IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0521

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

Plaintiffs/Appellees

VS.

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

Defendant/Appellant

ON APPEAL FROM THE MONTANA SECOND JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY, HON. MICHAEL G. MOSES, PRESIDING
CASE NO. 21-0521

AMICUS CURIAE BRIEF OF MONTANA CONSTITUTIONAL CONVENTION DELEGATES AND RESEARCH STAFF IN SUPPORT OF PLAINTIFFS/APPELLEES

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I. INTRODUCTION

Exactly fifty years ago today, on March 24th, the one hundred Delegates to Montana's 1972 Constitutional Convention adjourned after fifty-five days of drafting, debating, and adopting a new constitution for the people of Montana, which they "ordain[ed] and establish[ed] . . . "to secure the blessings of liberty for [their own] and future generations" of Montanans.[1] The Delegates were "an unusual group"; they "were not seasoned politicians, with the exception of a few former State Legislators."[2] Instead, the Delegates consisted of grassroots citizens who "were, on the whole, inquisitive, studious, well-meaning, and sincerely interested in improving Montana's political system . . . persons interested by nature or vocation in the political process."[3] They "arrived at our state Capitol from across Montana to frame a new future, shar[ing] a sense of purpose, a spirit of nonpartisan cooperation and a devotion to the public good that is worth remembering and celebrating in these quarrelsome times."[4]

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[1] Mont. Const., Preamble.

[2] Montana Constitutional Society of 1972, *100 Delegates: Montana Constitutional Convention of 1972* (1989), Foreword, excerpts attached hereto as **Appx. 1**, available at https://digitalcommons.mtech.edu/crucible_materials/6.

[3] *Id.*

[4] Montana Free Press, *Montana State University to host celebration of 1972 Constitutional Convention* (January 27, 2022), attached hereto as **Appx. 2**, available at https://montanafreepress.org/2022/01/27/msu-mtfp-host-montana-constitutional-convention-anniversary-event/; *see also* Fritz Snyder and Mae Nan

Now, a half century later, three of the surviving Delegates and the research analyst for the Bill of Rights Committee have convened again, sadly, a much smaller group, but imbued with that same sense of dedication and purpose—this time to defend the original intent underlying one of the most important fundamental rights they helped enshrine in the Constitution's Declaration of Rights: the right to individual privacy.

II. REASON FOR *AMICI'S* APPEARANCE

Plaintiffs-Appellees Planned Parenthood of Montana and Joey Banks, M.D. ("Appellees") filed this lawsuit challenging the constitutionality of three laws passed by the Montana legislature and signed into law by the governor on April 26, 2021—HB 136, HB 171, and HB 140—which significantly impede the long-recognized, fundamental right of Montanans to seek and obtain safe, pre-viability abortions from their healthcare providers of choice within the state.

Unsurprisingly, the district court granted a preliminary injunction against enforcement of these new acts. The State immediately appealed, arguing mostly about preliminary injunction standards and burdens of proof. Were that all, these *amici* would not have sought leave to appear. But Montana's Attorney General

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Ellingson, *The Lawyer-Delegates of the 197 Montana Constitutional Convention: Their Influence and Importance*, 72 Mont. L. Rev. 53, 53 (2011) [hereinafter "Ellingson"], excerpts attached hereto as **Appx. 3** ("[I]t is generally agreed [that the] Convention was conducted on a nonpartisan basis[.]").

asks this Court to overturn nearly thirty years of precedent in order to do something new and unprecedented—not to grant a new right, but to strip away a right long recognized as fundamental by Montana's courts, and to give to the legislature the power to proscribe, indeed eliminate, the right to individual privacy enshrined in the text these *amici* helped draft.[5] In no uncertain terms, these *amici* state firmly, with conviction, passion, and not a shred of doubt, that to grant the Attorney General's request would be not only contrary to the intent of the Constitutional Convention Delegates, but the beginning of the end of the one right—individual privacy—that is perhaps most important to what makes our great State the last best place on earth.[6]

III. DISCUSSION

Unlike the Attorney General, as delegates and research staff of the 1972 Constitutional Convention, *amici curiae* Mae Nan Ellingson, Lyle Monroe, Bob Campbell, and Rick Applegate were fully immersed in the research, analyses, and debates that took place surrounding the drafting of the new Montana Constitution.

