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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, Plaintiffs, vs. STATE OF MONTANA, by and through Austin Knudsen, in his official capacity as Attorney General, Defendant.	Cause No.: DV-21-00999 Hon. Gregory R. Todd **REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The laws set to take effect on October 1—HB 136, HB 171, and HB 140—will, if not enjoined, dramatically restrict Montanans' ability to exercise their constitutional right to a pre-viability abortion. These laws violate the Montana Constitution's rights to privacy, individual dignity, equal protection under the law, free speech, due process, and health, safety, and happiness, as well as the Montana Supreme Court's decision in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The laws also will create serious criminal and civil liability for Plaintiffs.

Plaintiffs seek a preliminary injunction to preserve the status quo. Absent such relief, Plaintiffs and their patients will be irreparably injured. If allowed to take effect, these laws will criminalize some pre-viability abortions and create prohibitive barriers to others. Still more women will face substantial and stigmatizing new barriers to obtaining abortion care, and will be forced to wade through a barrage of medically unnecessary requirements to exercise their fundamental right to "procreative autonomy," which includes "the right to seek and to obtain ... a pre-viability abortion." *Armstrong*, ¶ 14. Not only that, Plaintiffs' own free speech rights will be infringed by the government-mandated disinformation HB 171 and HB 140 compel them to convey. And Plaintiffs will be subject to severe criminal penalties for failure to comply with HB 136 and HB 171, despite the State's atextual (and in some instances, nonsensical) interpretations making clear those statutes are unconstitutionally vague.

Finding no support for these egregiously unconstitutional provisions in the Montana Constitution or caselaw, the State resorts to misdirection. First, it largely spurns the Montana authorities that govern Plaintiffs' motion, instead seeking to import inapposite federal decisions and standards to justify enactments that the Legislature's own lawyers warned were constitutionally suspect. When that approach fails, the State invents interpretations of the challenged statutes to obscure their harm, or ignores Plaintiffs' claims entirely. But the State's posturing cannot obfuscate the fact that these laws are blatantly unconstitutional and harmful. For these reasons and those explained further below, this Court should grant the motion and enjoin HB 136, HB 171, and HB 140.

ARGUMENT

I. Plaintiffs Have Standing To Challenge HB 136, HB 171, And HB 140

Plaintiffs have standing to challenge each of the three laws at issue on their own behalf and on behalf of their patients. As the State concedes, Plaintiffs have standing to challenge HB 136 (the 20-week ban) and HB 171 (the omnibus MAB restrictions law) under Montana Supreme Court precedent. *See* Def.'s Br. Opp'n Mot. Prelim. Inj. ("Opp'n") at 5.[1]

Likewise, Plaintiffs have standing to challenge HB 140 (the ultrasound offer law). The State argues that *Armstrong*'s standing holding is limited to criminal statutes. It is not. The question raised in *Armstrong* was: "Where governmental regulation directed at health care providers impacts the constitutional rights of women patients, may a health care provider litigate the infringement of these rights on behalf of the women or must the women aggrieved assert their own rights?" *Armstrong*, ¶ 8. It was not limited to the criminal context; nor did the Court circumscribe its holding. *Id.*, ¶ 13 ("Plaintiff health care 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 from a health care provider of their choosing."). In fact, *Armstrong* adopted its third-party standing rules from federal caselaw, including a U.S. Supreme Court opinion that expressly "decline[d] to restrict" to a "purely criminal context" its holding that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality op.); *see Armstrong*, ¶¶ 9-10 (citing *Singleton* in finding third-party standing).[2]

None of the State's other standing arguments is persuasive. The State contends that Plaintiffs have not suffered injury because "[t]here's no right to an abortion free from reasonable regulation," Opp'n at 6, but "[t]he State's standing argument is circular"—it assumes the

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[1] The State seeks to preserve any challenges to *Armstrong*'s standing holding for appeal. Opp'n at 6. Plaintiffs reserve the right to respond to those arguments on appeal.

[2] Montana courts have looked to federal constitutional caselaw for its persuasive value, while making clear that it does not set any sort of ceiling for Montanans' individual rights. *See, e.g., Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 324, 730 P.2d 380, 384 ("Because the federal constitution establishes the floor and not the apex of constitutional rights, state action may violate our Montana Constitution, but not violate any federal constitutional guarantee.").

regulations at issue are constitutional in the first place. *Weems v. State by & through Fox*, 2019 MT 98, ¶ 14, 395 Mont. 350, 357, 440 P.3d 4, 9. There is no support for the State's assertion that Plaintiffs are "conflicted because they have [a] pecuniary interest[] in maximizing the number of abortions." Opp'n at 6. To the contrary, the Montana Supreme Court has made clear that there is a "special relationship between a physician and patient," for abortion as for other medical procedures. *Armstrong*, ¶ 9. Indeed, the provider-patient relationship is particularly close in the context of abortion. *See Singleton*, 428 U.S. at 117 (plurality op.) ("[T]he constitutionally protected abortion decision is one in which the physician is intimately involved."). Further, contrary to the State's contention (at 6), Plaintiffs are not required to identify a specific patient to establish third-party standing. *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality op.) ("We have long permitted abortion providers to invoke the rights of their actual *or potential patients* in challenges to abortion-related regulations." (emphasis added)). Finally, although the State makes much of *Kowalski v. Tesmer*, 543 U.S. 125 (2004), *every single one* of the cases the State cites (at 5 n.3) as applying *Kowalski* in abortion-related challenges found that providers had standing to sue on behalf of patients.[3] And the U.S. Supreme Court has repeatedly affirmed abortion providers' standing to sue on behalf of their patients, including as recently as last year. *See June Med. Servs.*, 140 S. Ct. at 2118-2119 (plurality op.); *see also id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment).

