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**Admitted Pro Hac Vice*
***Application for Admission Pro Hac Vice Forthcoming*

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA, and JOEY BANKS, M.D., on behalf of themselves and their patients, Plaintiffs, vs. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, Defendant.	DV-21-00999 Hon. Michael G. Moses **STATE OF MONTANA'S REPLY IN SUPPORT OF MOTION TO STAY**

INTRODUCTION

Motions to stay proceedings are appropriate when an issue on appeal "will drive the trial and the legal theory upon which the Plaintiffs' claims" may proceed. *Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 2016 Mont. LEXIS 1126, at *4, 386 Mont. 392, 386 P.3d 543. Such is the case here.

The State's appeal, *Planned Parenthood v. State*, DA 21-0521, will clarify numerous issues: the proper preliminary injunction standard, the weight a district court should afford to the State's evidence, the role that presumed constitutionality of state statutes plays at the preliminary injunction stage of trial proceedings, and—of particular importance here—the appropriate level of judicial scrutiny applied to the three laws at issue here.

An issue like the appropriate tier of scrutiny is the lens through which the entire case is decided. An error on this fundamental issue would be compounded, necessitating further appeals, if the Court issues subsequent orders under incorrect levels of scrutiny. Ensuring that this Court proceeds under the correct standard will quite literally preserve judicial resources and prevent duplicative and costly litigation.

The State asks for a motion to stay proceedings because the State seeks to conserve judicial resources and the time and resources of the parties by addressing such foundational issues once on appeal, not multiple times.

ARGUMENT

A stay is necessary to preserve judicial economy and prevent relitigating the same matter multiple times in this Court. *See Atl. Richfield,* 2016 Mont. LEXIS 1126 at *4–6 (staying proceedings at the district court pending resolution of issue at the Montana Supreme Court to preserve judicial economy and avoid procedural entanglements); *accord Woodman v. Depositors Ins. Co.*, 2004 ML 858 (Mont. Dist. Ct. 18th Jud. Dist. 2004); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

A. This Court should apply the correct, settled levels of scrutiny to the laws at issue in this case.

The State intends to appeal the level of scrutiny applied to all three laws by the District Court in its preliminary injunction order. *State's Brief in Support* at 1. The stay will preserve judicial resources because proceeding under an incorrect tier of scrutiny will necessitate future appeals and duplicative litigation. Plaintiffs categorize this as a "*separate*" legal issue. *Pls.' Brief in Opposition* at 3 (emphasis in original). But the level of scrutiny is essential and inextricably tied to this case's resolution because the tier of scrutiny affects the constitutional analysis. *See Wiser v. State*, 2006 MT 20, ¶ 18, 331 Mont. 28, 129 P.3d 133 ("Under [strict scrutiny], regulation of health care professions necessary for the public's protection would become very difficult, if not impossible, for the State to undertake."). Plaintiffs seem to recognize this basic point. *Pls.' Brief* at 3 ("The State's indication that it intends to argue

on appeal that this Court applied the wrong level of scrutiny should not change this calculus, as the level of scrutiny that governs Plaintiffs' claims is well-settled."). Because the Plaintiffs disagree with the State, they respond that their view is "well-settled." That's not a legal argument—that's not much of an argument at all.

It is precisely *because* the State seeks to clarify the correct level of scrutiny in the wake of *Wiser* that a stay is appropriate here. *Wiser*, ¶ 15. If, as the State has consistently argued, *Wiser* controls, then parts or all of HB 136, 140, and 171 will be subject to rational basis review—not strict scrutiny. *See id.* ¶ 19.[1]

After the Montana Supreme Court rules on these issues, the parties will proceed under a clear standard of review for the remainder of the district court litigation. If the district court moves forward now, then there is a real risk of compounding error that the State will not have an opportunity to correct until much later in litigation. If—as the State has argued—the Court applied improper levels of scrutiny, it should allow the Montana Supreme Court to correct course now rather than later.

Plaintiffs contend that a stay "would stymie the normal progression of this case towards summary judgment or trial," *Pls.' Brief* at 3, but the correct level of scrutiny is essential at every state of the proceedings, particularly at summary judgment.