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[5] Appellant State of Montana's Opening Brief ("State's Br.) at 15-23.

[6] *See, e.g.*, *Gryczan v. State*, 283 Mont. 433, 455 (1997) ("[I]n this State, under Montana's Constitution, the right of individual privacy—that is, the right of personal autonomy or the right to be left alone—is fundamental. It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.").

As such, these *amici* are uniquely qualified to speak to the "framers' intent" underlying the right to individual privacy, an expressed intent that the Attorney General seeks to contort. Indeed, *amici* Delegates Campbell and Monroe themselves served on the Bill of Rights Committee, *amicus* Campbell introduced Article II, Section 10 on the Convention floor, and *amicus* Applegate conducted much of the underlying research for the Bill of Rights Committee. Contrary to the Attorney General's arguments, the Delegates of the Constitutional Convention crafted Article II, Section 10 using broad, nonspecific language to empower Montana's courts to construe the provision in accordance with evolving societal circumstances. The Delegates entrusted Montana's judiciary, not the legislature, with ensuring proper application of the right to individual privacy, and in the decades following ratification by the people, stayed mostly in the background as the courts did their work, properly recognizing that Montana's new Constitution took the U.S. Constitution as but a starting point.

In 1997, in *Gryczan*, this Court confirmed the existence—grounded in the individual right to privacy and related provisions in the Declaration of Rights—of a fundamental, constitutional "right of personal autonomy and right to be let alone."[7] In 1999, in its *Armstrong* decision, this Court recognized that this broad,

[7] *Gryczan*, 283 Mont. at 456.

fundamental right includes within it the "right to seek and obtain a pre-viability abortion [under] the procreative autonomy component of personal autonomy[.]"[8] At this late date, a full half-century after the Delegates did their work, the State's most partisan branch now seeks a change to this long-established precedent. In these circumstances, the doctrine of *stare decisis* has become a crucial component of upholding the Montana Constitution in the manner intended by its framers, to protect not only the rights of their own generation, but of the future generations invoked in the Preamble. To uphold that intent, this Court must decline the Attorney General's invitation to reverse *Armstrong*, and instead should continue as it has for three decades, to protect Montanans' individual privacy right to personal autonomy, including "the right to obtain a lawful medical procedure—a pre-viability abortion—from a [licensed] health care provider of [one's] choosing[.]"[9]

A. THE DELEGATES ADOPTED A BROAD, SELF-EXECUTING FUNDAMENTAL RIGHT OF INDIVIDUAL PRIVACY, ENTRUSTING THE COURTS TO CONSTRUE THE SCOPE OF THAT RIGHT IN ACCORDANCE WITH AN EVOLVING SOCIETY.

If the Attorney General had actually reviewed the transcripts of the Constitutional Convention—rather than engaging in *ad hominem* attacks against retired Justice James Nelson—he would understand that the Delegates were

[8] *Armstrong v. State*, 1999 MT 261, ¶ 48.

[9] *Weems v. State*, 2019 MT 98, ¶¶ 1, 29 (unanimously recognizing *Armstrong* is controlling law).

committed to insulating Montana's Declaration of Rights *against* legislative influence, not enabling it. He also would realize that the Delegates purposely drafted Article II, Section 10 to be broad, so that Montanans' right to privacy would be protected in the widest possible manner, subject to court review and analysis—not legislative whim.

