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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
 YELLOWSTONE COUNTY

<p>PLANNED PARENTHOOD OF          MONTANA and JOEY BANKS, M.D.,          on behalf of themselves and their          patients,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>STATE OF MONTANA, by and through          AUSTIN KNUDSEN, in his official          capacity as Attorney General,</p> <p style="text-align: center;">Defendants</p>	<p>DV-21-00999</p> <p>Hon. Gregory R. Todd</p> <p><b>REBUTTAL DECLARATION OF          ROBIN PIERUCCI, M.D., M.A.,          FAAP</b></p>
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1. Dr. Ralston states as uncontested fact, “a fetus is not able to experience pain before at least 24 weeks” because a) there is a lack of “key connections to the brain” and b) “fetuses never experience true wakefulness in utero” due to the uterine environment keeping them “in a continuous, sleep-like state” (Ralston Aff. ¶ 4). His statement stands on a biased theory regarding how pain should be defined, and persistently ignores substantial evidence.

2. The intrauterine environment does not keep a fetus perpetually unaware. Pierucci Decl. ¶¶ 21-24. Additionally, contradicting the ‘unaware’ fetus stance, is literature regarding “fetal sleep and wakefulness, fetal motility, fetal memory, fetal hearing, fetal breathing and its control, and fetal behavior”<sup>1</sup> as well as interventions for fetal stress<sup>2</sup>, facial expression<sup>3</sup> and more.

3. “None of this work is easily reconciled with the notion of a permanently unconscious human fetus”<sup>4</sup> and it “dismiss[es] the observations of parents, nurses and neonatal doctors on newborn but extremely premature babies, [and their] rigorous research.”<sup>5</sup>

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<sup>1</sup> Martin Ward Platt, *Fetal Awareness and Fetal Pain: The Emperor’s New Clothes*, ARCH DIS CHILD FETAL NEONATAL EDITORIAL, F236 (2011), <https://fn.bmj.com/content/fetalneonatal/96/4/F236.full.pdf>.

<sup>2</sup> Nadine S. Fink, et al., *Fetal Response to Abbreviated Relaxation Techniques. A Randomized Controlled Study*, EARLY HUMAN DEVELOPMENT (2011), <https://www.sciencedirect.com/science/article/abs/pii/S0378378210006948?via%3Dihub>.

<sup>3</sup> A. Kurjak, et al., *Fetal Hand Movements and Facial Expression in Normal Pregnancy Studied by Four-Dimensional Sonography*, JOURNAL OF PERINATAL MEDICINE (2005) <https://www.degruyter.com/document/doi/10.1515/JPM.2003.076/html>.

<sup>4</sup> Martin Ward Platt at F236, *supra* note 1.

<sup>5</sup> *Id.*

4. Impressive research involving infants who are less than 24 weeks gestation includes the work of NICUs across the country as demonstrated in publications<sup>6,7</sup> and center-based performance improvement work<sup>8</sup>— all demonstrating that increased attentions to decreasing direct pain as well as intentionally increasing soothing interventions in the most immature neonates measurably improves their immediate well-being and long-term outcomes.

5. There is consensus that noxious stimulation adversely affects a fetus, including those who are less than 24 weeks. In his rebuttal, Dr. Ralston relies on a 2021 article he co-authored that grants that, “there may be substantial short- and long-term adverse effects on the fetus and its developing central nervous system if the fetal physiologic stress response is not blunted” and even that “opioid analgesia should be administered to the fetus during invasive fetal surgical procedures to attenuate acute autonomic responses that may be deleterious, to avoid long term consequences of nociception and physiologic stress on the fetus, and to decrease fetal movement...”<sup>9</sup>

6. This is a much more subtle way to state what Lowery, *et al.* say in their literature review of what we already understood back in 2007: “Nociception causes

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<sup>6</sup> Mindy Morris, et al., *Small Baby Unit Improves Quality and Outcomes in Extremely Low Birth Weight Infants*, PEDIATRICS (2015) <https://pediatrics.aappublications.org/content/136/4/e1007>.

<sup>7</sup> O. Fathi, et al., *Development of a Small Baby Unit to Improve Outcomes for the Extremely Premature Infant*, JOURNAL OF PERINATOLOGY (2021) <https://europepmc.org/article/pmc/pmc7952830>.

<sup>8</sup> VERMONT OXFORD NETWORK, [public.vtoxford.org](http://public.vtoxford.org) (last visited September 27, 2021).

