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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA and JOEY BANKS, M.D., on behalf of themselves and their patients,	)	Cause No.: DV 21-00999
	)	Judge: Jessica T Fehr
Plaintiffs,	)	
vs.	)	**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
STATE OF MONTANA, by and through Austin Knudsen, in his official capacity as Attorney General,	)	
Defendant.	)	

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INTRODUCTION

Plaintiffs seek a preliminary injunction to prevent three unconstitutional laws from taking effect during the pendency of this litigation. For the reasons explained below, Plaintiffs establish a prima facie case that these laws violate the Montana Constitution. And absent a preliminary injunction, Plaintiffs and their patients face immediate, irreparable harm, including the threat of criminal prosecution, substantial civil penalties, and dramatic and irreversible health consequences.

The relief sought straightforwardly follows from the Montana Supreme Court's decision, more than two decades ago, that the right to privacy in "Article II, Section 10 of the Montana Constitution broadly 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 government interference." *Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370. That provision "protects a woman's right of procreative autonomy," including "the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Id.*

Despite this unequivocal constitutional protection, the State Legislature now aims to upend years of settled precedent through a multifront offensive against reproductive health care. The three laws from which Plaintiffs request preliminary relief—House Bills 136, 171, and 140—clearly violate *Armstrong* and numerous protections secured by the Montana Constitution. Among other things, these laws ban abortion at a pre-viable gestational age; impose drastic and unwarranted restrictions on access to medication abortion, including by imposing a 24-hour mandatory delay, requiring patients make at least two trips to the health center to see the same provider, and effectively banning medication abortion provided through telehealth; require health care providers to give medically inaccurate information to patients; and stigmatize those patients able to access abortion under this restrictive regime for their decision. Working together, the laws take aim at the full scope of abortion care the Montana Constitution guarantees—creating obstacles that operate to push women seeking abortion later into pregnancy and then cutting off access to abortion at an earlier gestational age. They also threaten Montana health care providers with severe

criminal sanctions and other penalties for providing women[1] with access to constitutionally guaranteed health care, in a blatant attempt to make lawful reproductive care inaccessible and to intimidate providers into no longer providing that care.

Worse, the legislators who drafted these laws knew that the laws would violate the Montana Constitution. Their *own lawyers* told them that enacting such restrictions on abortion ran headlong into "Montana's unique constitutional guarantee of the right to privacy" and "raises potential conformity issues with the requirements of the ... Montana Constitution." *See* Legal Review Note, House Bill 171 (Jan. 15, 2021); *see also* Legal Review Note, House Bill 136 (Dec. 31, 2020).

The challenged laws also trample on the Montana Constitution's guarantees of due process, equal protection, individual dignity, freedom of speech, and the right to seek safety, health, and happiness. To remedy these constitutional violations, Planned Parenthood of Montana and one of its healthcare providers, Dr. Joey Banks, move to preliminarily enjoin the State of Montana, by and through Attorney General Austin Knudsen, from enforcing these laws before they take effect on October 1, 2021. Absent an injunction, women in Montana will be irreparably harmed by being denied constitutionally protected abortion care, and Plaintiffs will be irreparably injured by the State's intrusion into the provider-patient relationship. This Court should, accordingly, grant Plaintiffs' motion.

STATEMENT OF FACTS

A. Plaintiffs Have Long Served The Community

Planned Parenthood of Montana, Inc. ("PPMT") is a non-profit Montana corporation that for decades has served as the largest provider of reproductive health care services to Montana residents, especially low-income Montanans. *See* Compl. ¶¶ 16-18; Stahl Aff. ¶ 5. PPMT operates five health centers staffed with experienced clinicians, who conduct both in-person and telehealth visits. *See* Stahl Aff. ¶¶ 4-6. Abortions are provided at each of PPMT's health centers, either through medication abortion ("MAB") (up to 11 weeks from the first date of a patient's last menstrual period ("LMP")) or procedural abortion (up to 21.6 weeks LMP). *See* Compl. ¶¶ 52-53, 57; Stahl Aff. ¶ 7. PPMT offers MABs to patients in three separate ways: (1) an in-person visit to a health center; (2) site-to-site telehealth, in which a patient at a health center meets by video

[1] Plaintiffs use "women" as shorthand for people who are or may become pregnant, but people of other gender identities, including transgender men and gender-diverse individuals, may also become pregnant, seek abortion services, and be harmed by the challenged laws.

with a provider located at another health center; and (3) direct-to-patient telehealth, in which a patient connects over video with a provider from wherever she is located and then, if eligible, is mailed the required medications to a Montana address. Compl. ¶¶ 48-50. Procedural abortions and MABs are both common, safe procedures. Compl. ¶¶ 29-32. Nationwide, one in five pregnancies ends in abortion. Compl. ¶ 29. About one in four American women will have an abortion by the time she reaches age 45. *Id.* Complications from both medication and procedural abortion are extremely rare. Compl. ¶ 32. When complications do occur, they can usually be managed in an outpatient setting, either at the time of the abortion or in a follow-up visit. *Id.*

Dr. Joey Banks provides abortion care through PPMT that would be prohibited by the challenged laws. Dr. Banks is trained and licensed to provide both procedural and medication abortions, and performs procedural abortions in Montana up to 21.6 weeks LMP. Compl. ¶ 19; Banks Aff. ¶ 8. She prescribes the drugs needed for MABs to patients throughout Montana, including through both site-to-site and direct-to-patient telehealth, and may decide (based on medical judgments about her patients' needs) not to offer a patient the opportunity to view and listen to active fetal ultrasounds. *See* Compl. ¶¶ 19, 183; Banks Aff. ¶¶ 50-53. But for the abortion restrictions challenged here, PPMT's and Dr. Banks's patients would continue to obtain, when medically appropriate, pre-viability procedural abortions at or beyond 20 weeks LMP. Likewise, those patients would continue to obtain MABs through site-to-site and direct-to-patient telemedicine when medically appropriate. And PPMT providers would continue to rely on their medical judgment when counseling patients, including in deciding whether to tell patients they may view active and still fetal ultrasounds, and listen to any accompanying audio.

