IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 21-0521

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

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV-21-00999, Hon. Michael G. Moses Presiding

APPELLEES' ANSWER BRIEF

APPEARANCES:

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

Hana Bajramovic*
Planned Parenthood Federation of America, Inc.
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
hana.bajramovic@ppfa.org

Alan E. Schoenfeld*
Michelle Nicole Diamond*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com

Alice Clapman*
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
(202) 973-4862
alice.clapman@ppfa.org

Kimberly Parker*
Nicole Rabner*
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000
nicole.rabner@wilmerhale.com
kimberly.parker@wilmerhale.com

Gene R. Jarussi
1631 Zimmerman Tr., Suite 1
Billings, MT 59102
(406) 861-2317
gene@lawmontana.com

**Admitted pro hac vice*

ATTORNEYS FOR PLAINTIFFS-APPELLEES

Austin Knudsen
David M.S. Dewhirst
Kathleen L. Smithgall
Brent Mead
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
brent.mead2@mt.gov

Kevin H. Theriot *
Denise M. Harle*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
dharle@ADFlegal.org

**Admitted pro hac vice*

ATTORNEYS FOR DEFENDANT-APPELLANT

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INTRODUCTION

The district court preliminarily enjoined House Bills 136, 171, and 140 ("HB136," "HB171," and "HB140") for two independent reasons: (1) Plaintiffs-Appellees Planned Parenthood of Montana and Dr. Joey Banks (collectively, "Providers") established a prima facie case that each of the laws violates multiple provisions of the Montana Constitution, and (2) these laws, if they took effect, would irreparably harm Providers and their patients. Both were correct. As to Providers' prima facie case, the enjoined laws prohibit or otherwise restrict pre-viability abortions and thus directly contravene Montana's constitutional right to privacy and this Court's decision in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. The laws also violate numerous other fundamental rights protected by the Montana Constitution, from freedom of speech to equal protection to due process. As to injury, the challenged laws would infringe constitutional rights. They also would inflict irreparable "medical, emotional, and social harm" on patients seeking abortions, and force providers to "substantially alter their practice," or else risk substantial criminal and civil liability for treating patients. App.A033 (District Court decision).

Because the State cannot seriously dispute the district court's considered application of precedent or factual findings, it seeks to upend two settled features of Montana law.

First, the State asks this Court to import the federal standard for preliminary relief (likelihood of success on the merits) and discard the prima facie standard long applied by Montana courts, including this one in recent decisions. The Court should not rewrite the preliminary injunction statute as the State urges, not least because adopting a new standard would not change the outcome in this case—the harms here are so grievous, the constitutional transgressions so apparent, that Providers are entitled to preliminary relief even under the State's proposed alternative.

Second, the State asks this Court to overrule *Armstrong*. This appeal is not the proper vehicle for this argument, "[b]ecause a preliminary injunction does not decide the ultimate merits of a case." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 16, 401 Mont. 405, 473 P.3d 386. More importantly, *Armstrong* was correct when it was decided more than two decades ago and remains correct today. The State has not justified departing from the "preferred course" of stare decisis. *City of Missoula v. Sadiku*, 2021 MT 295, ¶ 13, 406 Mont. 271, 498 P.3d 765.

When the State does grapple with the district court's opinion, it fails to demonstrate any manifest abuse of discretion that warrants overturning the preliminary injunction. The State's arguments about the weight of the evidence and

its alleged interest in preventing women[1] and providers from exercising their constitutional rights are foreclosed by precedent and unsupported by the record. This Court should affirm and preserve the status quo until the district court can reach the merits.

STATEMENT OF THE ISSUES

A. Whether this Court should fundamentally reorder Montana's preliminary injunction standard in a case where Providers prevail under both the existing standard and the State's proposed new standard.

B. Whether the district court manifestly abused its discretion in preliminarily enjoining three laws that would unconstitutionally infringe Montanans' fundamental rights, including the right to obtain pre-viability abortions.

C. Whether, in an appeal from a preliminary injunction that did not rule on the merits, this Court should overrule *Armstrong*, which correctly held that Montanans have a right to obtain pre-viability abortions under the Montana Constitution.

STATEMENT OF THE CASE

On August 16, 2021, Providers moved to preliminarily enjoin HB136, HB171, and HB140, which were set to take effect on October 1, 2021. District Judge Gregory R. Todd held a hearing on the motion on September 23, after which he allowed the State to file 46 pages of additional rebuttal affidavits. *See* Supp.App.I82

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

(Full hearing transcript); Supp.Apps.J-K (State rebuttal declarations). Judge Todd informed the parties he would issue a decision after receiving the State's rebuttal affidavits and before October 1. Supp.App.I75, 82.

On the eve of the laws' effective date, the State moved to disqualify Judge Todd based on comments made at the hearing six days earlier. Because the State's motion prevented Judge Todd from taking further action in the case, *see* § 3-1-805, MCA, the State's actions threatened to preclude *any* judicial review prior to the laws taking effect. Providers accordingly filed a Petition with this Court seeking an emergency stay of the laws' enforcement until the request for preliminary relief could be resolved. Pet., No. OP 21-0494 (filed Sept. 30, 2021).

While the Petition was pending, Judge Todd disqualified himself and the case was assigned to District Judge Michael G. Moses. This Court then denied the Petition "[b]ecause the motion for preliminary injunction … [was] now before a judge in jurisdiction," and Providers could "seek the requested relief through ordinary processes in the pending case." Order, No. OP 21-0494 (Sept. 30, 2021). That same day, Judge Moses issued a temporary restraining order preventing the challenged laws from taking effect. Supp.App.L.