Notably, the State ignores the fact that Plaintiffs have standing to challenge HB 140 based on the violation of their own free speech rights. *See* Pls.' Br. Supp. Mot. Prelim. Inj. ("Br.") at 18; Compl. ¶ 187. Indeed, the State largely ignores infringements of Plaintiffs' own rights with respect to *all* of the challenged laws, *see, e.g.*, Compl. ¶¶ 11-13, which give them

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[3] *See Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("[T]he requirements for third-party standing are met in relation to the claims asserted by the physician-plaintiffs on behalf of their patients."); *Planned Parenthood Sw. Ohio Region v. DeWine*, 64 F. Supp. 3d 1060, 1066 (S.D. Ohio 2014) ("Dr. Kress has third party standing to assert the rights of his patients."); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 611 (M.D.N.C. 2014) ("Plaintiffs have standing to assert the rights of their patients[.]"), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1222 n.20 (D. Kan. 2013) (same).

standing to challenge each of the statutes directly, *see Weems*, ¶ 14 (holding that abortion provider plaintiffs who "are impacted by the statute" have standing to challenge it).

II. The State Mischaracterizes The Governing Law

Throughout its brief, the State substitutes federal caselaw for Montana's well-established statutory standards for preliminary relief, and invents limits on the right to privacy found nowhere in the Montana Constitution.

A. The State Distorts Montana's Standard For Preliminary Relief

The State asserts that this case turns solely on "whether Plaintiffs are likely to succeed on the merits." Opp'n at 3. To be sure, Plaintiffs are likely to succeed on the merits of their claims, which are amply supported by well-settled Montana caselaw. But that is not the standard for preliminary relief in Montana. As the State elsewhere acknowledges, § 27–19–201, MCA, lays out "five, disjunctive circumstances" in which a preliminary injunction shall issue. Opp'n at 2-3. Two are relevant here: Plaintiffs are entitled to injunctive relief if (1) "it appears [they are] entitled to relief" *or* (2) "it appears the commission or continuance of some act during litigation would produce a great or irreparable injury." Section 27–19–201(1), (2), MCA. Neither provision requires proof of a *likelihood* of success on the merits (a consideration the State imports from federal caselaw). "Because a preliminary injunction does not decide the ultimate merits of a case, ... a party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 16, 401 Mont. 405, 414, 473 P.3d 386, 392; *see also Weems*, ¶ 18.[4]

It is enough, moreover, for Plaintiffs to "demonstrate[] *either* a prima facie case" of a constitutional violation "*or* a prima facie case that they will suffer an 'irreparable injury.'" *Driscoll*, ¶ 16 (emphasis added); *Weems*, ¶ 26 (affirming preliminary injunction based only on irreparable harm). In other words, each of the provisions in § 27–19–201, MCA, presents an independent basis for relief. The Court should accordingly reject the State's attempt to collapse these independent state law inquiries into the federal standard.

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[4] The State's assertion that the challenged laws "are presumed constitutional as a matter of law" is also irrelevant. Opp'n at 1. "The moving party's burden to defeat the presumptive constitutionality of a statute ... arises in litigating the merits of the complaint; a plaintiff is not required to sustain that ultimate burden to obtain a preliminary injunction." *Weems*, ¶ 18.

The Court should also reject the State's astounding claim that only a "complete loss of a constitutional right" causes an irreparable injury warranting a preliminary injunction. Opp'n at 3. Montana courts have frequently found irreparable injury and entered or upheld preliminary relief against abortion restrictions that do not "complete[ly]" eliminate the ability to obtain such care. *See, e.g.*, *Weems*, ¶ 25 (irreparable injury when provider qualification restricted availability of medication abortions); *Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1995 Mont. Dist. LEXIS 800, at *18 (1st Jud. Dist., Nov. 28, 1995) (irreparable injury when law required 24-hour mandatory delay, imposed same-provider requirement, and conditioned abortion access on provision of "a litany of state prescribed information" under the guise of informed consent). These cases demonstrate that the critical question under Montana law is whether the challenged "statute[s] *infringe*[] on a person's ability to obtain a lawful medical procedure." *Weems*, ¶ 19 (emphasis added). The State ignores that the Montana Supreme Court has critically reviewed regulations targeting abortion care, and defined expansively what constitutes an "infringement" on women's right to privacy. Any law that "presents a barrier to [qualified providers'] ability to ... perform the lawful medical procedures of early-term abortion" warrants injunctive relief. *Id.*, ¶¶ 19, 23 (first quoting *Armstrong*, ¶ 2, n.1, ¶ 62); *see also Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *7 (1st Jud. Dist., Mar. 12, 1999) (holding in challenge to abortion restriction that "any legislation *regulating* this fundamental right to privacy must be reviewed under a strict-scrutiny analysis," and concluding that a 24-hour waiting period unconstitutionally infringed that right (emphasis added)). As explained further in Plaintiffs' opening brief and below, the challenged laws plainly infringe on women's right to abortion.[5]