B. The Challenged Laws Interfere With The Provider-Patient Relationship

1. *HB 136*

In direct contravention of *Armstrong*, House Bill 136 ("HB 136") prohibits abortions at or after 20 weeks gestation—prior to fetal viability—absent very narrow (and vague) exceptions.[2] Violations carry extreme criminal consequences. *See* HB 136, § 4; Compl. ¶ 64.

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[2] Specifically, HB 136 prohibits performing or attempting to perform "an abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious health risk to the ... mother" or due to a medical emergency. *See* HB 136 § 3. By defining a fetus as "capable of feeling pain" at 20 weeks LMP, HB 136 effectively prohibits abortions beginning at 20 weeks LMP, which is pre-viability. *See* McNicholas Aff. ¶¶ 33-35.

2. *HB 171*

House Bill 171 ("HB 171") limits women's ability to access abortion care early in their pregnancy by imposing numerous burdensome and medically inappropriate restrictions on MABs. As described in detail below and in accompanying Affidavits, HB 171 imposes a mandatory 24-hour delay on MABs; requires multiple, unnecessary in-person visits with the same provider; prohibits the provision of medication abortion through telehealth and by mail; subjects providers to unnecessary and onerous qualification requirements; and compels providers to give their patients inaccurate, misleading information that a medication abortion can be "reversed" under the guise of "informed consent" (among other things). *See* HB 171. Taken together, HB 171 would severely restrict if not eliminate access to MAB, which comprised 75% of the abortions PPMT performed in FY2021, and prohibit all site-to-site and direct-to-patient MABs. *See, e.g.*, Stahl Aff. ¶¶ 10, 17-26.[3]

3. *HB 140*

House Bill 140 ("HB 140"), with limited exceptions,[4] requires "a person performing an abortion on a pregnant woman" to tell the woman that she may view "an active ultrasound" and "an ultrasound image," and "listen to the fetal heart tone," then requires the patient to sign a State-created form indicating whether she chose to view or listen to fetal activity. *See* HB 140 § 1(1). The law thus forces providers to provide care according to the specifications set forth in the law, irrespective of the provider's medical judgment regarding the appropriateness of these offers, and stigmatizes abortions. Violations carry substantial civil penalties. *See id.* at § 1(5).

LEGAL STANDARD

A preliminary injunction should issue when any one of the grounds enumerated in § 27-19-201, MCA is met. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 17, 395 Mont. 350, 358, 440 P.3d 4, 10; *Stark v. Borner* (1987), 226 Mont. 356, 359, 735 P.2d 314, 316. Two grounds are relevant here.

First, a preliminary injunction is warranted when an applicant is "entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or

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[3] FY 2021 for PPMT was July 1, 2020 through June 30, 2021.

[4] The law excepts abortions performed with the intent to: (a) save the life of the woman; (b) ameliorate a serious risk of causing the woman substantial and irreversible impairment of a bodily function; or (c) remove an ectopic pregnancy.

continuance of the act complained of, either for a limited period or perpetually." § 27-19-201(1), MCA. In the context of constitutional challenge, an applicant need only establish a prima facie case of a violation of her rights; indeed, "the trial court should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had." *Weems*, ¶ 18 (internal quote omitted).

Second, an injunction is warranted when "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." § 27-19-201(2), MCA. "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 414, 473 P.3d 386, 392; *see also Weems*, ¶ 25.

ARGUMENT

I. The Challenged Laws Are Unconstitutional

The challenged laws violate fundamental rights of Plaintiffs and their patients under the Montana Constitution. As explained below, HB 136, HB 171, and HB 140 infringe the right to privacy, right to individual dignity, right to seek safety, health, and happiness, and right to equal protection. Additionally, HB 136 and HB 171 violate the due process clause, and HB 171 and 140 violate the right to free speech. Because Plaintiffs have made the necessary prima facie showing of a constitutional violation, a preliminary injunction should issue.

A. HB 136 Violates Numerous Provisions Of The Montana Constitution

HB 136's criminalization of certain pre-viability abortions (1) infringes on the right to privacy and is not narrowly tailored to serve a compelling state interest; (2) is unconstitutionally vague; (3) violates Montanans' right to seek safety, health, and happiness by restricting access to a lawful medical procedure; and (4) violates the Montana Constitution's equal protection clause.[5]

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[5] As explained in the Complaint, HB 136's targeted attack on women's access to abortion also violates the Montana Constitution's guarantee of individual dignity. Compl. ¶ 70; *see also Armstrong*, ¶ 72 ("Respect for the dignity of each individual—a fundamental right, protected by Article II, Section 4 of the Montana Constitution—demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions."). The statute should also be enjoined on this ground.

