caselaw in adopting its standing rule, but the federal courts have been moving steadily away from the notion that abortion providers and clinics can assert the individual abortion rights of women. *See, e.g.*, P*lanned Parenthood of Greater Tex. Surgical Health Servs.*, 748 F.3d at 589 (applying the third-party standing rule in Kowalski v. Tesmer, 543 U.S. 125, 130–31 (2004) to abortion clinics' challenge to law requiring abortion doctor to have admitting privileges at nearby hospital); *Planned Parenthood Sw. Ohio Region*, 64 F. Supp. 3d at 1065 (applying Kowalski's third-party standing analysis to abortion clinic challenge to law restricting use of abortion drug RU-486); *Stuart*, 992 F. Supp. 2d at 610 (applying Kowalski's third-party standing analysis in abortionists' challenge to informed-consent law); *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1222 (D. Kan. 2013) (applying *Kowalski* in abortion clinic challenge to fetal-pain law).

Defendants accordingly preserve these standing arguments for appeal.

HB 140 is a different story. No criminal penalties result for noncompliance—"the context" from which *Armstrong*'s rule arose. *See Armstrong*, ¶ 13. Plaintiffs must therefore establish normal third-party standing to sustain their challenge to HB 140. That means they must have suffered an "injury in fact" and have a "close relation to the third party," who cannot protect her own interests due to "some hindrance." *Baxter Homeowners Ass'n*, ¶ 15 (quoting *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). Plaintiffs haven't explained why affording pregnant women an opportunity to see an ultrasound and listen to the heart tone of their unborn children causes abortion providers any injury at all. There's no right to an abortion free from reasonable regulation, much less some prerogative to assert that unqualified right on behalf of others. And as noted above, Plaintiffs' "close "relation" to pregnant women is undermined by their financial stake in performing as many abortions as possible. Plus, where a party attempts to assert the rights of "as-yet unknown clients allegedly affected by [a statutory scheme]," the Supreme Court has held that no close relationship exists—and there is no standing. *Id.* (citing *Kowalski*, 543 U.S. at 130–31). HB 140 doesn't require any woman to view an active ultrasound or listen to her baby's fetal heart tone; it simply requires that they be given those opportunities. This bill doesn't diminish a woman's right to an abortion at all.

Plaintiffs don't like HB 140 because they think some pregnant women may choose to see an ultrasound or hear their child's fetal heartbeat and then decline to have an abortion. But it would strain credulity to allow abortion providers to pursue in court, on behalf of women, the goal of keeping women in the dark. This Court should follow *Kowalski*'s straightforward application here. Plaintiffs cannot obtain an injunction of HB 140 because they lack standing to challenge it.

2. Plaintiffs fail to show a likelihood of success on the merits.

Second, these Plaintiffs are hopelessly conflicted because they have pecuniary interests in maximizing the number of abortions they commit. So allowing them to proceed under the banner of women's medical rights when challenging statutes that unquestionably raise the standard of care for women should arouse suspicion.

To obtain a preliminary injunction, Plaintiffs "must establish a prima facie case of a violation of [their constitutional] rights." *City of Billings v. Cnty. Water Dist.*, 281 Mont. 219, 227, 935 P.2d 246, 251 (1997). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence and information." *Prima facie*, Black's Law Dictionary (10th ed. 2014). At first glance, the challenged health-and-safety laws are rationally related to "a legitimate governmental objective" of protecting maternal health, protecting unborn life, and protecting the integrity of medical practice. *See Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 30, 402 Mont. 277, 477 P.3d 1065. While Plaintiffs clearly establish that they don't like these laws, they haven't made anything approaching a prima facie case that they violate anyone's constitutional rights.

Plaintiffs seek to vindicate a constitutional right that has never existed: an ability to perform abortion on demand, free from reasonable health-and-safety regulations. Although claiming to assert "fundamental rights under the Montana Constitution," Compl. ¶ 26, there is no "due process, equal protection, and free speech" right, Compl. ¶ 28, to perform unregulated, unrestricted abortions. "[N]ot every restriction on medical care impermissibly infringes that right." *Weems*, ¶ 19. Nor is there any irreparable injury when laws require abortionists to take commonsense health-and-safety precautions. These laws are clearly constitutional.