The State then imports two other prongs of the federal preliminary injunction inquiry that are foreign to Montana's statutory scheme for providing preliminary relief, arguing that the Court should decline to enter an injunction because such relief would "be adverse to the public interest" and "cause a gross imbalance in the equities." Opp'n at 14. These borrowed federal standards are belied by the text of Montana's preliminary relief statute and governing

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[5] The challenged laws should be enjoined even under the State's (incorrect) articulation of the legal framework, because HB 171 completely bans the provision of medication abortions through telemedicine and HB 136 completely bans pre-viability abortions performed beginning at 20 weeks.

precedent—which say nothing about conducting such an inquiry. *See, e.g.*, *Weems*, ¶¶ 1-27 (affirming grant of preliminary injunction without discussing public interest or balance of equities). Moreover, even if the Court were to consider the balance of the equities and public interest, they would favor a preliminary injunction because Plaintiffs seek to protect their and their patients' constitutional rights. *See Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) ("It is always in the public interest to prevent the violation of a party's constitutional rights." (citation omitted)); *Driscoll*, ¶ 24 (preliminary injunction "minimize[d] the harm to all parties" when moving party had made a prima facie showing of a violation of a constitutional right).

Finally, the State offers a nonsensical argument that a preliminary injunction would not preserve the status quo. Today, women in Montana may obtain surgical abortions between 20 weeks LMP and viability; medication abortions through the use of telehealth and without a 24-hour mandatory delay; and both surgical and medication abortions without being stigmatized and pressed to abandon their rights. Healthcare providers may deliver abortion care without being forced to convey State-mandated speech and without the threat of criminal penalties for failure to comply with vague laws. None of that will be true if the 20-week ban, the omnibus MAB restrictions law, and the ultrasound offer law are allowed to take effect on October 1. As a result, Plaintiffs ask this Court to enjoin these three not-yet-effective laws to prevent fundamental changes to Montana's regulation of pre-viability abortions. If such an injunction does not maintain the status quo, it is difficult to imagine one that would. The State's position—that the Legislature's decision to pass these laws somehow means that there is no status quo to preserve—would effectively foreclose *any* preliminary relief as against newly enacted statutes. Instead, the posture here is the same as in any challenge to a changed legal regime.

B. *Armstrong* Requires Strict Scrutiny

The State also misconstrues the protections afforded by the right to privacy. As the Montana Supreme Court has made clear, "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." *Armstrong*, ¶ 34. The State's central contention is that the abortion restrictions challenged here constitute "modest and reasonable measures to advance the health, safety, and welfare of pregnant women contemplating or obtaining abortions," and thus do not run afoul of *Armstrong* or trigger strict scrutiny. Opp'n at 2. Not only does this argument

mischaracterize the actual effects of these restrictions, but it takes far too narrow a view of the Montana Constitution's right to privacy; indeed, the State labors to identify *any* support from the Montana Supreme Court for its position, instead repeatedly relying on cases decided under the less-protective federal standard set forth in *Planned Parenthood Se. of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), and citing laws subject to the constitutions of other states. *See, e.g.*, Opp'n at 2, 8-13 (relying on inapposite authority); *see also Armstrong*, ¶ 41 ("[W]here the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution.").

With respect to relevant precedent, all the State offers is *Wiser*'s commonsense, but irrelevant, conclusion that "it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right." *Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 15, 331 Mont. 28, 32, 129 P.3d 133, 137. But Plaintiffs do not seek the right "to perform unregulated, unrestricted abortions," nor do they claim that "every restriction on medical care impermissibly infringes" on the right to privacy. Opp'n at 7. They simply ask this Court to apply *Armstrong*, which "leaves no doubt that" the right to privacy protects the right to obtain pre-viability abortion care, and any infringement on the ability to obtain such care triggers strict scrutiny. *Weems*, ¶ 19; *see also Armstrong*, ¶ 14 ("Article II, Section 10, protects a woman's right of procreative autonomy—i.e., here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice."); *Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *7. *Wiser*'s conclusion that the right to privacy did not preclude "the regulation of the denturity profession by the State Board of Dentistry"—in particular, the Board's promulgation of a rule "requiring that denturists refer all partial denture patients to dentists before providing partial denture services"—does not undercut these protections. *Wiser*, ¶¶ 7, 10.[6]

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[6] Montana courts have repeatedly addressed the standard of review in abortion cases, and consistently made clear that strict scrutiny applies. *See, e.g., Armstrong*, ¶¶ 34, 62; *Jeannette v. Ellery*, No. BDV 94-811, 1995 WL 17959705 (Mont. Dist. May 19, 1995); *Wicklund v. State*, No. ADV 97-671, 1998 Mont. Dist. LEXIS 227, *10 (1st Jud. Dist., Feb. 13, 1998); *Intermnt. Planned Parenthood v. State of Montana*, No. BDV 97-447, 1998 Mont. Dist. LEXIS 782, *20 (1st Jud. Dist., June 29, 1998). An offhand comment in a case about partial denture services does nothing to undermine the clear standards the Montana courts have otherwise set for abortion regulations. In any event, the right to obtain partial dentures from the health care provider of