On October 7, after reviewing the hearing transcript, the parties' briefs, and the extensive affidavit and declaration testimony, the district court preliminarily enjoined the laws for two independent reasons. First, Providers made out a prima

facie case that the three challenged laws are unconstitutional, justifying relief under § 27-19-201(1), MCA. As the court summarized:

> HB 136 bans pre-viability abortions at 20 weeks, in direct contravention of *Armstrong*. HB 171 bans medication abortions provided via telehealth and imposes mandatory delays on women seeking an abortion, significantly reducing their access to that care. HB 140 compels government-approved speech that interferes with the doctor-patient relationship.

App.A033.[2] Second, Providers demonstrated that irreparable harm would result if the laws were not enjoined, more than meeting the requirements of § 27-19-201(2), MCA. The district court concluded that not only would the deprivation of a constitutional right necessarily constitute irreparable injury (as this Court has long held), but Providers and their patients also would suffer additional, concrete, and direct harms absent relief. App.A032-034. In particular, patients would be unable to obtain "surgical abortions between 20 weeks LMP and viability," "medication abortions via telehealth or without a 24-hour mandatory delay," and either type of abortion "without being subjected to severe restrictions." *Id.* at 033. Further, Providers would have to "substantially alter their practice (and encounter the attendant medical, emotional, and social harm to themselves and their patients) or be subjected to serious legal repercussions." *Id.*

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[2] *See also, e.g.*, App.A022-023 ("HB 136 violates the Montana Constitution's guarantee of equal protection and due process"), 029-030 (HB171 violates Montana's free speech, equal protection, and due process clauses), 030-034 (HB140 violates rights to privacy, equal protection, and individual dignity).

STATEMENT OF FACTS

A. Planned Parenthood of Montana and Dr. Joey Banks

Planned Parenthood of Montana ("PPMT") is the largest provider of reproductive health care services in Montana. App.A003. Dr. Joey Banks is a contract physician at PPMT and the organization's former Chief Medical Officer. *Id.* at 004; App.J004 (Banks Aff.). PPMT provides procedural abortions and medication abortions ("MABs"). App.A003. Both procedural and medication abortions are common and safe. Supp.App.A9 (Complaint).

PPMT offers MABs to patients (1) in person at a health center; (2) through site-to-site telehealth, in which a patient at one PPMT health center connects through telehealth with a provider at another PPMT health center; or (3) through direct-to-patient telehealth, in which a patient connects via teleconference with a provider from wherever she is located and then, if eligible, is mailed the required medications to a Montana address. App.A004-005. Telehealth MABs are an especially important form of reproductive health care in Montana because they reduce the travel and expense of an in-person visit, which can be prohibitive for some patients given Montana's size and rural nature. In FY 2021, PPMT provided 76 percent of its MABs through telehealth consultations. Supp.App.A14, 22.

B. The Challenged Laws

1. HB136

HB136 bans abortion beginning at 20 weeks from the first day of a patient's last menstrual period ("LMP"), which the State and its experts agree is before fetal viability. The law's exceptions are narrow and vague. Specifically, the law permits an abortion beginning at 20 weeks LMP only if it "is necessary to prevent a serious health risk to unborn child's mother" or there is a medical emergency. HB136 § 3. Violations carry extreme civil and criminal penalties. *Id.* § 4.

2. HB171

HB171 significantly restricts access to MAB, which is the most common method of first-trimester abortion at PPMT. It mandates multiple, unnecessary in-person visits with the same provider; compels providers to give patients inaccurate information that MABs can be "reversed"; imposes medically unnecessary reporting requirements designed to scare women from accessing abortion care and providers from referring for or providing that care; requires a 24-hour mandatory delay for patients seeking MABs by requiring patients to have an ultrasound, receive bloodwork, and sign a consent form 24 hours prior to receiving the MAB; and subjects providers to unnecessary and onerous qualification requirements. HB171 §§ 3, 5, 7-9. Critically, it bans telehealth MABs entirely. *Id.* § 4. HB171 exposes providers to up to 20 years' imprisonment—even for negligent violations of the law—and subjects them to harsh civil penalties. *See id.* §§ 11, 12.

3. HB140

HB140 requires a provider to ask a patient if she wants to view an "active ultrasound" and "ultrasound image," and listen to the "fetal heart tone." HB140 § 1(1). The patient must then sign a State certification form noting whether she chose to view or listen to fetal activity, regardless of that patient's circumstances or the provider's judgment as to whether the suite of ultrasound offers is in the patient's best interest. *Id*. § 1(3). Violations carry substantial civil penalties. *Id.* § 1(5).

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for "manifest abuse of discretion." *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4. An abuse of discretion is "manifest" when it is "obvious, evident, or unmistakable." *Id.* Whether to grant injunctive relief "is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Id.*

The district court's factual findings are reviewed for clear error and should only be overturned "if they are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made." *State v. Reynolds*, 2017 MT 25, ¶ 13, 386 Mont. 267, 389 P.3d 243. To the extent the ruling is based on legal conclusions, this Court "determine[s] whether the interpretation of the law is correct." *Weems*, ¶ 7.

SUMMARY OF THE ARGUMENT

The district court did not manifestly abuse its discretion in preliminarily enjoining HB136, HB171, and HB140. It properly concluded that the challenged laws violate the Montana Constitution because they infringe fundamental rights and would irreparably harm Providers and their patients if not enjoined. In so holding, the district court carefully scrutinized the factual record—including the State's rebuttal evidence—and concluded that Providers' evidence outweighed that presented by the State. Under the disjunctive test for preliminary relief, both conclusions are independent bases to affirm.

Unable to succeed under controlling precedent, the State asks this Court to discard decades of caselaw. First, the State seeks to rewrite Montana's longstanding statutory framework for preliminary relief so that it parrots the federal standard. That request is unsupported by the statutory text and this Court's precedent and, in any event, is irrelevant given that Providers prevail under both existing Montana law and the State's proposed alternative. Second, the State asks this Court to overrule *Armstrong*. This argument is improper in the context of an interlocutory appeal from a preliminary injunction that did not reach the merits. And there is no basis for it; *Armstrong* was correct when decided, and it remains correct today.