A. The chemical abortion informed-consent provision (HB 171) protects patient safety.

What Plaintiffs complain about in HB 171 is at first glance constitutionally permissible and good policy. HB 171 establishes a protocol for obtaining informed consent 24 hours before chemical abortions drugs are administered. Plaintiffs claim the protocol includes a patient ultrasound and blood work, the results of which are provided to the physician.[4] That's important because those data confirm the

[4] Plaintiffs mischaracterize HB 171's requirements in an effort to make it seem more burdensome, claiming it requires an in-person examination and ultrasound 24 hours prior to the first abortion drug. But HB 171 does not clearly require either of those, and would be permissible even if it did. *See infra* Section IV.

existence and placement of the pregnancy before chemical abortion drugs are administered, information critical to avoiding documented risks like hemorrhage or death from ectopic pregnancy. Skop Decl. ¶ 55. On its face, the medical information Plaintiffs seek to keep from the hands of women and physicians is highly relevant to the procedure—the very definition of proper informed-consent information. That the informed-consent information is provided a mere 24 hours before the procedure is so reasonable and commonplace that it is the law in a majority of states.[5] *See also Casey*, 505 U.S. at 881–83 (upholding 24-hour informed-consent period).

To be clear, there is no right administer chemical abortion drugs—or to perform any other significant medical treatments—without first examining the patient and obtaining proper informed consent. Nor can a patient—in any context—waive informed consent to a medical treatment because it supposedly violates her privacy, dignity, happiness, or other rights. And that's no surprise: failure to obtain informed consent to a medical procedure is grounds for a medical malpractice lawsuit. *See DeMoney v. Kaufman*, No. DA 18-0295, 2019 MT 195N*, 2019 Mont. LEXIS 316 (Aug. 13, 2019) (tonsillectomy); *Howard*, 2019 MT 244 (spinal fusion). In HB 171, like other informed-consent laws, the State has determined that specific informed consent is required to protect patients' welfare and the medical profession's integrity. *See, e.g.*, MCA § 37–3–333 (breast cancer treatment); *id.* § 50–12–105 (certain treatments of terminal or chronic illness).

A "two-trip" process, moreover, has never been considered an unconstitutional obstacle to exercising the right to abortion. *See Casey*, 505 U.S. at 886 (affirming abortion law that would require "at least two visits to the doctor"). Nor is the in-person visit requirement unusual before prescribing medication with potentially severe complications risks. *See e.g.*, MAR 24.156.813(4) (An in-person visit is required prior to prescribing a Schedule II drug via telemedicine).[6] Nor is it a constitutional

[5] https://www.wholewomanshealth.com/abortion-waiting-periods/.
[6] *See also* Bozeman Health COVID-19 Information, *Safety Precautions* (last accessed Sept. 6, 2021), bit.ly/3l0FCOM (requiring in-person COVID-19 testing 48 hours prior to surgeries/procedures).

injury to be "forced to drive at least one to two hours each way" to obtain an abortion. *See* Compl. ¶ 56. More than 8000 medical providers in Montana are eligible to perform abortions. Riskin Decl. ¶ 3 & Ex. A. Abortion clinics are located in several Montana cities. Koch Decl. ¶ 4.c. Plaintiffs' failure to recruit abortion providers in more locations or set up operations in more remote areas is not the State's fault; and it's certainly no reason to mandate decreased protections for women by permitting unregulated chemical abortions. Skop Decl. ¶ 59.

Weaker still is Plaintiffs' claim that it is unconstitutional to require an abortion provider to make "reasonable efforts" to ensure a follow-up visit with the patient after a procedure that has a known risk of failure (thus requiring either surgical abortion, additional abortion drugs, or continued prenatal care) and ectopic pregnancy (thus requiring emergency surgery to avoid maternal death). Mulcaire-Jones Decl. ¶¶ 14-15, 80. So too with their attack on the requirement that physicians performing chemical abortions be "credentialed and competent" to manage foreseeable complications that can result. *Id.* And there's no basis for the argument that abortionists should be relieved from reporting requirements that are standard in the health care industry. It's remarkable to argue seriously—as Plaintiffs do—that the way to defend women's rights is to deprive them of these very basic health protections.