The State next claims that strict scrutiny "is the wrong standard for reviewing health-and-safety regulations," Opp'n at 11, but it ignores that the State has used the same argument to justify *every* restriction on abortion struck down by the Montana courts in the more than two decades since *Armstrong*. In *Armstrong* itself, for example, the sponsor of the challenged law said it "was intended to protect women who are seeking abortions from possible complications and that the legislation was a women's health and safety issue." *Armstrong*, ¶ 22. The Montana Supreme Court nevertheless applied strict scrutiny, observing that when "the legislature thrusts itself into this protected zone of individual privacy under the guise of protecting the patient's health, but, in reality, does so because of prevailing political ideology and the unrelenting pressure from individuals and organizations promoting their own beliefs and values, then the state's infringement of personal autonomy is not only constitutionally impermissible, it is, as well, intellectually and morally indefensible." *Id.* ¶ 60. So too in *Wicklund v. State*, a case involving restrictions on minors' ability to obtain abortions that the State sought to justify by reference to their health and safety. No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116, at *11-19 (1st Jud. Dist., Feb. 11, 1999). The State, to be sure, is free to claim that its purported interest in health and safety justifies the challenged restrictions under strict scrutiny. But the mere assertion of such an interest does not bypass that analysis altogether.

III. Plaintiffs Have Met The Standard For A Preliminary Injunction

A. Plaintiffs Have Established A Prima Facie Case Of Constitutional Violations

1. *HB 136*

i) HB 136 Violates The Right To Privacy, The Right To Seek Safety, Health, And Happiness, And The Right to Dignity

The fate of HB 136 is straightforward and dictated by *Armstrong*. HB 136 bans abortions beginning at 20 weeks LMP. The State and its experts agree with Plaintiffs that fetuses are *not* viable at 20 weeks LMP. *See* Opp'n at 12; Pierucci Decl. ¶ 6 (the "edge of viability has moved to 22-23 weeks"); Skop Decl. ¶ 31 (edge of viability is 21 weeks); Mulcaire-Jones Decl. ¶ 60 ("The world's most premature baby to survive was born at 21-weeks ..."); *but see* McNicholas

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one's choice, however important, is not comparable to "the decision of a woman whether or not to beget or bear a child," which lies at the very core of the right to privacy. *Armstrong*, ¶ 42.

Rebuttal Aff. ¶¶ 19-22 (disputing State experts' opinions on viability).[7] The right to privacy in Article II, Section 10 of the Montana Constitution protects a woman's right to "a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14. This point is constitutionally dispositive. For the same reasons, HB 136's infringement on the fundamental right to seek a pre-viability abortion also violates the Montana Constitution's right to individual dignity, *id.*, at ¶ 72, and its right to seek safety, health, and happiness, *id.* *See* Br. at 5 n.5 & 8-9. The Court's analysis need go no further.

The State's purported justifications for the 20-week ban are irrelevant in light of *Armstrong*'s conclusion that the State does not have any compelling interest in banning pre-viability abortion. But even if the Court considered the reasons the State puts forward, they would not suffice because the State does not even attempt to justify HB 136 under strict scrutiny, as it is required to do. *See supra* at 6-8. Falling far short of its obligation to demonstrate that HB 136 is 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, the State argues only that HB 136 is a "reasonable" regulation because it advances an "important interest" in limiting fetal pain. Opp'n at 11. That is not what strict scrutiny requires.[8]

In any event, the consensus in the medical community, based on the most up-to-date and reliable evidence and research, is that fetuses cannot experience pain before at least 24 weeks LMP and likely never experience pain in utero. *See* Ralston Rebuttal Aff. ¶¶ 4, 12-16; *see also Whole Woman's Health Alliance v. Rokita*, No. 1:18-cv-01904-SEB-MJD, 2021 WL 3508211, at *36, 63-64 (S.D. Ind. Aug. 10, 2021) (rejecting testimony to the contrary as reflecting a "'fringe view' within the medical community"), *appeal docketed*, No. 21-2480 (7th Cir. Aug. 12, 2021); *EMW Women's Surg. Ctr. v. Meier*, 373 F. Supp. 3d 807, 823 (W.D. Ky. 2019) (same), *aff'd*, 960 F.3d 785 (6th Cir. 2020).[9]

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[7] Montana law already outlaws the abortion of viable fetuses, § 50-20-109(1)(b), MCA, so HB 136 *must* target pre-viability fetuses for it to have any effect.

[8] The State's decision to forfeit any defense under strict scrutiny provides yet another independent reason to enjoin the statute.