ARGUMENT

I. This Court Should Not Rewrite Montana's Preliminary Relief Standard

A. The district court correctly applied settled Montana law

Section 27-19-201, MCA, provides that a preliminary injunction may be granted when any one of five grounds is met. *Weems*, ¶ 17. Here, the district court found that Providers were entitled to injunctive relief under each of the first two statutory subsections, which permit relief when (1) "it appears that the applicant is entitled to the relief demanded," or (2) "it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury." Section 27-19-201(1), (2), MCA.[3]

To meet these statutory preconditions, an applicant need only "establish a prima facie case, not entitlement to final judgment." *Weems*, ¶ 18. Prima facie means "at first sight" or "on first appearance but subject to further evidence or information." *Id.* This standard reflects that preliminary relief is meant to "preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Driscoll*, ¶ 14. Thus, it is not the job of "[]either the District Court []or this

[3] The State says it "will focus on those" subsections not because they are the basis for the decision below, but because "*[m]ost plaintiffs* assert subsections (1) and (2) in constitutional challenges." State's Brief ("Br.") 7 (emphasis added). That the State expressly directs its argument to what "most plaintiffs" assert, as opposed to focusing on the specifics of this case, only reinforces that the State is seeking wholesale revision of settled law.

Court [to] determine the underlying merits of the case giving rise to the preliminary injunction." *Id.* ¶ 12. Instead, "such an inquiry is reserved for a trial on the merits," *id.*, and "a court should not anticipate the ultimate determination of the issues involved" when contemplating a preliminary injunction, *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185.

B. The State's efforts to import the federal standard are irrelevant and unpersuasive

Because Providers satisfied the existing "prima facie" standard, *see infra* at 16-38, the State asks this Court to instead impose the federal rule. It should not.

1. Application of the State's preferred standard would not affect this case

The distinctions the State seeks to draw between the federal and Montana standards are irrelevant to this case because Providers prevail under both. As the district court correctly held, Providers established that the challenged laws are "likely" or "plainly" unconstitutional. App.A022 (HB136 "is likely unconstitutional"); *id.* at 026 (HB171's ban on telehealth MABs "plainly infringes the right to privacy"); *see also id.* at 033 ("Plaintiffs have also established that the restrictions and regulations of the challenged laws inflict constitutional injuries on Plaintiffs and their patients."). These are not tentative conclusions hinging on the prima facie standard; the district court found Providers' constitutional claims to be well-supported by the facts and the injunction straightforwardly compelled by

precedent. The district court also found, after reviewing the evidence submitted, that Providers "*will* suffer concrete and irreparable harm absent preliminary relief." *Id.* at 032 (emphasis added). For good reason—the challenged laws directly violate binding precedent and cause constitutional harms that are necessarily irreparable.

Both aspects of the district court's ruling were thus based on more than a "prima facie" case, making this appeal a poor vehicle for reinventing Montana's preliminary injunction standard. And although the State does not address the other elements of its proposed federal standard, the public interest and equities always weigh in favor of protecting fundamental rights. *See, e.g.*, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction.").

2. Subsection (1) does not require likelihood of success on the merits

Regardless, this Court should not adopt the State's proposed standard. Montana courts have long applied the statutory framework outlined in § 27-19-201(1), MCA. As this Court recently said, "[i]n considering whether to issue a preliminary injunction, neither the [d]istrict [c]ourt nor this Court will determine the underlying merits of the case … , as such an inquiry is reserved for a trial on the merits." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437

P.3d 142. This approach does not "ignore the presumption of constitutionality," Br. 6; it recognizes that "[t]he moving party's burden to defeat the presumptive constitutionality of a statute [] arises in litigating the merits of the complaint" and "a plaintiff is not required to sustain that ultimate burden to obtain a preliminary injunction." *Weems*, ¶ 18 n.4; *see also Driscoll*, ¶ 16. "In the context of a constitutional challenge" in particular, "an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but 'must establish a prima facie case of a violation of its rights under' the constitution." *Weems*, ¶ 18 (citation omitted).[4]

The State's primary response is to claim the well-established "prima facie" standard contradicts the text of § 27-19-201(1), MCA, because that provision begins with the phrase "when it appears that the applicant is entitled to the relief demanded." In other words, the State reads "appears … entitled to" to require a likelihood of success. Br. 7-9. But this Court has already concluded that "appears … entitled to" means showing "a prima facie case." *See, e.g.*, *BAM Ventures*, ¶ 18; *Driscoll*, ¶ 16; *Weems*, ¶ 18; *see also Prima Facie*, Black's Law Dictionary (10th ed. 2014) (defining "prima facie" as "on first appearance but subject to further evidence or

[4] *BAM Ventures* separately precludes the State's wholesale adoption of the federal standard by rejecting an irreparable injury requirement for subsection (1) claims. *See BAM Ventures*, ¶ 16 (injunction under subsection (1) requires only "the prevention of *some* degree of harm or injury" (emphasis added)).

information"). That decides the question and is why the State must ultimately ask this Court to overturn precedent. Br. 9 n.1. Moreover, the State's interpretation is inconsistent with the ordinary meaning of the statutory text; "appear" does not mean "*proven* likely to be." *See State v. Gardner*, 2022 MT 3, ¶ 15, 407 Mont. 72, 501 P.3d 925 ("When interpreting statutes, this Court looks to the plain meaning of the language used in the statute.").[5]