B. The 20-week limit (HB 136) protects women from risky late-term abortions and helps minimize fetal pain.

Several states limit late-term abortions past the 20-week mark.[7] Plaintiffs' complaint that HB 136 "unlawfully singles out women seeking abortions and abortion providers" is hyperbolic. This is a law aimed at protecting women's health and fetal life, both of which the State may vigorously purse. Montana law contains many provisions unique to abortion, which itself "is a unique act." *Casey*, 505 U.S. at 852; MCA

[7] Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and Wisconsin limit abortion at 22 weeks; Mississippi at 20-weeks; and Florida, Nevada, Massachusetts, and Pennsylvania at 24 weeks. https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions

§ 50-20-105 (requiring "humane disposition" of fetal remains after abortion); *id*. § 50-20-108 (required care for infants born alive during abortion); *Id*. § 50-20-111 (conscience protections for healthcare providers with moral objections to abortion).

Nothing in Article II, section 4 of the Montana Constitution guarantees the right to abortion on demand throughout pregnancy. Indeed, the right "to make personal judgments affecting one's own health and bodily integrity without government interference" has *never* meant that medical procedures should be unregulated or that there may be no limitations on when, where, and how abortions are performed.

Nor does Article II, section 4's equal protection guarantee prevent the unique act of late-term abortion—which intentionally ends a human life and carries known, significant health risks—from being subject to reasonable regulations. Plaintiffs' claim that HB 136 unlawfully "targets abortion beginning at 20 weeks LMP, but not abortion before 20 weeks LMP, in violation of the equal protection guarantee," Compl. ¶ 71, has no basis in law and can be rejected on its face because Montana law has never required that every abortion procedure sought—regardless of stage of pregnancy, age of the mother, or method of abortion—must be treated identically.[8]

Plaintiffs' vagueness attack on HB 136's exceptions likewise fails because laws with the same medical exceptions, *Casey*, 505 U.S. at 880, or even without health exceptions, *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007), have been repeatedly upheld by the U.S. Supreme Court. Additionally, the U.S. Supreme Court has held that the proper way to challenge a health exception in an abortion law is through an as-applied challenge, and not as a facial vagueness matter. *Gonzales*, 550 U.S. at 167 ("[T]hese facial attacks should not have been entertained in the first instance. In these circumstances, the proper means to consider exceptions is by as-applied challenge."). This is because "[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id*. But Plaintiffs are attempting to facially challenge exactly that: a health exception based on medical

[8] Except, of course, for decades prior to *Roe*, when Montana ensured that life was fully protected by making *all* elective abortions illegal. MCA §§ 94-401, 94-402.

risk—specifically, what constitutes a "serious risk of substantial and irreversible physical impairment of a major bodily function," Compl. ¶ 72.a., and whether an abortion is "necessitated," Compl. ¶ 72.b., in the case of any (unidentified) particular woman's circumstances.

Plaintiffs further claim the 20-week limit must be supported by a compelling state interest. But that is the wrong standard for reviewing health-and-safety regulations, which are not subjected to strict scrutiny. Plaintiffs can't pull extraordinary injunctive relief out of a hat by accusing the State of failing to meet the wrong burden.

And while Plaintiffs report that they perform abortions up to 21.6 weeks, they have not even attempted to superficially claim that women routinely seek abortions after the 20-week mark.[9] In fact, PPMT's overwhelming proportion of chemical abortions (prior to 11 weeks), Compl. ¶¶ 54–55, indicates that very few Montana women, if any, are seeking abortions as late as in their sixth month of pregnancy. Only 4% of abortions take place at or after 16 weeks. Skop Decl. ¶ 45. Stating that they "would" perform abortions up to 21.6 weeks, Compl. ¶ 20, without the barest support suggesting that women are seeking abortions from them post-20 weeks, is not enough to state a prima facie claim for irreparable injury warranting a preliminary injunction.

But even if some women sought abortions after 20 weeks LMP, HB 136 would be a reasonable and constitutional regulation. The law advances Montana's important interest in limiting pain and suffering experienced by unborn children during such procedures. *See Casey*, 505 U.S. at 873 (important government interest in "protecting the life of the unborn"); *Gonzales*, 550 U.S. at 158 (and protecting the medical profession's integrity by "promot[ing] respect for life, including life of the unborn").