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[1] Plaintiffs also confusingly ask this Court to "deny the State's apparent effort to overturn that settled precedent improperly through an appeal of a preliminary injunction." *Pls.' Brief* at 4. First off, preliminary injunctions are appealable by right. Mont. R. App. P. 6(3)(e). Second, the various legal issues the Supreme Court will clarify on appeal will make the rules of the road clear for the District Court. That is, respectfully, how American jurisprudence has always worked. There's nothing improper about the State's appeal or its request to Stay this Court's proceedings in the meantime.

Disrupting Plaintiffs' preferred litigation strategy or calendar is not "stymieing the proceedings." To the contrary, a stay pending appeal will clarify the issues for any subsequent proceedings in this Court, provide an orderly path forward, and properly conserve judicial resources, and preserve the parties' time and resources.[2]

B. A stay averts risk of conflicting decisions.

The risk of conflicting decisions warrants a stay of proceedings. *See Henry v. District Court*, 198 Mont. 8, 14, 645 P.2d 1350, 1353 (1982). A substantial risk of a conflicting decision exists because any decision of the Montana Supreme Court on appeal will be binding on this Court. Plaintiffs cite *Henry*, 198 Mont. at 14, 645 P.2d at 1353, in apparent disagreement. *Pls.' Brief* at 2. But in *Henry*, the movants asked for a stay in the Montana Supreme Court pending resolution of an entirely separate case in the United States Court of Appeals for the Ninth Circuit. *Id.* at 13. Because the decision of the Ninth Circuit would not bind the Montana Supreme Court, there was not a risk of conflicting decisions. *See id.* at 14. The devil's in the details. Here, as in *Atlantic Richfield*, a stay is warranted because the issue on appeal to a controlling court "will drive" future litigation in the district court. 2016 Mont. LEXIS 1126, at *5. The risk of conflicting decisions counsels towards a stay.

Any decision made by this Court between now and the resolution of the appeal must ultimately conform with the decision of the Montana Supreme Court. Rather

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[2] Plaintiffs also state that a stay will not preserve judicial economy "since the parties will have to litigate the merits of this matter regardless." *Pls.' Brief* at 3. Yes, that is correct. But the State is trying to prevent outlays of cost, expense, time, and resources required to litigate the merits *twice*.

than guess at or infer what the Montana Supreme Court will decide, it will conserve the resources of all involved to avoid potentially conflicting decisions and stay proceedings pending appeal.

C. This stay is for a limited period and does not prejudice plaintiffs.

The State's request for a stay is not open-ended or indefinite, *State's Brief* at 1, and it is properly constrained to an issue on appeal to a controlling court. While the Montana Supreme Court has upheld a district court's denial of a stay pending the outcome of related litigation, the related litigation in those cases was out-of-jurisdiction, not on appeal to the Montana Supreme Court. *See In re Crow Water Compact*, 2015 MT 217, ¶ 33, 380 Mont. 168, 354 P.3d 1217 (citing *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 33) (involving litigation in a different state), *Henry*, 198 Mont. at 14, 645 P.2d at 1353 (involving litigation in federal court). Because the State's request for a stay pending appeal involves an appeal to the Montana Supreme Court it does not raise the same indefiniteness concerns as cited in *In re Crow Water Compact*.

Plaintiffs will suffer no prejudice as a result of a stay. The laws have been enjoined and—as a result—are not being applied to any Plaintiffs. Instead, because of the preliminary injunction, they currently have the relief they seek. *State's Brief* at 2. A partial quote of Mont. R. Civ. 1. does not override all other interests. *Pls.' Brief* at 4. As the State argued in its brief, a full reading of Rule 1 requires just, speedy, and inexpensive determinations of every action. *State Brief* at 2. Duplicative litigation that imposes additional costs, both in terms of time and resources violates Rule 1.

CONCLUSION

We agree that this case is of "extreme constitutional importance," *Pls.' Brief* at 4, precisely because of the State's interest in protecting the health and wellbeing of pregnant women in Montana and the State's unquestioned interest in protecting potential life. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (There is a profound state interest "in promoting respect for human life at all stages in the pregnancy."). The constitutional importance of this matter only enhances the reasons the State has requested a stay. This Court should stay proceedings until the Montana Supreme Court rules on the foundational law governing this matter and then the constitutional issues may be fully addressed *once* at the district court.

DATED this 8th day of November, 2021.

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CERTIFICATE OF SERVICE

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