3. Subsection (2) does not require likelihood of success on the merits

The State also asserts that courts must determine whether plaintiffs have shown a likelihood of success in order to address whether they have shown irreparable injury for § 27-19-201(2), MCA. Br. 10. In other words, the State believes that likelihood of success is necessary to prove irreparable harm. That position again ignores both the plain language of the statute (which nowhere requires "likelihood of success" for irreparable harm) and this Court's precedent (which says only a prima facie showing of injury is required). *See supra* at 13-14. It is also

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[5] Two further points on subsection (1) warrant brief mention. First, contrary to the State's contention, the "prima facie" standard does not allow plaintiffs to obtain relief based on mere allegations. Br. 14-15. Indeed, the district court's exhaustive analysis in this case bears that out—nothing about its 35-page decision rested on mere allegations. Second, the State asserts that the prima facie standard improperly collapses the requisites for TROs and preliminary injunctions. *Id.* at 8. Nowhere does it explain why or how. Moreover, such a result would not be unusual even under the federal standard. *See Davis v. Stapleton*, 480 F. Supp. 3d 1099, 1107 (D. Mont. 2020) ("Whether a plaintiff seeks a temporary restraining order or preliminary injunction, the standard is the same.").

irrelevant given that the district court found that Providers had more than made a prima facie showing of injury. *See supra* at 11-12.

In any event, the State's harm argument collapses under its own contortions. The State contends that the district court actually *did* consider whether Providers made a showing of success when addressing their injuries. Br. 9-10 (stating that the district court's subsection (2) analysis "sounds a lot like the court's subsection (1) analysis" and arguing that "the district court incorrectly blended the two standards"). If, under the State's theory, the district court was supposed to consider whether Providers' claims were viable in assessing their injury, and in fact did so, there are no grounds for reversal.

4. The State's authority provides no support for its position

Instead of acknowledging this Court's recent, consistent precedent confirming that Providers are required to establish only a prima facie case, the State relies on *Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614. But as the district court explained, *Van Loan's* "likelihood of success" test is restricted to cases where the basis for the preliminary relief is non-compensable financial harm. *See* App.A015. *Van Loan* itself said as much. 271 Mont. at 184-185, 895 P.2d at 619. And this Court recently reaffirmed that narrow scope, stating that *Van Loan* applies only where the "injunctive relief [] requested pertained to a monetary judgment that could be rendered ineffectual by [the other party's] actions." *A.C. v. Borkholder*,

2019 MT 222N, ¶ 19, 397 Mont. 554, 455 P.3d 449; *see also Caldwell v. Sabo*, 2013 MT 240, ¶ 31, 371 Mont. 328, 308 P.3d 81 (reiterating this analysis is to be "narrowly interpreted").

The State concedes (at 12) that this Court has never applied the *Van Loan* test to cases involving constitutional injuries. That makes sense: it is an "extraordinary" case where monetary damages will not adequately compensate the injured party, so injunctive relief is permissible only if the applicant can make out a four-part test that includes the likelihood of success on the merits. *Van Loan*, 271 Mont. at 182-183, 895 P.2d at 618. In other words, an applicant must meet a higher standard to overcome the presumption that there is no irreparable harm when a remedy at law—*i.e.*, money damages—is available. Here, in contrast, constitutional rights are at issue—violations of which cannot ever be remedied through compensation.[6]

II. The District Court Did Not Manifestly Abuse Its Discretion

Under any standard, the district court correctly determined that Providers are entitled to preliminary relief for two independent reasons: Providers more than established a prima facie case that (1) HB136, HB171, and HB140 violate the

[6] *M.H. v. Montana High School Association* (1996) does not warrant a different result. That case used the language of the federal standard as shorthand for the Montana requirement, but twice reiterated that "[a]n applicant for a preliminary injunction must … establish a *prima facie* case on the underlying claim." 280 Mont. 123, 129, 929 P.2d 239, 243 (emphasis added). And more importantly, later cases have made clear that the prima facie standard still governs. *See supra* at 10-11.

Montana Constitution and (2) failing to enjoin the laws would irreparably harm Providers and their patients.

A. Providers made out more than a prima facie case of a constitutional violation

1. The district court properly held that strict scrutiny applies

Sidestepping decades of caselaw holding that abortion restrictions are subject to strict scrutiny, the State contends that HB136, HB171, and HB140 are subject to rational basis review because they merely "affect" abortion access protected by the right to privacy. Br. 23-24. This argument rests on two false premises. First, these laws do far more than "affect" abortion access. They were explicitly intended to, and do, prevent women from obtaining constitutionally protected care. Similar restrictions, this Court has long held, trigger strict scrutiny. Second, the State ignores entirely that the challenged laws are subject to strict scrutiny for transgressing provisions of the Declaration of Rights unrelated to privacy. The latter defect alone suffices to reject the State's position.

a. The challenged laws infringe the right to privacy

After a searching review of the record, the district court found that the challenged laws will outright ban certain pre-viability abortions, prevent women from obtaining common modalities of care, and otherwise significantly constrain access to abortion. This Court has applied strict scrutiny to similar restrictions on abortion because of their interference with the right to privacy. *See Armstrong*, ¶ 34

(restriction on which providers can offer abortions); *cf. Weems*, ¶ 25 (provider qualification restricted availability of MABs). This case—which involves a multitude of onerous restrictions directly targeting particular forms of abortion care—thus presents no occasion to determine whether there exists some lower bound at which a burden on pre-viability abortion access does not warrant strict scrutiny. *See* Br. 27 (urging the Court adopt the federal standard). Whatever that line, these draconian provisions cross it.

HB136 bans abortion at 20 weeks LMP.[7] As the district court noted, *all* experts agreed viability could not be reached by 20 weeks LMP. App.A022; *see also, e.g.*, Br. 31 ("The State presented evidence that viability can occur as early as 21 weeks"); App.F003 (State expert attesting that the "edge of viability has moved to 22-23 weeks"). HB136 thus bans certain pre-viability abortions outright. *See* App.A022. A complete ban, to state the obvious, does more than "affect" abortion access. HB136 must therefore be narrowly tailored to a compelling state interest.