1. *HB 136 Violates The Right To Privacy*

HB 136 cannot be reconciled with the Montana Constitution's right to privacy. *Armstrong*, ¶ 62. Because HB 136 prohibits certain pre-viability abortions, *supra*, at 3, "Montana's constitutional right to privacy is implicated," *Weems*, ¶ 19. The State must therefore demonstrate that the restriction is narrowly tailored to serve a compelling interest—meaning the law must be necessary "to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 59. "Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state." *Id.*

Armstrong plainly controls here. In that case, the Montana Supreme Court held that the State may not ban pre-viability abortions. *See Armstrong*, ¶ 49 (holding that the "right of procreative autonomy" in the Montana Constitution contains within it "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"); *see also id.* ("[T]he State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term."). In fact, the State's lawyers told them as much. *Supra*, at 2.[6]

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[6] The legislature's decision to ignore HB 136's constitutional infirmities is all the more glaring given that every federal appellate court faced with a pre-viability abortion ban (including ones with exceptions like those at issue here) has held it unconstitutional—despite applying the less protective standard set forth in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). *See, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019) (striking down 15-week ban with exceptions), *cert. granted in part sub nom. Dobbs v. Jackson Women's Health*, No. 19-1392, 2021 WL 1951792 (May 17, 2021); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) (striking down 6-week ban with exceptions); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down 6-week ban with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (striking down 12-week ban with exceptions), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013) (striking down 20-week ban, with exceptions), *cert. denied*, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996) (striking down 22-week ban with exceptions), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-69 (9th Cir.

But even if this Court were to consider the purported justifications for HB 136, the law is not necessary "to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 59. While the State attempts to justify the 20-week ban based on the need to avoid "fetal pain," there is widespread medical consensus that fetal pain is not possible before at least 24 weeks LMP. *See* McNicholas Aff. ¶¶ 37-38. Because HB 136 is not rooted in "bona fide" medical or scientific evidence, it is not narrowly tailored to any compelling state interest, and so violates Article II, Section 10 of the Montana Constitution.

2. *HB 136 Is Unconstitutionally Vague*

Although the Court need look no further than *Armstrong* to enjoin HB 136, the 20-week ban should be enjoined for the independent reason that it fails to give sufficient notice of the conduct the law purports to make a felony.[7] To be sure, "[t]he Legislature is not required to define every term it employs when constructing a statute." *State v. Martel* (1995), 273 Mont. 143, 150, 902 P.2d 14, 18. But the due process clause "requires a criminal statute to define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," and "in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Samples*, 2008 MT 416, ¶ 16, 347 Mont. 292, 295, 198 P.3d 803, 806 (internal citations omitted). Plaintiffs have made a prima facie showing that HB 136 cannot meet this standard, because it "require[s healthcare providers] to speculate as to whether [their] contemplated course of action may be subject to criminal penalties," *City of Billings v. Albert*, 2009 MT 63, ¶ 16, 349 Mont. 400, 402, 203 P.3d 828, 831, leaving Plaintiffs dependent on the whims of those charged with enforcing the law, *see Martel*, 273 Mont. at 148-150, 902 P.2d at 18.

The discretionary judgments HB 136 mandates—each of which may well differ as between reasonable health care providers—simply do not provide the notice that the Montana Constitution requires, especially where a felony prosecution is at stake. Take the exception for a woman's

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1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630 (M.D.N.C. 2019) (striking down 20-week ban with exceptions), *affirmed on other grounds*, 1 F.4th 280, 284 (4th Cir. 2021), *as amended* (June 23, 2021). If these pre-viability laws could not be justified under the federal undue burden standard, HB 136 certainly fails the more rights-protective test set forth in *Armstrong*.

[7] HB 136 provides that "[a] person who purposely or knowingly performs or attempts to perform an abortion in violation of [this law] is guilty of a felony." HB 136 § 4.

health. *See* Banks Aff. ¶¶ 13-14. Whether a situation "*so complicates* the mother's medical condition that it *necessitates* the abortion" is inherently ambiguous, subjective, and subject to different (yet reasonable) opinions. *See id.* ¶¶ 14-15. So too for the determination of what procedures "in reasonable medical judgment" would "provide[] the best opportunity" for the *pre-viability* fetus to survive, and when the failure to provide an abortion would cause a "serious risk of substantial and irreversible physical impairment of a major bodily function." *See id.* ¶¶ 14, 17-18. To hinge criminal liability on such terms "not only permits, but requires the kind of arbitrary and discriminatory enforcement that the due process clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent." *State v. Stanko*, 1998 MT 321, ¶ 28, 292 Mont. 192, 974 P.2d 1132, 1136.