Montana's interest in unborn life must be "measure[d]" "in 'the light of present medical knowledge.'" *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976) (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)). States are permitted to exercise "legislative judgment," *Doe v. Bolton*, 410 U.S. 179, 190 (1973), based on "advancing

[9] *See* Koch Decl. ¶ 4(b). Only 0.5% of induced abortions between 2016–2021 occurred at or after 21 weeks of gestational age.

medical knowledge," *Roe*, 410 U.S. at 116. And that's exactly what Montana did. Present medical knowledge establishes that, among many important developmental milestones at 20 weeks, an unborn child of this age not only feels pain, but has an "increased sensitivity" to it. Pierucci Decl. ¶¶ 7, 43-44.

The majority of abortion procedures performed in the second trimester are dismemberment (or "D&E") procedures using surgical instruments to crush and tear the unborn child apart before removing pieces of the dead child from the womb. Skop Decl. ¶11. These procedures unquestionably inflict pain on the fetal persons. And such a brutal procedure obviously "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician." *See, e.g.*, S.3 (Partial Birth Abortion Ban Act of 2003), 108th Cong., §§2(J) and 2(K).

Montana "has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment [or "D&E"] abortions." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018). This of course includes preventing the pain felt by unborn children during these procedures.

A 20-week limit makes eminent sense when considering the concept of "viability," because babies in the U.S. at 22-23 weeks usually survive when provided good medical care, Pierucci Decl. ¶ 6, with some even surviving at 21 weeks. Mulcaire-Jones Decl. ¶60.[10] With advancements in science and medical technology, viability is trending ever earlier. When *Roe* was decided, viability was "usually placed at about seven months (28 weeks)." 410 U.S. 113, 160. By the time of *Casey*, it was "at 23 to 24 weeks." 505 U.S. at 860. Now, 30 years later, it is unquestionably earlier, and the U.S. Supreme Court is reconsidering whether the vague notion of "viability"—which changes from pregnancy to pregnancy based on countless factors—should matter in a constitutional analysis at all. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392,

[10] And because ultrasounds can have a 1-2 week margin of error, some babies identified as 20 weeks gestation may actually be older. Skop Decl. ¶ 34.

2021 WL 1951792 (S. Ct. May 17, 2021). Montana may permissibly protect its important interests in the life of its preborn citizens who are on the cusp of birth. *Cf.* MCA § 45-5-116 (criminalizing fetal homicide after 8 weeks gestation).

C. The ultrasound offer (HB 140) ensures that a woman has the right to see and hear her own child before deciding.

At first (or second) glance, the assertion that a woman being offered the opportunity—which she is free to decline—to view her ultrasound before making a final determination about her pregnancy is plainly not an infringement of a constitutional abortion right. Rather, the ultrasound offer empowers woman to more fully understand the nature of the procedure, which will terminate the life of a human person: her own child. Skop Decl. ¶¶ 81, 86. A woman has a right to know what is happening inside her.[11]

Such regulations are commonplace: 21 states currently require that a woman be shown, or at least offered, an ultrasound image before undergoing an abortion.[12] As a prima facie matter, the mere *offer* of information central to a momentous medical decision does not violate any fundamental right protected by the Montana Constitution. To the contrary, it enhances individual dignity, health, safety, and happiness, by empowering a woman with information. Enjoining HB 140 would require a finding that offering this additional information to women would cause them irreparable harm. Plaintiffs may not make women's decisions for them by hiding important information. *EMW Women's Surgical Ctr.*, 920 F.3d at 427–29 (upholding informed-consent requirement to display and describe ultrasound results to pregnant woman, as truthful, nonmisleading, and relevant to the abortion procedure).

Nor, of course, is the requirement to offer critical information a prima facie infringement on Plaintiffs' ability to practice medicine, which is validly subject to regulations that advance the standard of medical care. *See, e.g., Casey*, 505 U.S. at 884 (rejecting abortionists' First Amendment challenge to informed consent and

[11] *See also Id.* § 50-20-302.

[12] https://www.guttmacher.org/state-policy/explore/requirements-ultrasound

finding "no constitutional infirmity in the requirement that the physician provide the information mandated by the State here").

3. To minimize harm, denial of the preliminary injunction is required, so that health-and-safety protections may go into effect.