HB171 significantly restricts Montanans' access to MABs, most notably by prohibiting the use of telehealth. *E.g.*, App.A026. The telehealth ban alone would have substantial repercussions for reproductive health care in Montana; 76 percent

[7] Specifically, HB136 bans abortion at the point fetuses can perceive pain, which the statute incorrectly defines as occurring at (and not "after," Br. 29) 20 weeks LMP.

of the MABs that PPMT provided in FY2021 utilized telehealth. App.K004-005 (Stahl Aff.). Telehealth MABs improve access to early care, particularly in underserved communities (such as rural areas) or among low-income or mobility-limited patients who otherwise find it difficult to travel. *See* App.H013 (McNicholas Aff.). And because MABs are provided up to 11 weeks LMP and are indisputably pre-viability, "the ban on using telehealth for medication abortion plainly infringes the right to privacy." App.A026. HB171 is subject to strict scrutiny.

HB140 interferes with the patient-provider relationship by forcing providers to give care in accordance with the State's edicts—not providers' own professional medical judgments. App.A017, 031. Moreover, by asking patients to sign a State-developed certification form indicating whether they chose to view or listen to fetal activity, HB140 plainly stigmatizes patients and discourages women from obtaining pre-viability abortions—"a constitutionally protected right." App.A031. Strict scrutiny again applies.

The State's contrary arguments find support in neither caselaw nor logic. The State claims that "it is well established in privacy challenges that courts must first determine whether a law impermissibly intrudes upon a protected right before determining the proper level of scrutiny." Br. 25. But whether an intrusion is "impermissible" necessarily turns on the level of scrutiny applied. In disputing that commonsense proposition, the State confuses the ultimate question *under* strict

scrutiny—whether an infringement is narrowly tailored and justified by a compelling interest—with the initial determination *whether* to apply strict scrutiny.

The cases the State characterizes as conflating these analytical steps do nothing of the sort. In *Hastetter v. Behan* (1982), the constitutional claim failed because the plaintiff could not establish that the right to privacy protected the conduct at issue. 196 Mont. 280, 282-283, 639 P.2d 510, 511-513. In *Gryczan v. State* (1997), the Court first considered whether the plaintiffs' conduct was protected by the right to privacy. 283 Mont. 433, 449, 942 P.2d 112, 122. After concluding it was, the Court asked whether the challenged act restricted that right. 283 Mont. at 451, 942 P.2d at 123. Because it did, strict scrutiny applied. 283 Mont. at 449, 942 P.2d at 122. That is exactly the approach the district court took here; the only difference is that this Court has *already* held that pre-viability abortions are protected by the right to privacy, and infringements on that right must survive strict scrutiny. *See Weems*, ¶ 19 (*Armstrong* "leaves no doubt that" the right to privacy protects the right to obtain pre-viability abortions). *Armstrong* already did much of the analysis the State suggests was lacking, and the district court completed it by concluding the challenged laws infringe on access to constitutionally protected care.

Nor do *Wiser v. State* or *Montana Cannabis Indus. Ass'n v. State* ("*MCIA*") call into question the applicable level of scrutiny. Br. 21-22, 24-25. *Wiser* held that rational basis review applied to the regulation at issue because a fundamental right

was *not* involved, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133 ("[W]hen the rights affected are not fundamental, we do not utilize strict scrutiny review."), which the district court recognized distinguishes this case, App.A021. And the Court in *MCIA* reiterated *Armstrong*'s holding that the "right to obtain a particular *lawful* medical procedure"—there, as here, a pre-viability abortion—is fundamental. 2012 MT 201, ¶ 27, 366 Mont. 224, 286 P.3d 1161.

At bottom, the State's refrain that Providers seek a "categorical rule [that] would set abortion apart as a subject matter the State may never regulate" is hyperbolic and misleading. Br. 27. As with laws limiting any other fundamental right, regulations restricting access to pre-viability abortions must comply with the Montana Constitution.

b. The challenged laws infringe additional fundamental rights

The State contests the application of strict scrutiny only with respect to the right to privacy, but—as the district court correctly held—the challenged laws are independently subject to such review because they transgress other fundamental rights. *See, e.g.*, App.A022-023 ("Plaintiffs also establish a prima facie case that HB136 violates the Montana Constitution's guarantee of equal protection"), 029-030 (holding that Providers established a prima facie case that HB171 infringes on abortion providers' right to free speech), 031 ("Plaintiffs also make out a prima facie case that HB140 violates the right to equal protection and individual dignity.").

Laws that infringe on these provisions are also subject to strict scrutiny. *See, e.g.*, *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. The State entirely ignores these aspects of the decision below, which provide an independent basis to affirm.

2. The district court correctly held that the challenged laws fail strict scrutiny

The district court concluded that these laws severely restrict access to pre-viability abortions, infringing the right to privacy (among others). The State must therefore demonstrate that the laws are narrowly tailored to serve a compelling interest—meaning they must be necessary "to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 59. "Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state." *Id.*

The State cannot meet this burden. The challenged laws "ban[]" and "significantly reduc[e]" access to pre-viability abortions, App.A033, and this Court has already held that the State lacks a compelling interest in such interference with the right to privacy, *Armstrong*, ¶ 49. That analysis suffices to affirm the district court's order. But even if this Court were to consider the State's purported justifications for the laws, they are unavailing.

a. HB136 fails strict scrutiny

i. HB136 violates the right to privacy

Because HB136 prohibits abortions starting at 20 weeks LMP—which the State concedes is before viability (at 31)—*Armstrong* controls, and the law fails strict scrutiny. *See Armstrong*, ¶ 49 (no "compelling interest or constitutional justification" in banning pre-viability abortion). Indeed, the State's own lawyers warned legislators of HB136's constitutional infirmity. *See* Supp.App.A96 (HB136 Legal Review Note) (HB136 "raises potential conformity issues with the requirements of the … Montana Constitution.").[8]