Stanko held that a similarly ambiguous statute was unconstitutionally vague. The phrase at issue read, in relevant part, "[a] person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed *no greater than is reasonable and proper* under the conditions existing." *Stanko*, ¶ 19 (emphasis added). The Court noted that whether an offense had occurred "will always be a question of judgment at the time based on the conditions at the time." *Id.*, ¶ 26. Just as in *Stanko*, HB 136 unconstitutionally leaves the determination of whether an abortion qualifies for the health exception as a "question of judgment" and does not comport with due process.[8]

3. *HB 136 Violates The Right To Seek Safety, Health, And Happiness*

Article II, Section 3 of the Montana Constitution protects the "inalienable right[]" to seek "safety, health and happiness in all lawful ways." *Armstrong*, ¶ 72. As the Montana Supreme

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[8] To the extent the bounds of the exceptions can be discerned at all, they are unconstitutionally narrow because they do not permit providers to use "appropriate medical judgment" in deciding when an abortion is necessary "for the preservation of the life or health of the mother." *See Stenberg v. Carhart*, 530 U.S. 914, 938 (2000); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (describing "medical judgment" as involving consideration "of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"). The definition of "serious health risk" to the pregnant woman, for example, does not allow abortions when necessary to avert death of the mother by suicide; treat serious but not immediately life-threatening health conditions; or address a severe fetal anomaly diagnosis. The same is true of the "medical emergency" exception. Beginning at 20 weeks LMP, a patient with a health-threatening medical condition may be prohibited from obtaining an abortion or have to delay the procedure until her condition worsens to the point where immediate action is necessary, and the abortion therefore meets the medical emergency exception's exacting requirements.

Court held in *Armstrong*, this provision protects the right "to make personal judgments affecting one's own health and bodily integrity without government interference" and "does not permit the government's infringement of personal and procreative autonomy in the name of political ideology." *Id.*, ¶¶ 72-73; *see also Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 23, 382 Mont. 256, 231, 368 P.3d 1131, 1166 ("In pursuing one's own health, an individual has a fundamental right to obtain and reject medical treatment."). Yet that is precisely what HB 136 seeks to do by taking away the right to pre-viability abortion guaranteed by the Montana Constitution. HB 136 thus violates Section 3 on the same basis that it violates the right to privacy.[9]

4. *HB 136 Violates The Equal Protection Clause*

Article II, Section 4 states that "[n]o person shall be denied the equal protection of the laws." This provision is more protective of individual rights than the Fourteenth Amendment. *See Cottrill v. Cottrill Sodding Serv.*, (1987) 229 Mont. 40, 42, 744 P.2d 895, 897. Strict scrutiny applies if the distinctions drawn by a law affect fundamental rights. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 450. Here, HB 136 unlawfully discriminates against women who choose to exercise their fundamental right to privacy by limiting access to constitutionally protected, pre-viability abortions, and particularly against women seeking abortions beginning at 20 weeks LMP. Further, the law discriminates against the providers who offer that constitutionally protected health care. For the reasons described above, this differential treatment cannot be justified by a compelling state interest. *See supra*, at 6-7; *see also Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *27 (1st Jud. Dist. May 19, 1995) (holding that a law violates the equal protection clause when "some women are excluded from benefits to which they are otherwise entitled solely because they seek to exercise [the] constitutional right" to an abortion).

B. HB 171 Is Unconstitutional

While HB 136 seeks to limit women's ability to exercise their right to an abortion *later* in pregnancy, HB 171 limits their ability to obtain an abortion *earlier* in pregnancy. Working together, the laws thus take aim at the full scope of abortion care the Montana Constitution

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[9] The other laws challenged here violate Section 3 for similar reasons. HB 140 inserts the State between women and their health care providers by elevating government-mandated shaming over medical judgments; and HB 171 greatly reduces access to (lawful) MABs. *See* Compl. ¶¶ 100, 125, 141-142, 154-160, 180-186.

guarantees—pushing women seeking abortion later into pregnancy and then cutting off access to abortion at an earlier gestational age. Yet even considered alone, HB 171 imposes a morass of medically unnecessary restrictions on MABs which, individually and collectively, limit women's ability to access abortions. It also violates the Montana Constitution's guarantees of privacy, due process, equal protection, and free speech, and should therefore be enjoined.

1. *HB 171 Violates Patients' Right To Privacy*

i. HB 171 Restricts Access To Lawful Abortions

As with HB 136, Plaintiffs have made a prima facie showing that HB 171 restricts women's right to pre-viability abortions in violation of the right to privacy. To start, Sections 5 and 7 infringe on patients' right to privacy by requiring that a provider conduct an extensive, in-person examination of the patient and obtain the patient's informed consent via a State-created form at least 24 hours before that same provider prescribes an MAB.[10] Section 10 then gives the State 60 days *after* HB 171's effective date to create and distribute the forms required by the law, which would appear to prevent providers from prescribing any MAB in Montana until the form is available. Because MAB is preferred by or medically indicated for some patients, this alone suffices to violate the right to privacy. Banks Aff. ¶ 23. But even after the State creates its mandatory forms, the consequences of these provisions for abortion access will be severe. Whereas some patients can currently have an MAB without traveling to a health center at all and others can do so by traveling to the health center closest to them, Sections 5 and 7 would require all patients to make *multiple* trips to a health center (which might be hundreds of miles away) over *multiple* days. *See* Banks Aff. ¶¶ 24-27.[11] Yet many patients who obtain MABs cannot afford the time and expense of travelling across a state as large as Montana to reach an abortion provider even once, much less two or more times. *See* Banks Aff. ¶ 25. Others face considerations like

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[10] Specifically, HB 171 provides that "[i]nformed consent to a chemical abortion must be obtained at least 24 hours before the abortion-inducing drug is provided to the pregnant woman" and, as part of that process, requires the patient to undergo an ultrasound. *See* HB 171 § 7(2), (5)(a). This ultrasound requirement independently violates the right to privacy because MABs can be safely provided without an ultrasound in certain circumstances, as PPMT's experience demonstrates. *See* McNicholas Aff. ¶¶ 51-52; Stahl Aff. ¶ 20. Requiring an ultrasound for every MAB thus interferes with the constitutional right to make health care decisions in consultation with a health care provider.