A preliminary injunction is only warranted when necessary to minimize harm to all parties. *Davis*, ¶ 24. Here, a preliminary injunction would harm unborn babies, pregnant women, and the public at large. Plaintiffs' request must therefore fail because an injunction would (i) be adverse to the public interest, (ii) not prevent any irreparable injury, and (iii) cause a gross imbalance in the equities—each independent reasons to deny injunctive relief.

A. An injunction would undermine to the public interest.

The Legislature identified specific health dangers and harms that will be addressed by HBs 136, 171, and 140. As elected representatives of the people of Montana, the Legislature's judgment and duly enacted laws warrant deference. Plaintiffs who profit from expanding abortion may not ask this Court to strike down laws simply because they disagree with the legislature's "weighing of costs and benefits to public health." Compl. ¶ 80. The Legislature has determined that these laws advance better medical care by providing in-person pre-abortion examinations, more fulsome informed consent, and reducing medically risky and harmful late-term abortions. Enjoining—even temporarily—these laws would disserve the public interest.

Plaintiff PPMT reports that it performed nearly 1200 abortions last year. So each day that goes by without the new health-and-safety laws will see three to four women undergoing abortions there without the care the Legislature has now determined is prudent and reasonably necessary to promote public health and welfare. Each day without these laws could also result in the loss of three to four fetal lives, which perhaps would be preserved and spared excruciating pain and suffering.

B. Plaintiffs fail to identify any "irreparable injuries" that could warrant a preliminary injunction.

A claim of irreparable injury fails when the alleged injury is not an actual legal

entitlement. *Benefis Healthcare*, 2006 MT 254, ¶ 29 (affirming denial of preliminary injunction where there was no statutory basis for the alleged injured "right"); *See also Valley Christian Sch.*, 2004 MT 41, ¶ 11 (affirming denial of preliminary injunction where constitutional rights allegedly infringed were not, at first glance, harmed by the challenged regulation).

Plaintiffs don't identify specific rights they believe they are entitled to, beyond references to broad constitutional provisions. By Plaintiffs' logic, *any* restriction on abortion violates numerous constitutional rights. But that is legally. "[I]t does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right." *Wiser*, ¶ 15.

Plaintiffs also fail to allege constitutional harm because they are attempting to assert constitutional rights that aren't theirs. *See supra* Section I.1.

Moreover, Plaintiffs' claims of constitutional harm are on their face in error because they demand strict scrutiny for laws that are not subject to that level of constitutional review. When the State is exercising its plenary power to regulate health and safety—even though it "often implicates individual rights"—courts "do not utilize strict scrutiny review, requiring a compelling state interest." *Wiser*, ¶19. Plaintiffs repeatedly demand that these health-and-safety laws be supported by "compelling interests," while ignoring the legitimate and important state interests supporting them. *E.g.*, MPI 6, 13, 17. But "the State need only demonstrate a rational basis for the regulation." *Wiser*, ¶ 19.

In addition, Plaintiffs allege purely speculative and hypothetical harms without even a pretense of factual support. *E.g.*, Compl. ¶ 148 (claiming that provider qualifications "may effectively ban the provision of some" chemical abortions because Plaintiffs find it "difficult to imagine a contract that could cover the potential universe of complications"); MPI 4 (claiming, without support, that HB 171 might "eliminate access" to chemical abortion in Montana); MPI 11 (claiming that a 24-hour period "could span weeks").

4. Plaintiffs' speculative, unsupported allegations do not establish a prima facie case and are rebutted by the State's evidence.

Plaintiffs' preliminary injunction evidence includes speculative assertions and unsupported testimony but few concrete facts. And Plaintiffs mischaracterize the requirements of the challenged statutes to make their burden easier. Even so, the State's evidence rebuts all the material facts asserted by Plaintiffs' witnesses. *See Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 20, 391 Mont. 120, 415 P.3d 986.

A. Evidence supports HB 171's reasonable informed consent and chemical abortion safety regulations.

Plaintiffs mischaracterize HB 171's requirements. Start with their contention that HB 171 effectively imposes a 24-hour waiting period on obtaining a chemical abortion because the medical professional providing the abortion must obtain informed consent, in person, the day before administering the drug. MPI 10 n.10. But the provider can obtain consent electronically the day before the appointment for the physical examination required by Sections 4 and 5. HB 171(7)(2).