Throughout the Convention, the Delegates repeatedly rejected any possibility that the legislature would have a say in defining the scope of the rights detailed in Article II, in particular the right to individual privacy. Indeed, Delegate Dahood, the Chairman of the Bill of Rights Committee, explained as a starting point that "constitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights."[10] In other words, the Delegates never intended the scope of these fundamental rights to be subject to the partisan, political vagaries of the legislative and executive branches. Instead, these rights exist beyond the reach of politics and therefore must be construed by our State's only nonpartisan branch: the judiciary.

[10] Montana Constitutional Convention, Verbatim Transcript (1972) ("Mont. Const. Conv."), Vol. 5, at 1644.

1. The Delegates intended the right of privacy to be broader than under earlier drafted Constitutions.

In considering and ultimately adopting the language for Article II, Section 10, the Delegates knew that both the United States Supreme Court and the Montana Supreme Court had recognized a right to individual privacy.[11] Because that right was found in the penumbras of other specified rights, however, it was often circumscribed. As such, the Delegates believed it critical to codify the right by including it specifically in the text of the Declaration of Rights. To this end, when *amicus* Campbell moved on the floor of the Convention to add Article II, Section 10 to the Declaration of Rights, he noted that judicial recognition of a fundamental right to privacy was not enough: "the right of privacy is a right which is not expressly stated in either the United States or the Montana Constitution. It is our feeling, on the Bill of Rights Committee, that the times have changed sufficiently that this important right should now be recognized."[12]

Indeed, when the Bill of Rights Committee proposed the language for Article II, Section 10—which was unanimously adopted by the Bill of Rights Committee and approved almost verbatim[13] by the full Convention—it explained

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[11] *See* Larry M. Elison and Dennis NettikSimmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 11 (1987), excerpts attached hereto as **Appx. 4**; *see also* Ellingson, at 71.

[12] Mont. Const. Conv. Vol. 5, at 1680.

[13] Prior to its introduction for a vote, *amicus* Campbell moved on behalf of the Bill of Rights Committee to amend the language of Article II, Section 10 to include the

that Section 10 "accomplishes . . . *the elevation of the judicially-announced right of privacy to explicit Constitutional status*. The right has been guaranteed in case law at the federal level [*Griswold v. Connecticut*, 381 U.S. 479 (1965)] and in Montana [*State v. Brecht*, 28 St. Rep. 468, 473 (1971)]. The committee believes that the only circumstance in which the right of privacy may be infringed is following the showing of a compelling state interest."[14] The Committee further explained it had "proposed *a broad provision* in this area *to permit flexibility to the courts* in resolving tensions between public interests and privacy."[15]

When he introduced Article II, Section 10 on the Convention floor, *amicus* Campbell discussed in detail the U.S. Supreme Court's holding in *Griswold*.[16] He explained:

> [*Griswold*] held that the right of privacy extended into the marital privacy, that the state did not have a compelling state interest in going into the bedroom of a married couple to prevent contraception. And they ruled the Connecticut anticontraception law invalid as invading

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word "individual" to make clear that the right protected was *individual* privacy. *See* Ellingson, at 72; Mont. Const. Conv., Vol. 5, at 1680. The Delegates voted in favor of that amendment and subsequently voted to include Article II, Section 10 in the Constitution as amended. *See* Mont. Const. Conv., Vol. 5, at 1680-81.

[14] Mont. Const. Conv., Comments, Vol. 2, at 632 (emphasis added) (bracketed citations in original).

[15] *Id.* at 632-33 (emphasis added).

[16] This discussion of *Griswold's* recognition of a right to procreative autonomy was informed by the analysis in *amicus* Applegate's *Bill of Rights, Constitutional Convention Study No. 10*, Montana Constitutional Convention (1971-1972), at 237-42, excerpts attached hereto as **Appx. 5**.

> the right of privacy. Now, we don't know how the interpretations will go from there, what the [U.S.] Supreme Court will do. What [Article II, Section 10] would do—by requiring that this area of privacy be protected unless there is a showing of a compelling state interest, it produces what I call a semipermeable wall of separation between individual and state.