The State attempts to evade *Armstrong* by repeating an argument it made in a footnote before the district court: HB136 *might* protect *some* viable fetuses because gestational age could be mistakenly underestimated. *See* Br. 32-33; Supp.App.B19 (Prelim. Inj. Opp'n); Supp.App.E11-12 (Prelim. Inj. Reply). But there is no dispute that HB136 would ban pre-viability abortions where gestational age has been accurately determined, as it is in the majority of cases. Indeed, because Montana already prohibits post-viability abortions, *see* § 50-20-109(1)(b), MCA, HB136 must be intended to reach pre-viability abortions for it to have any effect, *see State v. Jardee*, 2020 MT 81, ¶ 8, 399 Mont. 459, 461 P.3d 108 ("[I]n construing a statute,

[8] The lawyers gave a similar warning about HB171. *See* Supp.App.A98-99 (HB171 Legal Review Note).

this Court presumes that the legislature intended to make some change in existing law by passing it."). And even if there were some doubt about the reach of HB136 (and there is not), the district court weighed the evidence and properly concluded that HB136 would prohibit certain pre-viability abortions. *See* App.A022. That does not constitute a manifest abuse of discretion.

The State's purported justifications for HB136 are irrelevant in light of *Armstrong*'s conclusion that the State does not have a compelling interest in banning pre-viability abortions. *See supra* at 22. But even if the Court were to consider the reasons the State put forward, they are not necessary "to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 59. While the State attempts to justify the 20-week ban based on the need to avoid "fetal pain," the consensus in the medical community is that a fetus cannot experience pain before at least 24 weeks LMP. *See* Supp.App.F3, 5-8 (Ralston Rebuttal Aff.); *see also Whole Woman's Health All. v. Rokita*, 2021 WL 3508211, at *36, *63-64 (S.D. Ind. Aug. 10, 2021) (rejecting testimony to the contrary as reflecting a "fringe view"), *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). Nor is the 20-week ban necessary to protect "women from dangerous late-term abortions." Br. 30. Abortion is very safe at all points in pregnancy and is safer than

childbirth. App.H007. Because HB136 is thus not rooted in "bona fide" medical evidence, it is not narrowly tailored to any compelling state interest.[9]

ii. HB136 violates equal protection

The district court also correctly held that Providers made a prima facie case that HB136 violates Montana's equal protection guarantee, which "provides for even more individual protection than the comparable" federal right. *Cottrill v. Cottrill Sodding Serv.* (1987), 229 Mont. 40, 42, 744 P.2d 895, 897; *see* App.A022. Because HB136 distinguishes between women seeking medical care based on their decision to exercise a fundamental right, it is subject to (and fails) strict scrutiny for the same reasons it violates the right to privacy. *See supra* at 23-25; *see also* App.A022. The State did not engage with these arguments below, *see* App.A022, so forfeits its right to do so on appeal, *see State v. Jensen*, 2020 MT 309, ¶ 19, 402 Mont. 231, 477 P.3d 335.[10]

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[9] The State also argues that the 20-week ban is necessary to maintain "the ethical integrity of the medical profession." Br. 30. This argument is meritless. According to American Medical Association Code of Medical Ethics Opinion § 4.2.7, "[t]he Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law."

[10] Regardless, the State's brief argument on this score is baseless. The State suggests that because HB136 might protect some viable fetuses, the fundamental right to pre-viability abortion is not implicated and "HB 136 can't violate equal protection." Br. 33 n.7. But the question whether a fundamental right is implicated affects the level of scrutiny that should be applied, not whether an equal protection claim can be brought.

b. HB171 fails strict scrutiny

i. HB171 violates the right to privacy

The district court carefully analyzed the restrictions HB171 imposes on MABs (including a complete ban on telehealth, a mandatory 24-hour delay, and an extra trip requirement). The court then considered the evidence the State presented to justify those restrictions and found it lacking. On appeal, the State disputes that factual finding, and claims its evidence shows that HB171's provisions "are sensible medical regulations" consistent with the right to privacy. Br. 37. But it has identified no clear error in the district court's assessment of the record.

First, Providers demonstrated that the mandatory 24-hour delay and extra trip that HB171 imposes fail strict scrutiny. As below, the State contends that these provisions are necessary to ensure women give "informed consent." Br. 38-39. The district court properly rejected this argument after weighing the State's evidence of medical justification against Providers' evidence of their already-robust informed consent protocols. App.A009-011, 027-028. Because the State could not show that a delay was narrowly tailored to prevent "a medically-acknowledged, bona fide health risk," it violates the Montana Constitution. *Armstrong* ¶ 59; *see also Planned Parenthood of Missoula v. State*, 1999 Mont. Dist. LEXIS 1117, at *22 (1st Jud. Dist., Mar. 12, 1999) (concluding the same 20 years ago). The State's identification

of other constitutions that it claims permit such delays says nothing about the protections applicable here. Br. 38-39.[11]

Other aspects of HB171 further undermine the State's argument that HB171 promotes informed consent. First, Section 7(5)(f), (h), and (j)(v) mandate that providers give their patients medically inaccurate information about "reversing" MABs. Numerous courts and trusted medical authorities like the American College of Obstetricians and Gynecologists have concluded that there is no evidence that MABs are reversible. *See* App.J011-012; *see also, e.g.*, *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1150 (D.N.D. 2019) ("[T]he 'abortion reversal' protocol is devoid of scientific support, misleading, and untrue."). As the district court observed, "[t]he State's own expert describes the experimental nature of this 'abortion reversal treatment.'" App.A029. Forcing providers to tell their patients false information *undermines* the informed consent process by confusing the critical