[11] Beyond functionally barring direct-to-patient MABs through the in-person examination requirements, HB 171 expressly prohibits the provision of abortion-inducing drugs via courier, delivery, or mail service. *See* HB 171 § 4.

intimate partner violence or mobility limitations that restrict their ability to do so. *See* Compl. ¶¶ 34, 37, 100. Further, given the scarcity of health centers and abortion providers, and the volume of patients seeking pre-viability abortions, it is unlikely an individual provider will be able to see the patient a second time 24 hours after "informed consent" is obtained, forcing patients to delay far longer than 24 hours. *See* Stahl Aff. ¶¶ 19-20. This additional delay, which could span weeks, may push patients past the timeframe for MAB. *See* Banks Aff. ¶ 26; *see also Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *10-11 (1st Jud. Dist., Mar. 12, 1999) (noting that the scarcity of abortion providers in Montana means that "a 24-hour delay may well mean a delay of one to two weeks"). These provisions impose a mandatory delay disguised as "informed consent," which, as another Montana district court recognized, violates the state Constitution's privacy guarantee. *See Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *22 (striking down a 24-hour mandatory delay law).

Sections 7(5)(f), (h), and (v) then infringe on the right to privacy by mandating that providers give their patients false information about "reversing" MABs. As numerous courts and trusted medical authorities like the American College of Obstetricians and Gynecologists and the National Academies of Science, Engineering, and Medicine have concluded, there is no evidence that MABs are reversible. *See* Banks Aff. ¶¶ 29-32; *see also Planned Parenthood of Tenn. & N. Miss. v. Slatery*, No. 3:20-CV-00740, 2021 WL 765606, at *14 (M.D. Tenn. Feb. 26, 2021) (describing information about possibility of abortion "reversal" as "untruthful and/or misleading"); *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1150 (D.N.D. 2019) ("[T]he 'abortion reversal' protocol is devoid of scientific support, misleading, and untrue."). Forcing providers to tell their patients false information about the possibility of reversal—and to direct them to a private website full of misinformation—distorts patient decisionmaking, risks patient safety, and undermines the informed consent process. Consistent with ethical informed consent practices, Plaintiffs counsel their patients that they must be firm in their decision to have an abortion before beginning an MAB. Banks Aff. ¶ 32. Sections 7(5)(f), (h), and (v) undermine this message, requiring Plaintiffs to simultaneously tell patients that the effects of MAB drugs can be reversed should the patient change her mind. This infringes on the right to privacy because, as *Armstrong* explained, a person makes medical decisions "largely upon her or his personal trust in the education, training, experience, advice, and professional integrity of the health care provider he or she has chosen." *Armstrong*, ¶ 58. The intimacy and necessity of that trust makes even more

serious "the infringement of personal autonomy and privacy that accompanies the government usurping, through laws or regulations which dictate how and by whom a specific medical procedure is to be performed, the patient's own informed health care decisions made in partnership with his or her chosen health care provider." *Id.*[12]

Section 5(2) also requires abortion providers to be "credentialed and competent to handle complications management," or have a contract with another practitioner credentialed to handle "complications." The law defines "complications" broadly, to include a plethora of conditions ranging from anxiety to sleep disorders to death. *See* HB 171 § 3(5); *see also* McNicholas Aff. ¶¶ 60-69. PPMT providers are, of course, trained in the risks associated with MAB and are able to recognize symptoms—in person or through telehealth visits—that require additional or acute care, directing patients to seek emergency care when needed. *See* Compl. ¶ 147; Banks Aff. ¶ 40. But no PPMT provider (and potentially no provider anywhere) has the capability to handle all the listed complications, meaning they must comply with the provision by contracting with another provider. Stahl Aff. ¶¶ 22-23; McNicholas Aff. ¶¶ 68-69. And given the law's broad, ambiguous language, it is difficult to imagine a contract that could cover the potential universe of complications, to say nothing of the hardship of finding a practitioner willing to enter into such an agreement. Stahl Aff. ¶ 22; Banks Aff. ¶¶ 41-42. The law thus effectively bars providers who are experienced and well-equipped to provide MAB from providing any abortions at all, without any medical justification.

As if imposing such hurdles to abortion access were not enough, Section 9 then imposes onerous, medically inappropriate reporting requirements that could expose the personal information of patients and providers, putting their safety at risk and chilling patients' ability to obtain pre-viability abortions. Most egregiously, the law requires that PPMT report the identity of the provider who dispensed the abortion-inducing drug and various patient identifiers, including the patient's county, state, country of residence, age, race, and number of previous abortions the patient has had. HB 171 § 9(2). Reports filed under the law must be made available to the public. HB 171 § 9(8). For patients, the risk of identification and the associated stigma—and for

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[12] HB 171 further attempts to discourage women from obtaining abortions on the basis of false medical advice regarding RH immunoglobulin, and arguably requires the provision of Rh immunoglobulin to women seeking MABs, even when this costly procedure is not medically necessary. *See* Compl. ¶ 100; Banks Aff. ¶ 33.

providers, the certainty—may chill their willingness to obtain or provide pre-viability abortion care. *See* Banks Aff. ¶¶ 45-46. This risk is especially acute for patients who live in less populated counties and/or are subject to intimate partner violence. *See id.* ¶ 45.[13]

ii. HB 171 Is Not Narrowly Tailored To Any Compelling State Interest

The State gives multiple justifications for HB 171's restrictions, but none suffice. Because the State's rationales are not rooted—as required by the Montana Constitution—in medically recognized, bona fide health risks, the law is not narrowly tailored to any compelling interest. *See Armstrong*, ¶¶ 59, 62.