Accordingly, Article II, Section 10 was meant to "guarantee our individual citizens of Montana this very important right-the right to be let alone; and *this has been called the most important right of them all*."[17]

Finally, *amicus* Campbell preemptively rejected any suggestion that this fundamental privacy right would be subject to the political views of the legislature:

> Some may urge and argue that this is a legislative, not a constitutional issue. We think the right of privacy is like a number of other inalienable rights; a carefully worded constitutional article reaffirming this right is desirable. Wade Dahood of Anaconda, Chairman of the Bill of Rights Committee, hit the nail on the head when he said: "*As government functions and controls expand, it is necessary to expand the rights of the individual*." The right to privacy deserves specific protection.[18]

As such, this Court appropriately relied upon "the Bill of Rights Committee's favorable reference to *Griswold*" when it concluded in *Armstrong* that "the procreative autonomy component of personal autonomy is protected by Montana's constitutional right of individual privacy found at Article II, Section 10."[19] Indeed,

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[17] Mont. Const. Conv., Vol. 5, at 1681 (emphasis added).

[18] *Id.* (emphasis added).

[19] *Armstrong*, ¶ 48.

the Court correctly recognized this must be so, because to imbue the legislature with the right *to deny* this procreative autonomy "in favor of birth," would "necessarily" recognize the opposite, that the legislature would also have "the power *to require* abortion[.]"[20]

In further discussions on whether to amend Article II, Section 10 as adopted, *amicus* Campbell once again reiterated the intention to use broad, general language to allow courts to later expound upon the scope of the right, noting that there "was much discussion before our committee, and why not try to define the right, to put in specific examples. *But it is our feeling that once you do that, you are running a risk that you may eliminate other areas in the future which may be developed by the court*."[21] Delegate Burkhardt eloquently drove this critical point home:

> I think those who write a Bill of Rights have something of the same goal in mind. *They don't want a precise, hidebound kind of inescapable statement that has to be put into the statutes. What they're looking for is the soul of a document, the living, growing reality.* And I think this group has demonstrated soul, not only in this section but in some of the sections just ahead of us—the right to know, the right to privacy, which I hope we'll get to eventually. But it seems to me that what we're dealing with here is an expression of poetry which, nevertheless, is a kind of a safety net under the high wire in the circus. And while it may not serve every situation, there may be an occasion of blatant abuse when the safety net is needed and

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[20] *Armstrong*, ¶ 49 (emphasis added) (invoking the horror of state-imposed "eugenics by involuntary sterilization" upheld by the U.S. Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927)).

[21] Mont. Const. Conv., Vol. 6, at 1851 (emphasis added).

> it will be there and it will serve a very important function. Therefore, I'd like to get to the language of the original committee, for, *while it is somewhat imprecise, it's the kind of poetry that a court that's concerned for justice can work with and the future can find hope in*.[22]

In short, the Attorney General is simply wrong in his assertions that the Delegates meant to leave this critical, fundamental right to the vagaries of the partisan political branches. As plainly documented, their oft-expressed intent was the polar opposite.

2. The Delegates' discussions and framing of Article II, Section 9 bolsters the conclusion that the Delegates intended the right of privacy to be broad and construed by the courts.

Article II, Section 9—"the "right to know" provision—was one of the more vigorously debated provisions in the Declaration of Rights. As ratified, it provides that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[23] The "individual privacy" addressed is the right enshrined in Section 10, and "delegates quickly zeroed in on the most

[22] Mont. Const. Conv., Vol. 5, at 1665 (emphasis added).

[23] Mont. Const., Art. II, § 9.

contentious issue implicit in this section: the proper balance between the right to know and the right to privacy," two critical, but possibly conflicting, rights.[24]

a. The Delegates rejected a role for the legislature to articulate the scope of Montanans' right to privacy.