[11] The State notes (at 39) that it has imposed a mandatory delay on minors seeking an abortion, but fails to mention that this law is the subject of ongoing litigation. At any rate, regulation of minors' abortion access, justified by the State as protecting minors from their own immaturity, has no bearing on whether *adult* women should experience a medically unjustifiable delay when seeking to exercise their fundamental rights. The State's argument to the contrary only underscores the retrograde, paternalistic underpinnings of HB171.

message that patients should only start an MAB when they are firm in their decision.[12]

Second, the State argues that a compelling state interest justifies HB171's physician credentialing requirements, but it again identifies no clear error in the district court's contrary assessment of the facts. HB171 does not further any interest in abortions being performed by qualified medical professionals. Rather, it imposes medically unnecessary credentialing requirements that are so stringent they effectively bar qualified clinicians from providing MABs without justification. PPMT providers are trained in the risks associated with MAB and to recognize symptoms, in person or through telehealth, that require additional care. *See* Supp.App.A39; App.J015. But HB171 defines "complications" so broadly, and to include conditions so unrelated to MAB (ranging, for example, from anxiety to sleep disorders to death, *see* HB171 § 3(5)), that no PPMT provider (and likely no provider anywhere) could handle them all. *See* App.K009; App.H021. It is equally difficult to imagine a contract with another practitioner that could cover the potential universe of "complications," let alone a practitioner willing to enter into such an agreement. *See* App.K009; App.J015-016. Indeed, it is "common sense and standard practice

[12] The record also demonstrates that Providers obtain patients' informed consent. *See* App.J012; Supp.App.H2 (Banks Reply Aff.).

to direct patients to specialists or emergency care if patients develop a health condition that the original treating provider cannot treat." App.J015.[13]

Third, the district court properly concluded that HB171's physical exam requirements and telehealth ban do not "promote[] the health and safety of women," as the State claims. Br. 40-41. After considering the State's arguments about MABs' potential risks, the court credited Providers' evidence that the risks "are similar in magnitude to [those] of taking commonly prescribed and over-the-counter medications such as antibiotics and NSAIDs such as ibuprofen," App.A027, and noted that "telehealth enables [Providers] to provide healthcare for Montanans in remote areas," *id.* The State's vague profession that it is "promot[ing] the health and safety of women" does not satisfy *Armstrong*'s requirement that it demonstrate a "narrowly defined instance[]" of a "medically-acknowledged, bonafide health risk" justifying state intervention into the private provider-patient relationship. *Armstrong*, ¶ 59.

Finally, the State claims that the district court improperly "credited [Providers'] unsupported speculation" that Section 9's medically inappropriate

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[13] The State claims this broad definition of "complications" "applies only to Section 7(5)(e)'s required consent form." Br. 41. Section 3 of HB171, however, states that the law's definitions apply in "sections 1 through 14." The district court correctly applied this broad, ambiguous definition of "complications" to the credentialing requirements in Section 5(2).

reporting could chill patients' willingness to obtain and providers' willingness to provide pre-viability abortions. Br. 45. But Providers submitted competent evidence substantiating those fears, *see* App.J017, and the State offered nothing in response. That failing is unsurprising—that the law says information shall not be *used* to identify women means nothing when the law itself requires potentially identifying information be deemed public records. *See* HB171 § 9(8).

ii. HB171 violates the right to free speech

The district court properly enjoined HB171 for another reason—Providers made a prima facie showing that it unconstitutionally compels providers' speech. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, 198 P.3d 284. Yet, the information mandated by Section 7(5) regarding MAB "reversals" directs providers to make false representations to patients. *See supra* at 27. The law thus forces providers to ignore their ethical obligation to provide accurate medical information tailored to assist the patient's decisionmaking and instead endorse a government-specified source advocating an unproven treatment, regardless whether the providers believe that information is accurate, appropriate, or conducive to informed consent.

c. HB140 fails strict scrutiny

The district court properly enjoined HB140, which stigmatizes and discourages women from exercising fundamental rights, thereby violating the rights to privacy, equal protection, individual dignity, and free speech. App.A031. The State's argument on appeal again reduces to a dispute about the facts. Yet far from being a "basic informed consent law," Br. 47, the district court correctly concluded that HB140 overrides providers' judgment, interferes with the patient-provider relationship, stigmatizes abortion, and mandates speech with no medical purpose.

The fundamental defect in HB140 is that it precludes providers from making decisions according to their best medical judgment. There is no medical reason to override providers' considered views about whether they should ask patients if they want to view an active ultrasound and ultrasound image of the fetus and listen to the "fetal heart tone." As Providers established, these requirements—combined with the demand that women sign a State form indicating whether they chose to view or listen to fetal activity—are "medically unnecessary," will "stigmatize abortion," and "could make women feel pressured to view or listen to fetal activity, which may not be in the patient's best interest, or discourage them from having an abortion" altogether. *See* App.J018. HB140 thus "usurp[s]" sensitive health care decisions, undermines the "personal trust in the education, training, experience, advice, and professional integrity of the health care provider [a patient] has chosen," and

interferes with the medical "partnership" at the core of the privacy right. *Armstrong*, ¶ 58.[14]

Patients, moreover, already make "informed decisions" based on their own deliberative process and PPMT's extensive patient education and informed consent process. *See* App.J012. The provision of medically unnecessary information undermines informed consent. And the State's argument only clarifies that, regardless of HB140's infringement on the right to privacy, the mandated "offer" constitutes "government-approved speech that interferes with the doctor-patient relationship" in violation of Providers' right to free speech. App.A033; *Denke*, ¶ 47.