The State first claims that HB 171 seeks to "protect[] the health and welfare of a woman considering an abortion." *See* HB 171 § 2. But this broad and ambiguous description cannot constitute a "narrowly defined instance[]" in which the State has a compelling interest in protecting pregnant women from a medically-acknowledged, bona fide health risk, as MAB is an extraordinarily safe treatment. *See Armstrong*, ¶ 59; McNicholas Aff. ¶ 14 (noting that the risks of the drugs used in MABs are similar in magnitude to the risks of taking commonly prescribed and over-the-counter medications). And because abortion is safer the earlier in pregnancy it is provided, laws like HB 171 that delay patients access to MAB undermine their health and welfare. *See* McNicholas Aff. ¶ 44.

The State also asserts that a provider should examine a pregnant woman prior to an MAB "to confirm the gestational age of the [fetus]." HB 171 § 2(2). But such an examination serves no medical purpose; peer-reviewed medical literature and PPMT's experience demonstrate that MABs can be provided in appropriate cases based on self-reported LMPs without any difference in complication rate. *See* McNicholas Aff. ¶¶ 49-51.[14]

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[13] The reporting requirements separately violate patients' constitutional right to informational privacy. *See Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶ 14, 355 Mont. 49, 55, 224 P.3d 1240, 1244; *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448 ("Medical records are quintessentially 'private' and deserve the utmost constitutional protection.").

[14] The State suggests an in-person exam is also necessary because a woman may have had a miscarriage at the time she presents for the abortion, and "the routine administration of an abortion-inducing drug following spontaneous miscarriage is unnecessary and exposes the woman to unnecessary risks associated with the abortion-inducing drug." HB 171 § 2(2). This is medically inaccurate; mifepristone and misoprostol are in fact used for medical management of miscarriage. *See* McNicholas Aff. ¶ 56.

The State next claims that a compelling interest in "reducing the risk that a woman may elect an abortion only to discover later, with devastating psychological consequences, that the woman's decision was not fully informed" supports the delays and deceptions the law mandates. HB 171 § 2(4). But there is no evidence to support the State's paternalistic suggestion that pregnant women are incapable of making informed decisions regarding their health care, nor that healthcare providers are currently providing inadequate information to their patients. And mandatory delays do not increase decisional certainty. *See* McNicholas Aff. ¶ 41.

The State further attempts to justify HB 171 by claiming its restrictions are necessary to ensure that women "receive[] comprehensive information on abortion-inducing drugs, including the potential to reverse the effects of the drugs if the woman changes the woman's mind, and that a woman submitting to an abortion does so only after giving voluntary and fully informed consent to the procedure." HB 171 § 2(5). But there is no evidence that MABs are reversible, and mandating the provision of false information undermines informed consent and harms the provider-patient relationship. *See supra*, at 11-12; *see also* McNicholas Aff. ¶¶ 57-58.

In a final attempt to justify the restrictions, the law asserts that HB 171 "adds to the sum of medical and public health knowledge." HB 171 § 2(6). Even assuming a genuine interest in improving public health knowledge is compelling, HB 171 is not tailored (let alone narrowly tailored) toward this goal.[15] Making public the identity of providing and referring clinicians adds nothing "to the sum of medical and public health knowledge." And collecting "complications" under an extremely broad rubric that includes normal, expected effects (such as "heavy bleeding") as well as later medical events that have nothing whatsoever to do with the abortion (such as "subsequent development of breast cancer") is a transparent attempt to drum up fear and misinformation, not "add to the sum of public health knowledge." McNicholas Aff. ¶¶ 59-67.[16]

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[15] As *Armstrong* held, the only State interests that can justify an abortion restriction are those arising out of the need to "preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 59. The State's broadly framed interest in "medical and public health knowledge" falls outside of this "narrowly defined instance[]" of permissible regulation, *id.*

[16] For reasons similar to those discussed in this section, and as explained further in the Complaint, HB 171 also violates the Montana Constitution's right to individual dignity. Compl. ¶¶ 94, 114, 133, 146.