<sup>9</sup> Society for Maternal-Fetal Medicine (SMFM), et al., *Journal Pre-proof: Consult Series No. 59: The Use of Analgesia and Anesthesia for Maternal-Fetal Procedures*, AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY, Lines 230-39 (2021) [https://www.ajog.org/article/S0002-9378\(21\)00965-0/pdf](https://www.ajog.org/article/S0002-9378(21)00965-0/pdf).

physiologic stress which in turn causes increases in catecholamines, cortisol, and other stress hormones. Physiologic stress is different from emotional pain felt by the more mature fetus or infant, and this stress is mitigated by pain medication such as opiates... Whereas evidence for conscious pain perception is indirect, evidence for the subconscious incorporation of pain into neurological development and plasticity is incontrovertible.”<sup>10</sup>

7. What is not incontrovertible, or consensus, is Dr. Ralston’s assertion that “all available medical evidence indicates that fetal pain is not possible before 24 weeks of pregnancy.” Ralston Aff. ¶ 12. The first source cited in his own 2021 publication with the Society of Maternal Fetal Medicine states, “[h]ow and when this complex brain network develops to encode noxious stimuli and create the experience of pain is an important area of current research.”<sup>11</sup>

8. Unfortunately, this same paper as well as the SMFM and ACOG limit their definition of pain to the one created by the International Association for the Study of Pain (IASP). They believe that pain must have the two components of “an unpleasant sensory and emotional experience associated with, or resembling that associated with, actual or potential tissue damage.”<sup>12</sup> They also specifically clarify, “[p]ain and nociception are different phenomena. Pain cannot be inferred solely from activity in

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<sup>10</sup> Curtis L. Lowery, et al., *Neurodevelopmental Changes of Fetal Pain*, SEMINARS IN PERINATOLOGY (2007), <https://www.sciencedirect.com/science/article/abs/pii/S0146000507000687?via%3Dihub>.

<sup>11</sup> Madeleine Verriotis, et al., *The Development of the Nociceptive Brain*, NEUROSCIENCE (2016), <https://www.sciencedirect.com/science/article/abs/pii/S0306452216303311?via%3Dihub>.

<sup>12</sup> Srinivasa N. Raja, et al., *The Revised IASP Definition of Pain: Concepts, Challenges, and Compromises*, PAIN (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7680716/>

sensory neurons.”<sup>13</sup> This separation of noxious stimuli induced physical responses from emotional, experiential awareness of pain originated with Merskey, the chair of the IASP Subcommittee on Taxonomy who previously published his philosophy that pain is a “psychic event and not a physical event...the pain is not these sense data but the perceptual experience of discomfort.”<sup>14</sup>

9. However, in their review of fetal pain literature, Derbyshire and Bockmann note that “as others have pointed out, such a demanding definition of pain restricts pain almost exclusively to fairly mature human beings.”<sup>15</sup> They suggest a definition “which focuses less on subjective reflection (*knowing that* I am in pain) and more on the immediate unreflective feel of pain (*being in* pain).”<sup>16</sup>

10. Derbyshire and Bockmann’s definition is not just a philosophy. The data support it. Theirs and multiple other pain literature reviews acknowledge subcortical activity.<sup>17,18,19,20</sup> These authors note that the developing neural elements may be

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<sup>13</sup> Srinivasa N. Raja, et al., *The Revised IASP Definition of Pain: Concepts, Challenges, and Compromises*, PAIN (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7680716/>

<sup>14</sup> H. Merskey, *Logic, Truth and Language in Concepts of Pain*, QUALITY OF LIFE RESEARCH (1994) <https://doi.org/10.1007/BF00433379>.

<sup>15</sup> Stuart W. Derbyshire, et al., *Reconsidering Fetal Pain*. JOURNAL OF MEDICAL ETHICS 46, no. 1: 3 (2020), <https://doi.org/10.1136/medethics-2019-105701>.

<sup>16</sup> *Id.*

<sup>17</sup> Curtis L. Lowery, *supra* note 10.

<sup>18</sup> Karen D. Davis, et al., *The Pain Switch: An “Ouch” Detector*, Pain (2015), [https://journals.lww.com/pain/Citation/2015/11000/The\\_pain\\_switch\\_\\_an\\_\\_ouch\\_\\_detector.9.aspx](https://journals.lww.com/pain/Citation/2015/11000/The_pain_switch__an__ouch__detector.9.aspx).

<sup>19</sup> Slobodan Sekulic, et al., *Appearance of Fetal Pain Could be Associated with Maturation of the Mesencephalic Structures*, Pain (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5115678/>.