[9] The State's attempt (at 12 n.10) to devise an ex post rationale for HB 136 based on the possibility that gestational age could be mistakenly underestimated does not change the calculus. This argument is irrelevant; viability is not the same for every pregnancy, but a determination that must be made on a case-by-case basis. McNicholas Rebuttal Aff. ¶ 20. As a result, states

ii) HB 136 Violates The Montana Equal Protection Clause

The State largely ignores Plaintiffs' equal protection challenges. The State does not even attempt to address Plaintiffs' argument that the 20-week ban discriminates against women who choose to exercise their fundamental right to pre-viability abortions and providers whose care facilitates women's exercise of that right. *See* Br. at 9. And in contesting that HB 136 discriminates against women seeking pre-viability abortions beginning at 20 weeks LMP, the State takes aim at a straw man, arguing that Montana does not require "every abortion procedure ... [to] be treated identically." Opp'n at 10. Plaintiffs do not contend that every patient seeking an abortion must be treated identically. Rather, Plaintiffs assert, based on long-settled Montana law, that statutes that draw distinctions based on the exercise of fundamental rights are subject to strict scrutiny. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 450. Because the right to obtain an abortion before viability (including beginning at 20 weeks LMP) is a fundamental right, strict scrutiny applies. Accordingly, it is not enough for HB 136 to be, as the State claims, "reasonable"—and, in any event, HB 136 is not reasonable because it lacks any medical justification. *See supra* at 9.

iii) HB 136 Violates Due Process

With respect to Plaintiffs' argument that HB 136 is unconstitutionally vague (because the exceptions do not give providers fair notice of the conduct it criminalizes, *see* Br. at 7-8), the State's only retort is to, yet again, improperly apply federal law to a state claim. The State cites no Montana case for the proposition that facial vagueness challenges are disallowed. Nor could it. *See, e.g., State v. Stanko*, 1998 MT 321, ¶ 13, 292 Mont. 192, 974 P.2d 1132, 1135 (allowing motorist to bring facial vagueness challenge to statute). Moreover, the federal cases that it cites are inapposite. *Casey* resolved a *substantive* due process challenge, and said nothing about vagueness. *See generally Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). The Court in *Casey* addressed whether the statutory exception at issue violated due

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may not impose "weeks of gestation" as the sole determining factor in whether abortion is permissible, as HB 136 does; viability must instead be assessed by "the attending physician on the particular facts of the case before him [or her]." *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979) (so holding under the *less protective* federal standard); *see also id.* at 386 (acknowledging that there may be potential for "imprecision" in viability determinations). Here, the State usurps that judgment. That violates the right to privacy.

process because it was "too narrow," *id.* at 880, which is an entirely different question from whether an exception provides adequate notice of the conduct prohibited, as Plaintiffs allege here. And *Gonzales v. Carhart* in no way suggests that vagueness challenges premised on the criminal liability of abortion providers, like the one Plaintiffs bring in this case, must be as-applied. 550 U.S. 124, 167 (2007) (stating that as-applied challenge was "the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used"). Further, even after *Gonzales*, courts have upheld pre-enforcement vagueness challenges to statutes restricting abortion. *See, e.g., Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2021 WL 4127691, at *17 (6th Cir. Sept. 10, 2021); *Hopkins v. Jegley*, 510 F. Supp. 3d 638, 739 (E.D. Ark. 2021), *appeal docketed*, No. 21-1068 (8th Cir. Jan. 11, 2021).

2. *HB 171*

Nothing in the State's brief undermines Plaintiffs' prima facie showing that HB 171—which imposes numerous and burdensome restrictions on medication abortion ("MAB")—is unconstitutional. To the contrary, the State primarily defends HB 171 by claiming that the statute means something other than what it says. But these attempts to minimize the law's effects do not prevent criminal prosecutions—with risk of substantial jail time—premised on more natural interpretations of the statute, and so the State's strained reading of HB 171 does nothing to obviate the law's (immediate and irreparable) harms. *See* Br. at 9-17. That is true as a general matter, but it is especially concerning here given that the limiting constructions the State proposes are implausible on their own terms. Moreover, even under the State's narrow interpretation, HB 171 imposes severe barriers to care and, for that reason among others, contravenes the right to privacy and numerous other provisions of the Montana Constitution. If anything, the State's wildly divergent reading of the statute *bolsters* Plaintiffs' vagueness challenges. *See* Br. at 16-17; *infra* at 16-17.

i) <u>The State's Reading Of HB 171 Is Nonsensical</u>

The State disputes that HB 171 requires an ultrasound and two trips to see an abortion provider at least 24 hours apart, asserting that the law allows patients to sign the State's consent

form electronically.[10] But that form requires the provider to record "the probable gestational age of the unborn child as determined by both patient history *and ultrasound results* used to confirm gestational age." HB 171 § 7(5)(a) (emphasis added). An ultrasound, to state the obvious, cannot be done over the internet. That means HB 171 requires an in-person visit to obtain "informed consent." And because the statute separately requires the provider who dispenses the abortion medication to conduct an in-person examination of the patient, HB 171 § 5, the law requires two trips to a health care center spread across at least two—and likely many more—days.

The State responds that the "informed consent" process only requires recording the results of an ultrasound "if one is administered," Opp'n at 17, but that ignores the law's plain text. HB 171 states that the mandatory consent "form is not valid and consent is not sufficient unless ... each entry, list, description, or declaration" is filled out and individually initialed by the patient. HB 171 § 7(4). Missing from this extensive description of the form's requirements is (just like the purported allowance for electronic consent) any exception for ultrasounds not performed.[11] The State's claim that no ultrasound is required is further undermined by Section 9's reporting requirements, which "must include the date of the ultrasound and gestational age determined on that date." HB 171 § 9(2)(g). It is self-evidently not possible to report the date and results of an ultrasound that did not occur. HB 171 thus requires an in-person visit at least 24 hours before abortion medications can be prescribed (again, in person).[12]

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[10] In support of this proposition, the State cites only HB 171 § 7(2). This provision states 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," subject to exceptions not relevant here. Nothing in the statutory text indicates that electronic consent is permissible.