And HB 171 doesn't require the medical practitioner providing the chemical abortion to be the practitioner obtaining informed consent. HB 171(5) only requires "the qualified practitioner providing an abortion-inducing drug" to examine the woman in person beforehand. There's no requirement that the *same* practitioner obtain consent. Instead, "a qualified medical practitioner" can take Section 7(3)'s required consent.[13] So Plaintiffs' purported concern that the process "could span weeks" because it is "unlikely" the same medical provider would be available to obtain consent and then conduct the physical exam 24 hours later arises from their own misreading of HB 171. MPI 10–11.[14]

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[13] Moreover, Plaintiffs cite no specific examples or evidence that pregnant women "cannot afford the time or expense to make multiple trips," merely speculating that it may be a problem because Montana is large and has a large rural population. MPI 10; Banks Aff. ¶¶ 24–27. But these issues are no different from healthcare in general, in Montana, which often requires travel and multiple visits as a matter of course. Mulcaire-Jones Decl. ¶¶ 65–67.

[14] Plaintiffs must do more than merely state this conclusory scheduling-problem argument; they must back it up with some documentation about patient load and appointment length. 8400 abortions have been performed in Montana in the past 5.5

They also misread the informed consent requirements in § 7(5)(a) as requiring an ultrasound before the abortion. That provision merely lists the requirements for the consent form, which must include "the probable gestational age of the unborn child as determined by both patient history and ultrasound results used to confirm gestational age." It does not require an ultrasound, only noting the results if one is administered. That must be so because Sections 4 and 5 of HB 171 list the steps a provider must follow to legally administer chemical abortion, and conducting an ultrasound is not one of them. *See Dukes v. City of Missoula*, 2005 MT 196, ¶ 14, 328 Mont. 155, 119 P.3d 61 ("Rather than restricting their scope to narrow clauses in a statutory scheme, courts will read the relevant statutes in their entireties; this gives courts the tools by which to effect the will of the Legislature."); *see also* A. Scalia & B. Garner, Reading Law 167 (2012) ("the whole-text canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts").

Of course, medical practitioners can and should provide an ultrasound before administering chemical abortion because it is the best method to assess gestational age, rule out ectopic pregnancy, determine fetal life, and ensure informed consent. Skop Decl. ¶¶ 82–86; Mulcaire-Jones Decl. ¶¶ 11–13; 72–75; 94–98. Plaintiffs' testimony to the contrary is unpersuasive, using qualifying words like "often medically unnecessary"; and the only study cited says ultrasounds are "usually unnecessary." MPI 10 n.10 (citing McNicholas Decl. ¶¶ 51–52).

Plaintiffs' evidence also fails to establish that HB 171's informed-consent disclosures are inaccurate. MPI 11–12. Dr. Banks cites no studies for her testimony that information about abortion-pill reversal (APR), the possible need for Rh immunoglobulin, and breast cancer risk is false. Banks Aff. ¶¶ 29–32. And she concedes there is a danger of Rh incompatibility "which may cause complications in subsequent pregnancies," *Id*. ¶ 33, but cites no evidence for her opinion that the risk is very low

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years, which works out to 4–5 abortions per day statewide. Koch Decl. ¶ 4. Surely this permits time for Plaintiffs to administer informed consent as required. And if the backlog is truly "weeks" to see a qualified provider, one wonders about Plaintiffs' business inefficiencies and priorities.

under 8 weeks gestation. Dr. McNicholas testifies only that she isn't "aware" of evidence that APR is possible, McNicholas Aff. ¶¶ 57–58, citing an ACOG practice bulletin, and mischaracterizing a partial study which indicated that chemical abortion drugs are dangerous, not that administration of progesterone is. Skop Decl. ¶ 71.

There is abundant evidence that APR works, the risk of breast cancer increases for women who don't have children, and Rh immunoglobulin is necessary for a significant percentage of pregnant women. Skop Decl. ¶¶ 56, 64–69,74-76. Knowledge of this information is therefore vital to informed consent.