<sup>20</sup> Sampsa Vanhatalo and Onno van Nieuwenhuizen, *Fetal Pain?*, Brain and Development (2000), [https://www.brainanddevelopment.com/article/S0387-7604\(00\)00089-9/fulltext](https://www.brainanddevelopment.com/article/S0387-7604(00)00089-9/fulltext).

immature, but they are not inactive.<sup>21,22</sup> Thus the process of pain perception could be made with any structure satisfying the conditions that perception is the organization, identification, and interpretation of sensory information in order to represent and understand the environment.<sup>23</sup>

11. Sekulic, *et al.* conclude, early rudimentary form of the perception of pain in human species could be achieved only with mesodiencephalic structures during intrauterine development.<sup>24</sup> Derbyshire formerly published that fetal pain did not exist, but now, informed by the data, states “evidence, and a balanced reading of the evidence, points towards an immediate and unreflective pain experience mediated by the developing function of the nervous system from as early as 12 weeks”.<sup>25</sup>

12. The same major medical societies, of which Dr. Ralston is part of, as recently as the early 1990s denied the pain capability of not just a fetus, but of full-term babies. Informed by the evidence, this changed. Dr. Anand, *et al.*’s 1992 study looked at term infants taken to cardiac surgery with adequate compared to inadequate anesthesia and the worse intraoperative and post-operative outcomes of those babies whose anesthesia was inadequate.<sup>26</sup> As a result, infants are no longer taken to surgery without anesthesia.

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<sup>21</sup> Curtis L. Lowery, *supra* note 10.

<sup>22</sup> Slobodan Sekulic, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Stuart W. Derbyshire and John C. Bockmann, *Reconsidering Fetal Pain*, Journal of Medical Ethics (2020), <https://jme.bmj.com/content/medethics/46/1/3.full.pdf>.

<sup>26</sup> K.J.S. Anand and P.R. Hickey, *Halothane-Morphine Compared with High-Dose Sufentanil for Anesthesia and Postoperative Analgesia in Neonatal Cardiac Surgery*, The

13. A literature review that discusses the progress made in fetal analgesia states, “[s]ome doubts on the necessity and safety of providing analgesia to the fetus during prenatal surgery were raised 10 years ago... These objections now seem obsolete.”<sup>27</sup> The obsolete objections are the same ones that Dr. Ralston continues to support. “This review shows that neuroinhibitors give fetuses at most some transient sedations, but not a complete analgesia, that the cerebral cortex is not indispensable to feel pain, when subcortical structures for pain perception are present, and that maternal anesthesia seems not sufficient to anesthetize the fetus.”<sup>28</sup>

14. Additionally, my previous declaration cites studies showing infants who are missing their cerebral cortex or whose cortex is significantly malformed respond appropriately to both painful and consoling stimuli. Pierucci Decl. ¶ 39. Even more dramatically demonstrating Dr. Ralston’s and colleagues’ over estimation of the cerebral cortex’s involvement in consciousness, is a study involving 108 primary caregivers of children with hydranencephaly. The authors state, “the drastic loss of cortical tissue in hydranencephaly, coupled with an identification of the conscious state with cortical function, has encouraged the default assumption that these children are not conscious.”<sup>29</sup> What they documented was the “capacity of children

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New England Journal of Medicine (1992),  
<https://www.nejm.org/doi/full/10.1056/NEJM199201023260101>.

<sup>27</sup> Carlo V. Bellieni, *Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress*, *Pediatric Research* (2021), <https://www.nature.com/articles/s41390-020-01170-2>.

<sup>28</sup> *Id.*

<sup>29</sup> Barb Aleman and Bjorn Merker, *Consciousness Without Cortex: a Hydranencephaly Family Survey*, *ACTA PAEDIATRICA* (2014),  
<https://onlinelibrary.wiley.com/doi/10.1111/apa.12718>.

with hydranencephaly to experience a spectrum of hedonic states spanning from distress to contentment, pleasure and even joy, as expressed through screaming, crying, fussing, smiling, giggling and laughter... indicat[ing] that they are not only physiologically awake but conscious.”<sup>30</sup> The capacity of a fetus, who does not yet have mature connections to his or her cerebral cortex, to be affected by pain is not merely my opinion, it is supported by the literature and, as Derbyshire and Bockmann note, a denial of fetal pain is not settled consensus.<sup>31</sup>

15. Though I now hold associations with pro-life groups, prior to becoming a neonatologist I was not against abortion. Given my clinical work as well as continued assessment of the evidence, I discovered that I was wrong.

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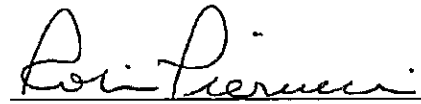
<sup>30</sup> *Id.*

<sup>31</sup> Stuart W. Derbyshire, *supra* note 25.



I submit this declaration pursuant to Mont. Code Ann. §§ 1-6-105 and 27-19-303, which together permit parties to present declarations for the court to consider at a preliminary injunction hearing. I hereby declare under penalty of perjury under the laws of the United States of America and the State of Montana that the foregoing is true and correct.

Dated: September 28, 2021

  
Robin Pierucci, M.D., M.A., FAAP

## CERTIFICATE OF SERVICE

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