[11] The State further contends that this illusory exception "must" exist "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." Opp'n at 17. Section 4, however, says that "[a]n abortion-inducing drug may be provided only by a qualified medical practitioner following the procedures set forth in [sections 1 through 14]." HB 171 § 4 (alteration in original). And one of those procedures, as described above, is recording "the probable gestational age of the unborn child as determined by ... *ultrasound results* used to confirm gestational age." HB 171 § 7(5)(a) (emphasis added).

[12] The only logical reading of HB 171's ultrasound requirement undermines the State's disclaiming of the same-provider requirement. Given that the State-mandated consent process necessitates an ultrasound, a patient has to receive an in-person exam at least 24 hours before an

The State also asserts that the provider qualification provisions contained in HB 171 require only that a clinician "be able to treat or refer for treatment patients experiencing complications *while* the drugs are terminating their pregnancies and immediately afterward." Opp'n at 18. This argument again lacks any basis in the statutory text. Section 5 of HB 171 provides that "[a] qualified medical practitioner providing an abortion-inducing drug must be credentialed and competent to handle complications management, including emergency transfer, or must have a signed contract with an associated medical practitioner who is credentialed to handle complications." HB 171 § 5(2). The statute then defines "complications" to include the byzantine list of conditions detailed in Plaintiffs' opening brief, many of which lack any connection to MABs or would occur long after the care Plaintiffs' provide. *Id.* § 3(5); *see also* Br. at 12. And although the State contends that this definition "applies only to Section 7(5)(e)'s required consent form," the statute itself says otherwise: the unconstitutionally broad definition contained in Section 3(5) expressly applies to Section 5's provider qualification provision. *See* HB 171 § 3 ("As used in [sections 1 through 14], the following definitions apply" (alteration in original)).

ii) HB 171 Is Unconstitutional Under Any Interpretation

Properly construed, HB 171 egregiously violates women's rights to privacy, to individual dignity, to equal protection, and to seek safety, health, and happiness.[13] *See* Br. 9-17. But even under the State's strained interpretation, the omnibus MAB restrictions law violates the Montana

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abortion. Because the statute also requires the provider actually performing the MAB to conduct an in-person examination, if the statute did not require the provider performing the abortion to also obtain what the State terms "informed consent," HB 171 would effectively require two separate in-person examinations—one by the person performing the ultrasound, and one by the person dispensing the abortion medication. Were this a permissible reading of the statute, it would independently violate the right to privacy. There is no conceivable justification for requiring *two* doctors to conduct a physical exam (separately, and at least 24 hours apart) before providing an MAB.

[13] The State's brief does not distinguish among Plaintiffs' claims that HB 171 violates these distinct provisions of the Montana Constitution, and instead defends the law generally as "constitutionally permissible and good policy." Opp'n at 7. At most, the State appears to dispute whether HB 171 violates the right to privacy. Because the State has thus forfeited any argument as to the other constitutional claims brought in the preliminary injunction motion, this Court should enter an injunction on those grounds regardless of its analysis of the privacy rights discussed in the State's brief.

Constitution. The State does not dispute that HB 171 bans telehealth MABs, imposes a 24-hour mandatory delay on all MABs, compels provider speech, imposes a reporting regime that makes public information that could be used to identify the women who seek abortions and will certainly identify the providers who offer (or even refer for) that care, and is unconstitutionally vague.

First, the State acknowledges that HB 171 bans prescribing MABs through telehealth. Opp'n at 8. The State justifies this restriction on abortion by claiming that "there is no right [to] administer chemical abortion drugs ... without first examining the patient," and in-person visits are not "unusual before prescribing medication with potentially severe complications risks." *Id.* As to the former, the State misunderstands the right at issue. The constitutional infirmity arises out of *patients'* right to obtain pre-viability abortions. Plaintiffs offer their patients the alternatives of obtaining care in-person or through telemedicine, and a large number of patients access care through telemedicine. Stahl Aff. ¶¶ 20-21. HB 171 would prohibit them from doing so. *See* Br. at 10 & n. 11.[14] That restriction clearly infringes the right to privacy, and therefore must be justified by a compelling state interest. *See Weems*, ¶¶ 19, 23; *Armstrong*, ¶¶ 2, n.1, 62. The State, however, specifically declines to defend the statute on those grounds. *See, e.g.*, Opp'n at 15. And the State's remaining rejoinder (that the risks of MAB justify a blanket telemedicine prohibition) is not supported by the facts; medication abortion is just as safe as commonly prescribed and over-the-counter medications such as antibiotics and nonsteroidal anti-inflammatory drugs like ibuprofen. *See, e.g.*, McNicholas Aff. ¶¶ 14 & n.3, 20; McNicholas Rebuttal Aff. ¶ 6; *see also Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 265 (Iowa 2015) (striking down rule that would have prohibited telemedicine abortions under less restrictive undue burden standard and rejecting claim that rule would have provided any safety benefit). More, outside of the abortion context, the State has advocated for the expansion of telehealth and noted that "[t]elehealth services are transforming how care is