Plaintiffs also mischaracterize HB 171's provider competency provisions, claiming they are impossible to comply with. MPI 12. But HB 171(5)(2) reasonably requires chemical abortion providers to "be credentialed and competent to handle complications management, including emergency transfer, or must have a signed contract with an associated medical practitioner who is." "Complications management," and "complications" are not defined, but they need not be. A reasonable reading requires the provider to be able to treat or refer for treatment patients experiencing complications *while* the drugs are terminating their pregnancies and immediately afterward. Mulcaire-Jones Decl. ¶¶ 79–83. HB 171's definition of "complication" in Section 3(5) applies only to Section 7(5)(e)'s required consent form that must contain "a description of the risks of complication from a chemical abortion, including incomplete abortion, which increase with advancing gestational age." The "complication" definition includes long term effects like "coma placenta previa in subsequent pregnancies," and "preterm delivery in subsequent pregnancies." It makes no sense to apply Section 3(5)'s "complication" definition to the "complications management" requirement and a reasonable reading of the statute does not do so. Mulcaire-Jones Decl. ¶¶ 78–80. Especially when the very next subsection requires efforts for a follow-up appointment, logically referring only to the near and short-term future.

Finally, Plaintiffs speculate that HB 171's reporting requirements "could" expose patient personal information, and "may" chill women's willingness to have abortions or providers' willingness to administer them. MPI 12–13. They don't indicate that they will stop performing abortions, they cite no statistics or other specific

evidence about how the reporting requirement will chill women's abortion decisions, and they outright ignore HB 171's provisions prohibiting the reporting of any "information or identifiers that would make it possible to identify, in any manner or under any circumstances, a pregnant woman who has obtained or seeks to obtain a chemical abortion." HB 171(9)(3). They also overlook HB 171's prohibition on using these reports to identify women obtaining abortions. *Id*. at (9) & (10).[15]

HB 171's required reports will provide accurate, currently unavailable information that will help the State mitigate the risks that chemical abortions pose to women. Skop Decl. ¶¶ 50, 80; Mulcaire-Jones Decl. ¶ 21. Plaintiffs' unfounded fears about informational misuse are undercut by the statutory text and experience.

B. Plaintiffs' HB 136 arguments cite outdated studies and ignore the law's allowance of reasonable medical judgment.

The testimony of Dr. Pierucci, a neonatologist that supervises a 50-bed NICU, confirms that unborn babies at 20 weeks gestation can experience pain. Pierucci Decl. ¶7. Dr. Pierucci cites many recent studies confirming this and establishes the irrelevancy of the outdated studies Plaintiffs' expert relies on to claim a fetus cannot feel pain until 24 weeks (McNicholas Aff. ¶¶ 37–38). Pierucci Decl. ¶¶ 21–33.

The statutory text also belies Plaintiffs' claim that they do not know what HB 136's health exceptions mean. MPI 7. Abortion providers must exercise "reasonable medical judgment" as defined in HB 136(2)(8). Mulcaire-Jones Decl. ¶¶ 63–64. Plaintiffs effectively concede that this eliminates any alleged confusion by (perhaps mistakenly) arguing that the health exceptions do not allow the use of "appropriate medical judgment." MPI 8 n. 8.

C. Evidence shows that the opportunity to view an ultrasound before abortion helps women make an informed choice and avoid debilitating regret and guilt.

Women need as much information as possible to make an informed choice about abortion. Ultrasounds provide vital information to women seeking to

[15] Plaintiffs also fail to explain how the new reporting requirements create particularized fears that the existing reporting requirements did not.

understand their pregnancies, their children's development, and abortion's consequences. Having an ultrasound may influence a mother's decision, and it may help prevent the later guilt and regret that often arise when a woman learns the stage of the fetus's development at the time of abortion. Skop Decl. ¶86. Plaintiffs present no concrete facts, statistics, or studies supporting their speculation that pre-abortion ultrasound "serves only to stigmatize patients," or that requiring women to sign a form stating they declined the opportunity "may" further stigmatize and discourage them from seeking medical care. MPI 17 (citing Banks ¶¶ 51–52).

But they must do more to obtain a preliminary injunction. The relief they request is extraordinary, and the Court should grant it only if they make the requisite showing. After 20 pages, Plaintiffs have demonstrated only that they dislike HB 136, HB 140, and HB 171 because those laws dare to raise the standard of medical care and provide more important information to pregnant women. They are not likely to succeed, the laws will not cause any—much less irreparable—harm, and the public interest overwhelmingly favors putting women and pain capable preborn persons first, not abortion providers.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Preliminary Injunction.

DATED this 7th day of September, 2021.

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Date: September 7, 2021

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