As later recounted by *amicus* Ellingson, this debate was quite vigorous. Concerned that the right to privacy could limit the right to know, Delegate Cate proposed limiting the right to privacy by adding the language "as may be provided by law" to the end of the provision. This proposal was met with fierce resistance. Delegate Eck countered that the intent of the Bill of Rights Committee was for the courts—not the legislature—to determine the scope of the right to privacy. Delegate Foster reiterated that intent: "in fact, the courts would have to strike the balance between the merits of public disclosure and the merits of privacy, and our committee had faith in our courts to strike this balance. And *we did not feel that this particular provision should be left to the Legislature to interpret*."[25]

Delegate Martin, "a long-time newspaperman," moved to delete Article II, Section 9 in its entirety because he believed the privacy exception was so broad that it could harm the right to know. But Delegate Dahood rose to "give an impassioned defense of the Committee's report," and the Convention voted down

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[24] Ellingson, at 66.

[25] *Id.* at 66-67 (citing Mont. Const. Conv., Vol. 5, at 1671-72) (emphasis added).

Delegate Martin's motion. When debate resumed on whether to amend Section 9 to include the language "as may be provided by law," Delegate Brown expressed a concern that leaving this decision up to the courts would open the floodgates of litigation. In response, Delegate Schiltz accused Delegate Brown of "throwing up a smokescreen," expressing confidence in the courts to resolve any litigation efficiently. Delegate Schiltz again expressed the Convention's common refrain: "I don't think this kind of language belongs in the Bill of Rights anywhere. I think we're announcing principles here, and *we shouldn't be referring things to the Legislature from the Bill of Rights*."[26] In the end, the amendment was rejected by a vote of 56-30, Section 9 was adopted by voice vote, and the Delegates firmly rejected a legislative role in interpretation of Montanans' individual privacy right.[27]

b. When given one more chance to empower the legislature to define the scope of the right to privacy, the Delegates said no.

Nine days later, as a result of pressure from the news media, Delegate Dahood moved to suspend the rules for the purpose of reconsidering the provision.[28] He proposed to amend Section 9 to provide a right to know "except in cases in which the legislature, subject to court interpretation, shall have determined

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[26] Ellingson, at 66-67; Mont. Const. Conv., Vol. 5, at 1677 (emphasis added).

[27] *Id.* (citing Mont. Const. Conv., Vol. 5, at 1679-80).

[28] *Id.* (citing Mont. Const. Conv., Vol. 7, at 2482).

that the demands of individual privacy exceed the merits of public disclosure."[29] This proposed amendment was met with stiff opposition from the other Delegates. For the first time during the Convention, Delegate Blaylock—Vice Chairman of the Bill of Rights Committee—opposed Chairman Dahood. He insisted that the language adopted by the Delegates should stand: "it was very carefully worked out in the Bill of Rights Committee. We all agreed to it, and then it was presented to this Committee of the Whole, where it was debated very thoroughly. We have many legal people in this room, and they—and we adopted it."[30]

Apparently unpersuaded, Delegate Davis next moved to delete Section 9 entirely, arguing again for a role for the legislature, and as the rigorous debate ensued, Convention President Graybill took the unusual step of asking to be relieved of the Chair in order to speak on the issue:

> I rise with some hesitation to oppose the Chairman of the committee on this matter, but I do so partly because I notice that he rises with some reluctance himself to change this language. . . . *[A] Bill of Rights is the document of the Constitutional Convention and of the Constitution . . . [i]t is our statement of the rights of the people . . . and this language says that we'll give it to the Legislature.* Now, I don't—I'm not against giving lots of things to the Legislature . . . but *we should not push on the Legislature the duty of determining what the rights of the people are in this state.*[31]

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[29] Ellingson, at 68-69 (citing Mont. Const. Conv., Vol. 7, at 2484).

[30] *Id.* at 69 (quoting Mont. Const. Conv., Vol. 7, at 2485).

[31] *Id.* at 69-70 (citing Mont. Const. Conv., Vol. 7, at 2488, 2491); Mont. Const. Conv., Vol. 7, at 2496-97 (emphasis added).