2. *HB 171 Violates Montana's Equal Protection Clause*

HB 171 further violates the Montana Constitution because it imposes myriad requirements and limitations on MAB when it does not do so for medical procedures posing similar risks. It thus subjects women seeking MABs to additional travel, time, expense, and stress—to the point of precluding access for some women altogether—as compared to persons seeking analogous forms of medical care. For example, HB 171 does not impose the same provider qualification or public reporting requirements on childbirth. *See Armstrong*, ¶ 49 (suggesting that individuals who "choose[] to terminate [a] pre-viability pregnancy" are similarly situated to those who "cho[o]se to carry the fetus to term"); *see also* Compl. ¶¶ 144, 164 (noting that no such requirements attach to other forms of health care with similar risks). HB 171's disfavorable treatment of those persons is not narrowly tailored to serve any compelling state interest—as discussed above, there is no medical reason for requiring pregnant women seeking MABs to endure the additional requirements that HB 171 uniquely imposes on them. As a result, although some pregnant women may continue to put their "personal trust in the education, training, experience, advice, and professional integrity of the[ir] health care provider," *id.* at 384, women seeking to exercise the fundamental right to a pre-viability abortion are denied that opportunity. Such differential treatment cannot be squared with the Equal Protection Clause. *See Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *27.[17]

3. *HB 171 Violates Montana's Free Speech Clause*

Article II, Section 7 of the Montana Constitution states that "[n]o law shall be passed impairing the freedom of speech or expression." Although distinct from the protections afforded by the First Amendment, the Montana Constitution offers the same speech protections as does the federal constitution. *See City of Helena v. Krautter* (1993), 258 Mont. 361, 363-34, 852 P.2d 636, 638. As a result, laws compelling speech and content-based regulations of speech are both subject to strict scrutiny and presumptively invalid. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-98 (1988); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("[F]reedom of speech prohibits the government from telling people what they must say.").

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[17] HB 171 also subjects providers of abortion care to numerous restrictions not imposed on other medical practitioners. *See supra*, at 10-15. These distinctions—which ignore how safe MAB is relative to other medical procedures, *supra* at 13—violate Plaintiffs' right to equal protection under the law.

HB 171 violates the right to free speech guaranteed by the Montana Constitution because it compels speech from providers, even when that information is false and the provider objects to the content of that speech. The law requires providers to give "information about the possibility of reversing the effects" of the MAB, including that information on "revers[ing] the effects of an abortion obtained through the use of abortion inducing drugs is available at www.abortionpillreversal.com" or by calling "(877) 558-0333 for assistance in locating a medical professional who can aid in the reversal of an abortion." HB 171 § 7(5)(f), (v). As discussed above, these statements are not supported by medical evidence, and thus direct the provider to make specific representations that are false. *See* McNicholas Aff. ¶¶ 57-58. Further, the law requires providers to endorse a particular (private, unverified) source of medical information advocating an unproven treatment, regardless whether the providers believe that information accurate or appropriate for their patients. These requirements force providers to choose between their ethical obligation to provide accurate medical information to their patients and a felony charge under HB 171 § 11. *See* Banks Aff. ¶¶ 30, 32. Because "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," these provisions are unconstitutional. *Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, ¶ 47, 198 P.3d 284, 296 (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)).

4. *HB 171 Is Void For Vagueness*

HB 171 is void for vagueness because it leaves many of its key provisions so vague that ordinary people would not be able to understand what conduct is prohibited, despite punishing violations with up to 20-year prison terms. For example, HB 171 §5(3) requires providers to make "all reasonable efforts" to ensure that a patient returns for a follow-up appointment but does not contain any explanation of what "all reasonable efforts" means. HB 171 §§ 5(2), 3(5), and 3(10) suffer from similar problems. They require that an MAB provider "be credentialed and competent to handle complications," but HB 171 § 3(5) defines "complications" so broadly—including a range of conditions from anxiety to sleep disorders to death—that a provider would lack fair notice of when he or she would be subject to criminal liability for violating the law. And the law does not even attempt to define what it means to "be credentialed and competent to handle" this extensive, amorphous category of matters. Just as the speed limit statute at issue in *Stanko* was unconstitutionally vague because of the lack of clarity around what was "reasonable and proper,"

subjecting persons to the whims of those charged with enforcing the law, HB 171's vagueness violates the Montana Constitution.

C. HB 140 Is Unconstitutional

HB 140 compels providers to tell all abortion patients—whether they are seeking MAB or a procedural abortion—that they may view an active ultrasound and ultrasound image of the fetus and listen to the "fetal heart tone." It then requires that patients sign a State-created certification form that "indicates whether the woman viewed the active ultrasound or ultrasound image or listened to the fetal heart tone." HB 140 § 1. Like HB 171, HB 140 requires providers to use a "certification form developed by the [State]" but unlike HB 171, it imposes no timeframe in which the State must create the form—meaning that if the State does not create the form by the law's effective date, it is not clear how providers, including PPMT, will be able to provide *any* abortions in Montana. These requirements violate the constitutional rights to privacy, equal protection under the law, and free speech, because the State lacks a compelling interest in mandating such an intrusion on the provider-patient relationship.

1. *HB 140 Violates Montana's Right To Privacy*

HB 140 precludes providers from making decisions according to their best medical judgment. Plaintiffs do not ask every patient if she wants to view an active and still ultrasound, and to listen to any audio, which is required by the new law. Banks Aff. ¶ 50. This directive has no medical purpose and serves only to stigmatize patients. *Id.* ¶¶ 51-52. Moreover, asking patients to sign a State-developed certification form indicating that they chose not to view an ultrasound or listen to fetal activity may further stigmatize patients with no medical reason and discourage them from seeking abortion care. *Id.* ¶ 52.

These requirements infringe on patients' right to procreative autonomy and the provider-patient relationship. By overriding providers' judgments and forcing patients to sign State-created forms, HB 140 "usurp[s]" sensitive health care decisions, undermines the "personal trust in the education, training, experience, advice, and professional integrity of the health care provider [a patient] has chosen," and interferes with the medical "partnership" at the core of the right to privacy. *Armstrong*, ¶ 58.