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[14] The State also contests that a ban on providing MABs through telemedicine would reduce abortion access, claiming that long drives in dangerous conditions work no constitutional harm and contending that "Plaintiffs' failure to recruit abortion providers in more locations or set up operations in more remote areas is not the State's fault." Opp'n at 8-9, 16 n.13. But the effect of the State's restrictions must be measured against the status quo, and Plaintiffs have presented unrebutted evidence of *specific patients* whose ability to obtain an abortion would be limited by HB 171's telemedicine ban. *See* Banks Aff. ¶ 38.

delivered in Montana, particularly in our frontier and rural communities." Compl. ¶ 132 (quoting Montana Governor's statement in signing HB 43, which expands access to telehealth services that were originally extended because of the COVID-19 pandemic).[15]

Second, the State does not dispute that HB 171 imposes a 24-hour mandatory delay—even if consent is obtained electronically. Contrary to the State's claim that such provisions have "never been considered an unconstitutional obstacle to exercising the right to abortion," a Montana district court has already held that imposing a 24-hour mandatory delay violates the right to privacy. *See Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *22 (striking down a 24-hour mandatory delay where the initial consultation could be performed by phone).

Third, the State admits that HB 171 mandates that providers make certain statements to their patients about "abortion-pill reversal (APR), the possible need for Rh immunoglobulin, and breast cancer risk." Opp'n at 17. In defending the speech mandates imposed on providers, the State does not even attempt to grapple with the Montana Constitution's prohibition on compelled speech and content-based regulations. *See* Br. at 15-16; *see also Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, ¶ 47, 198 P.3d 284, 296 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)). Plaintiffs, moreover, have presented ample evidence that the statements the statute compels them to make are false and will undermine informed consent (by suggesting a patient can always change her mind after beginning an MAB), rather than enhance consent as the State suggests. *See, e.g.*, McNicholas Aff. ¶¶ 57-58; Banks Aff. ¶¶ 29-33. These requirements are all the more problematic when their effect on the provider-patient relationship is considered.[16] In any event,

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[15] Furthermore, because it requires ultrasound dating, HB 171 imposes the additional burden of preventing women from ending their pregnancy at the beginning of pregnancy (when it is safest), before the pregnancy would be visible by ultrasound. *See* Compl. ¶¶ 90, 100(h); McNicholas Aff. ¶ 55.

[16] Indeed, the State threatens to damage the patient-provider relationship by forcing providers to tell patients that, for example, breast cancer is a complication from an MAB. This link has been thoroughly disproven. *See* McNicholas Aff. ¶ 61 & n.46; McNicholas Rebuttal Aff. ¶ 11 & n.17. Indeed, the most the State's own expert will say is that "[i]t is physiologically plausible that the interruption of a normal pregnancy might place a young woman at increased risk for breast cancer later in life," Skop Decl. ¶ 4—and the State, in its brief, asserts not that

Plaintiffs already provide women with information about the abortion process and ensure that they are confident in their decision to have an abortion. *See* Banks Aff. ¶ 32; Banks Reply Aff. ¶¶ 2-3. Mandating additional information (or rather *dis*information) undermines that process, further harming patients. Banks Aff. ¶ 32.

Fourth, the State concedes that HB 171 imposes new, public reporting requirements on Plaintiffs. Although the State glibly suggests that Plaintiffs fail to explain how these requirements will risk disclosures beyond the existing reporting regime, the State ignores that information collected under HB 171 "*must be deemed public records* and must be available to the public in accordance with the confidentiality and public records reporting laws of this state." HB 171 § 9(8) (emphasis added). Moreover, Plaintiffs explained in their opening brief and substantiated through affidavits how these provisions put providers' safety at risk and chill patients' ability to obtain pre-viability abortions. *See, e.g.*, Br. at 12-13; Banks Aff. ¶ 46 (describing threats of physical violence received as a result of being identified as providing abortion care and the desire of "many abortion providers … to stay anonymous for fear of harassment or even violence"); Banks Aff. ¶ 45 (describing how patients could be identified under the new law). In the face of these clear risks, the State does not even attempt to defend the necessity of publicly reporting the identities of providing and referring clinicians. And the State's own data indicates that certain demographic categories of women obtaining abortions contain very few members, which makes obvious the risk of identification through the additional data the law requires. *See* Koch Decl. ¶ 4.[17]

Finally, the State does not dispute that HB 171 is unconstitutionally vague. Nor could it. The fact that the State's interpretation of what is required of providers under the law differs so

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MABs may cause breast cancer but that "the risk of breast cancer increases for women who don't have children," Opp'n at 18.

[17] These concerns are not mitigated by the law's purported protections. Opp'n at 19. The State does not suggest that *providers'* identities would be shielded from widespread disclosure, yet Dr. Banks's own experiences demonstrate the harm that results from making the identities of abortion providers public. Banks Aff. ¶ 46. And regardless of whether the State seeks to prohibit using the newly public information to identify and harm patients, the criminal laws already preclude the threats of violence abortion providers must endure when their identities are publicized. Such prohibitions have not stopped those attacks, and there is no reason to believe HB 171 would be any more successful when it comes to protecting patients.

significantly from Plaintiffs' understanding belies any claim that "ordinary people can understand what conduct is prohibited," *State v. Samples*, 2008 MT 416, ¶ 16, 347 Mont. 292, 295, 198 P.3d 803, 806, despite punishing violations with decades-long prison terms. *See* Br. at 16-17. Most notably, as described above, HB 171 § 5(2) requires that an MAB provider "be credentialed and competent to handle complications," but HB 171 § 3(5) defines "complications" so broadly that a provider would lack fair notice of when she or he would be subject to criminal liability. Nor does the law even attempt to define what it means to "be credentialed and competent to handle" this amorphous category of matters.