Following this speech, by an overwhelming vote of 16-70, the Delegates firmly and finally rejected the proposed amendment to allow the legislature to construe and cabin the right to privacy, and the language of Section 9 was ultimately adopted as originally proposed by the Bill of Rights Committee.[32]

In sum, the Convention transcripts demonstrate the Delegates' unwavering resolve to include in the Declaration of Rights a broad right to individual privacy that the judiciary—*not* the legislature—would construe, lest this fundamental right be subject to change every two years along with Montana's roster of legislators. Contrary to the Attorney General's argument, the Delegates emphatically *rejected* the idea that this fundamental right be left to the discretion of the legislature.

B. *ARMSTRONG* IS CONSISTENT WITH THE DELEGATES' INTENT, AND *STARE DECISIS* COMPELS THIS COURT TO UPHOLD IT.

Inherent in the Delegates' decision to entrust the judiciary with articulating the boundaries of the fundamental rights set forth in Article II was their understanding that the courts would interpret the Declaration of Rights consistent with both the Delegates' original intent and the demands of an evolving society. That is exactly what this Court did in *Armstrong*.

[32] Ellingson, at 71 (citing Mont. Const. Conv., Vol. 7, at 2636-37, 2498).

1. *Armstrong* correctly sets forth the Delegates' intent underlying the right to privacy in Article II, Section 10.

As *amici* have done in this Brief, this Court in *Armstrong* took a deep dive into the Convention transcripts, other related historical documents, and pertinent law review articles. Based upon this history, and on case law addressing the right to privacy, the Court correctly recognized that the Delegates "intended this right of privacy to be expansive," to "exceed[] even that provided by the federal constitution," and to that end, "the Bill of Rights Committee proposed 'a broad provision to permit flexibility to the courts in resolving the tensions between public interest and privacy.'"[33] The Court then completed the task with which the Delegates entrusted it: the Court construed the scope of the right to privacy consistent with the purposes underlying Article II, Section 10 and the evolution of society and its circumstances.

In reaching its conclusion in *Armstrong* "that Article II, Section 10, protects a woman's right of procreative autonomy—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," this Court appropriately noted the Bill of Rights Committee's repeated references to *Griswold* in the drafting of Article II, Section 10 and in its presentation and debate on the Convention floor. The Attorney

[33] *Armstrong*, ¶¶ 33-34 (original alterations omitted).

General ignores those references completely—along with the Delegates' repeated statements regarding the intentionally broad scope of the right to privacy—in stating that "*Armstrong* remarkably located a right to pre-viability abortion in a constitutional provision meant to prevent government snooping."[34] As shown above, no one who actually reviews the Convention transcripts can credibly conclude that the Delegates meant with their adoption of Article II, Section 10, to protect only against "government snooping." That is pure partisan politics speaking, nothing more, which nicely demonstrates why the Delegates correctly, and presciently, left interpretation of this fundamental right to the judiciary, not to the legislature or executive branch.

2. The Attorney General misconstrues Delegate Dahood's statement regarding a rejected amendment to Article II, Section 3.

At its core, the Attorney General's argument for overturning *Armstrong* relies upon the false assertion that"[t]he framers of the Montana Constitution expressly rejected *Armstrong*'s holding that the Declaration of Rights includes a right to abortion."[35] The sole support provided for this position is a statement

[34] State's Br. at 18.

[35] *Id.* at 19.

made by Delegate Dahood with respect to *Article II, Section 3* on the meaning of inalienable rights, not *Article II, Section 10* on individual privacy.[36]

Section 3 provides, in relevant part, that "[a]ll persons are born free and have certain inalienable rights."[37] Delegate Kelleher proposed to amend the provision by replacing the word "born" with "conceived," stating that he "would leave to the courts the meaning of when a 'person' is conceived."[38] Delegate Dahood rose in opposition, explaining that Delegate Kelleher was "attempting to . . . by constitutional command, prohibit abortion in the state of Montana."[39] Delegate Dahood explained further:

> That issue was brought before the committee. We decided that we should not deal with it within the Bill of Rights. It is a legislative matter insofar as we are concerned. The world of law has for centuries conducted a debate as to when a person becomes a person, at what particular state, at what particular time; and we submit that this particular question should not be decided by this delegation. *It has no part at this time within the Bill of Rights of the Constitution of the State of Montana*, *and we oppose it for that reason*.[40]

Following this brief exchange between Delegates Kelleher and Dahood regarding this longstanding philosophical debate, the Kelleher "personhood"

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[36] State's Br. at 19.