No compelling interest justifies these mandates. The State cannot demonstrate an "obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk" because

there is no conceivable medical reason to force providers to tell patients they may see and hear an ultrasound in all circumstances. *Armstrong*, ¶ 59. And the law's own exceptions highlight its lack of narrow tailoring; if there were a medical justification for forcing doctors to make such an offer, there would be no reason to except any abortions outside of medical emergencies in which there was no time for an ultrasound.

2. *HB 140 Violates The Montana Constitution's Free Speech Clause*

HB 140 also violates Montana's right to free speech. The law both compels providers to convey certain information in the State's language and regulates providers' speech on the basis of its content. In other words, the law "requires [a provider] to change the content of his speech or even to say something where he would otherwise be silent." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (citing *Riley*, 487 U.S. at 795). And as explained above, there is simply no legitimate justification for these requirements; telling patients they may view and listen to an active ultrasound when a provider deems it against the patient's best interests does nothing to protect a woman's health. The only conceivable reason for the ultrasound offer requirement is to shame or pressure women who seek to exercise a right protected by the Montana Constitution to abandon that right.

3. *HB 140 Violates Montana's Right To Equal Protection*

Finally, HB 140 violates the Montana Constitution's equal protection clause by discriminating against people seeking to exercise their right to seek pre-viability abortions. As noted above, strict scrutiny applies if the distinctions drawn by a law affect fundamental rights. *Snetsinger*, ¶ 17. That is the case here. HB 140 targets patients who seek to exercise their fundamental right to procreative autonomy and deprives those women of the honest medical advice of their health care providers, whereas other pregnant patients retain access to the full benefits of the medical partnership protected by the right to privacy. This differential treatment contravenes Montana's Equal Protection Clause. *See Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *27; *see also supra*, at 9, 15. Thus, HB 140 must be narrowly tailored to serve a compelling government interest. For the reasons described above, *see supra*, at 17-18, it is not. Instead, the law is transparently designed to discourage the exercise of the fundamental right it targets.[18]

[18] For these reasons and as explained further in the Complaint, HB 140 also violates the Montana Constitution's right to individual dignity. *See* Compl. ¶ 186.

II. Plaintiffs And Their Patients Will Suffer Irreparable Harm Absent A Preliminary Injunction

Although Plaintiffs have made more than the prima facie showing of a constitutional violation necessary for an injunction to issue, preliminary relief should issue for a second, independent reason: absent an injunction blocking the laws challenged here, Plaintiffs and their patients will be irreparably harmed. Courts in this state have long recognized that violations of constitutional rights—in particular to privacy and free speech—cause irreparable harm. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 286 P.3d 1161, 1165 ("[T]he loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."); *Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction."). If allowed to take effect, the challenged laws will deprive Plaintiffs and their patients of their rights, as well as causing them irreparable medical, emotional, and social harm.

Consider first the injuries to Plaintiffs' patients if the unconstitutional legislation goes into effect during the pendency of this case. Absent preliminary relief, HB 136 will preclude women from obtaining abortions beginning at 20 weeks LMP but before viability. Patients will thus be denied a fundamental right and forced to carry their pregnancies to term, travel out of state (if they can afford to do so), or attempt to self-induce, which often includes dangerous means. There could hardly be a clearer case of irreparable injury. HB 171 then takes aim at the (common, exceedingly safe) MABs that make up the vast majority of abortions in Montana. The numerous Montana women who seek to obtain MABs through direct-to-patient visits would be forced to travel hundreds of miles for a series of visits in which they would be subjected to a battery of unnecessary procedures and false health information. Indeed, any woman seeking an MAB would need to incur additional travel, stress, expense, and potential risk to her health because of HB 171's efforts to turn a straightforward prescription into a state-mandated, multi-trip, days-long ordeal. These significant restrictions on access to lawful abortions indisputably infringe on patients' right to privacy, and thus cause irreparable harm.

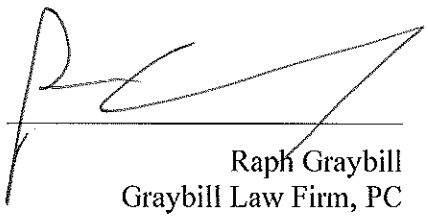
And those are just the injuries patients stand to suffer. Providers, to give one of the more egregious examples, would be forced by HB 171 to provide false and harmful information about supposed abortion "reversals," while counseling their patients—who "typically seek[] out and may consent to the most risky and intimate invasions of body and psyche, largely upon her or his

personal trust in the education, training, experience, advice, and professional integrity of the health care provider he or she has chosen," *Armstrong*, ¶ 58. And it will subject providers to the risk of felony prosecution if they fail to comply with the "reversal" mandate or any of HB 171's other medically unnecessary requirements. HB 140 imposes further harms, compelling Plaintiffs to speak even when, in their best medical judgment, they should remain silent, and dictating what must be said. That is the prototypical violation of the right to free speech, and irreparably injures Plaintiffs.

CONCLUSION

Plaintiffs have made a prima facie showing that their and their patient's constitutional rights will be violated absent an injunction, and that Plaintiffs and their patients will suffer clear, irreparable harm if preliminary relief is not granted. Accordingly, this Court should issue an order to show cause why a preliminary injunction should not be granted and, following a hearing, enter a preliminary injunction.

Respectfully submitted this 16th day of August, 2021.



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