3. *HB 140*

HB 140 violates providers' free speech rights because it compels them to convey State-mandated language and regulates providers' speech on the basis of its content. *See* Br. at 18. The State has no response other than to cite a federal case dealing with another state's informed consent law. *See* Opp'n at 13-14 (citing *Casey*, 505 U.S. at 884). But HB 140 goes much further than a traditional informed consent requirement. It mandates that providers offer images and sounds to patients that have no medical purpose and would serve only to convey the State's disapproval of abortion. It is thus fundamentally different from the provision upheld in *Casey*. *Cf. Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) (holding that a law requiring physicians to perform an ultrasound, display a sonogram, and describe the fetus to women seeking abortions violated physicians' free speech rights).

The State's arguments with respect to HB 140's infringement on patients' rights fare no better. As an initial matter, the State does not even respond to Plaintiffs' argument that HB 140 violates patients' right to equal protection or to individual dignity under the Montana Constitution. *See* Br. at 18 & n.18. And with respect to the right to privacy, the State misses the point: while an ultrasound offer on its own may not violate the right to privacy, the stigmatizing effect on patients that results from the combination of receiving the State's set of "offers," along with being required to sign a State-created form indicating whether they chose to view or listen to fetal activity, certainly does.[18]

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[18] As a result, the comparison to less burdensome laws in other states is irrelevant. *See* Opp'n at 13.

B. Plaintiffs Have Demonstrated Irreparable Harm

Under longstanding Montana law, violations of constitutional rights—in particular to privacy and free speech—cause irreparable harm. *See* Br. at 19. And Plaintiffs have made a clear showing, including through a Verified Complaint and several affidavits in support of their preliminary injunction request, of how their constitutional rights and their patients' constitutional rights will be infringed if the challenged laws are allowed to go into effect on October 1. To name just a few examples: Montanans will be banned from exercising their right to a pre-viability abortion beginning at 20 weeks LMP (HB 136); they will be prohibited from obtaining telehealth MABs (HB 171); providers will be compelled to convey disinformation to their patients (HB 171) and make statements designed to stigmatize patients and deter patients from exercising their right to an abortion (HB 140); and providers will be subject to harsh criminal penalties without notice of the conduct criminalized (HB 136 and HB 171).[19]

Attempting to avoid this clear showing of irreparable harm, the State resorts to obfuscation. For example, its claim (at 11 & n.9) that Plaintiffs have demonstrated only that they *perform* abortions up to 21.6 weeks LMP, but not that women *seek* abortions after 20 weeks LMP, is a red herring; the State's own materials make clear that women have sought (and received) abortions beginning at 20 weeks LMP. *See* Koch Decl. ¶ 4 (reporting 166 abortions performed from 18 to 20 weeks and 50 abortions performed at 21 weeks or more). And the State's assertion that "[m]ore than 8000 medical providers in Montana are *eligible* to perform abortions," Opp'n at 9 (citing Risken Decl. ¶ 3 & Ex. A) (emphasis added), says nothing about the number of doctors who are trained or willing to provide abortions (especially given the stigmatization and harassment that abortion providers face, *see* Banks Aff. ¶ 46). The State does not dispute that, including PPMT health centers, there are only seven generally available abortion facilities in Montana, and even fewer that are able to provide procedural abortion after 14 weeks LMP. Banks Aff. ¶ 10. Moreover, according to the State's own submissions, only 10 percent of obstetrician-gynecologists are willing to perform abortions, Skop Decl. ¶¶ 42, 58, and

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[19] The State does not contest that the challenged laws restrict Montanans' ability to obtain pre-viability abortions. *See, e.g.*, Opp'n at 1, 7-13 (describing how HB 171 restricts medication abortions, HB 136 bans certain pre-viability abortions, and HB 140 imposes additional requirements on women seeking pre-viability abortions).

the State has no way of knowing whether the "[m]ore than 8000 medical providers," Opp'n at are actively practicing in Montana, *see* Risken Decl. Ex. A.[20]

The "great or irreparable injury" to Plaintiffs, § 27–19–201(2), MCA, is not limited to the constitutional realm either. By their own terms, the laws at issue in this application for preliminary relief expose Plaintiffs to substantial criminal and civil liability in their capacity as providers. The creation of substantial new legal liabilities that directly and uniquely affect Plaintiffs is a textbook case for preliminary relief to preserve the status quo. And the State makes no pretense of disputing the harms to providers, which are neither speculative nor hypothetical, and which cannot be undone once the challenged laws take effect.

CONCLUSION

For the foregoing reasons, and for the reasons stated in their opening brief and in the affidavits submitted in support of both briefs, Plaintiffs respectfully request that the Court preliminarily enjoin HB 136, HB 171, and HB 140.

Respectfully submitted this 17th day of September, 2021.

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[20] The State's focus on how many providers there are, or might be, is yet another deflection, since the restrictions Plaintiffs challenge impose a variety of barriers *between* patients and their providers.