[37] Mont. Const., Art. II, § 3.

[38] Mont. Const. Conv., Vol. 5, at 1640.

[39] *Id.*

[40] *Id.* (emphasis added).

amendment—again, not an amendment to Article II, Section 10, but to Section 3—was overwhelming rejected, without further debate, on a 15-71 roll call vote.[41] The Attorney General's attempt to turn this rejected amendment to the inalienable rights section into a grant of power to the legislature to construe the individual right of privacy in whatever manner a given roster of legislators might care to, even if that means destroying the right, is nonsensical. If that were true, the right to privacy would be, at best, whimsical—far from the fundamental right the Delegates fervently sought to protect. As the Convention's transcripts plainly establish, that was decidedly *not* the intent of the Delegates regarding the right they identified and protected as the most important right of all.[42]

3. The Doctrine of *Stare Decisis* Should Apply in this Case.

As this Court has long recognized, *stare decisis* "is of fundamental and central importance to the rule of law," and it "reflects our concerns for stability, predictability and equal treatment."[43] Although, as the Attorney General points

[41] Mont. Const. Conv., Vol. 5, at 1640.

[42] Mont. Const. Conv., Vol. 5, at 1681.

[43] *State v. Gatts*, 279 Mont. 42, 51 (1996) (quoting *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194 (1983)).

out, *stare decisis* does not require this Court to "follow a 'manifestly wrong decision,'"[44] following precedent "is this Court's 'preferred course.'"[45]

As documented above, the Delegates' intent underlying Article II, Section 10 is quite clear. *Gryczan* and *Armstrong* got that intent precisely right. Because the State cannot establish that this Court's holding in *Armstrong* is manifestly wrong, *stare decisis* instructs that it be upheld. A half-century after the Convention Delegates expressed their intent, and thirty years after *Armstrong* properly effectuated that intent, is simply too late to contrive a rationale to strip away rights so long accepted and relied upon. *Amici* implore this Court to stand firm. The Court got this right and should affirm *Armstrong*, not reverse it.

IV. CONCLUSION

Armstrong is entirely consistent with the intent underlying Article II, Section 10. As the Delegates intended, Montanans' individual right to privacy—the right to personal autonomy and to be let alone—is not subject to the political pendulum; it is absolute, fundamental. As society and its circumstances evolve over time, the boundaries of these fundamental rights have and will continue to shift. But that movement is slow, careful, and considered—unlike legislative

[44] State's Br. at 16.

[45] *City of Missoula v. Sadiku*, 2021 MT 295, ¶ 13 (quoting *Formicove*, 207 Mont. at 194; *Certain v. Tonn*, 2009 MT 330, ¶ 19).

decisions. And it *adds* rights; it does not *delete* them. As the Delegates emphatically asserted, it is the province of the judiciary, the one nonpartisan branch of government, to determine where those boundaries lie. In *Armstrong*, this Court properly followed its constitutional directive, taking into account the Delegates' intent that Montanans' right to privacy be construed broadly, and the fact that the Delegates—with their repeated citations to *Griswold*—intended that right to include the basic, bodily autonomy of reproductive freedom. Fifty years after the Delegates' intent was documented in the Convention's notes and research materials, and in the understanding of these *amici*, it is now up to this Court to protect that precious, and priceless, legacy.

Respectfully submitted this 24th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, Emily J. Cross, certifies that the foregoing complies with the requirements of Rules 11 and 12, Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ *Emily J. Cross*

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CERTIFICATE OF SERVICE

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