3. HB136 and HB171 are unconstitutionally vague

The district court correctly concluded that HB136 fails to give sufficient notice of the conduct it makes a felony. *See* App.A023. The due process clause in the Montana Constitution "requires a criminal statute to define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," and "in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Samples*, 2008 MT 416, ¶ 16, 347 Mont. 292, 198 P.3d 803 (internal citations omitted). HB136 fails on both scores by leaving the determination

[14] For the same reasons, HB140 infringes the rights to equal protection and individual dignity by targeting patients who seek to exercise their fundamental right to procreative autonomy, and then depriving those women of the honest medical advice of their providers.

of whether an abortion falls within the health exception as a "question of judgment," despite the fact that whether a situation "so complicates the mother's medical condition that it necessitates the abortion" is ambiguous, subjective, and subject to different (yet reasonable) opinions. *Compare* Br. 37 (asserting the exception is understood by "Montana doctors"), *with* App.J007 (contrary affidavit of a Montana doctor).[15] Because HB136 thus requires healthcare providers "to speculate as to whether [their] contemplated course of action may be subject to criminal penalties," it must be enjoined. *City of Billings v. Albert*, 2009 MT 63, ¶ 16, 349 Mont. 400, 203 P.3d 828.

In response, "the State cites inapposite federal law." App.A023. *Casey* resolved a substantive due process challenge and said nothing about vagueness. *See generally Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). And the only other case the State points to is *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007), which it cites for the proposition that certain abortion restrictions "without health exceptions" have been upheld against vagueness challenges, Br. 36. But *Gonzales* did not foreclose vagueness challenges to abortion restrictions. *See, e.g.*, *Memphis Ctr. for Reprod. Health v. Slatery*, 2021 WL 4127691, at *17 (6th Cir. Sept. 10,

[15] The district court did not, as the State contends, rest its vagueness holding on disagreement amongst the parties about the meaning of the exceptions. *See* Br. 36-37. It simply noted that the parties' differing interpretations "bolster[ed] Plaintiffs' prima facie case." App.A030.

2021), *reh'g en banc granted*, 18 F.4th 550 (6th Cir. 2021); *Hopkins v. Jegley*, 510 F. Supp. 3d 638, 739 (E.D. Ark. 2021), *appeal docketed*, No. 21-1068 (8th Cir. Jan. 11, 2021). And it certainly says nothing about the actual issue on appeal—whether *these* exceptions are unconstitutionally vague.

The district court also correctly held that HB171 is void for vagueness. Section 5(2), for example, requires that an MAB provider "be credentialed and competent to handle complications management" or contract with other practitioners who can handle "complications." But Section 3(5) defines "complications" so broadly that a provider would lack fair notice of when she would be subject to criminal liability, and does not define at all what it means to "be credentialed and competent to handle" this category of matters. Section 5(3) further requires providers to make "all reasonable efforts" to ensure that a patient returns for a follow-up appointment, but does not explain what that means (a point which the State has never addressed).

The plain text of the law belies the State's claim (at 46-47) that Providers themselves introduce the ambiguity through an overly restrictive reading of HB171. *See* HB171 § 5 (requiring the provider who dispenses the abortion medication to conduct an in-person exam); *id.* §§ 7(5), 9 (indicating that an ultrasound must be performed). The district court thus did not err in finding "that HB 171 fails the requirement that 'ordinary people can understand what conduct is prohibited,'" and

concluding that that "[t]he fact that the State's interpretation of what is required of providers under the law differs so significantly from Plaintiffs' understanding itself bolsters Plaintiffs' prima facie case." App.A030.

4. The district court considered the State's evidence

The State next contends that the district court inadequately considered its evidence. Br. 28. Not so. The district court scrutinized both parties' evidentiary submissions, which were extensive. *See* Apps.D-H, J-K; Supp.Apps.C-D, F-H, J-K. As to HB136, for example, the court recognized that "there is disagreement among the State's and Plaintiffs' experts as to when viability is," but noted the consensus that the 20-week ban was pre-viability and thus "likely unconstitutional." App.A022. For HB171, the district court accurately noted that "[t]he State's experts do not dispute that medication abortions are pre-viability," and thus HB171 must be justified by a compelling state interest. *Id.* at 026. The district court also found that Providers had offered sufficient evidence regarding the safety of telehealth and the lack of necessity for ultrasounds to rebut the State's proffered justifications. *See id.* at 027. Later, the court again demonstrated that it was scrutinizing both parties' evidence when it noted that "[t]he State's own expert describes the experimental nature of" so-called "abortion reversal treatment." *Id.* at 029. The district court thus properly "analyze[d] and explain[ed] which evidence is more persuasive." Br. 28.

This Court should "give great deference to [those] findings of fact" and affirm. *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 22, 348 Mont. 68, 199 P.3d 810.[16]

Porter v. K & S Partnership (1981), 192 Mont. 175, 627 P.2d 836, does nothing to disturb that conclusion. *Porter* found a manifest abuse of discretion based on the district court's complete failure to account for one party's submissions and multiple erroneous evidentiary rulings. 192 Mont. at 180-84, 627 P.2d at 839. Here, in contrast, the district court permitted the State to offer all the evidence it wished, then considered the entire record. App.A002 (noting the submission of "rebuttal affidavits" and the court's review of "the affidavit testimony submitted by the parties"). Indeed, the State cannot even identify what the district court "fail[ed] to properly consider" about the evidence. Br. 29.

[16] The fact that Providers' experts have some connection to other Planned Parenthood affiliates does not undercut their credentials—indeed, their knowledge of abortion is what makes them competent to opine on the subject. In any event, the district court was well within its authority to weigh the parties' testimony and find one more credible. *See State v. Holman* (1990), 241 Mont. 238, 241, 786 P.2d 667, 669 ("Evaluation of expert testimony lies 'within the province of the trier of fact.'").

B. Providers demonstrated irreparable harm

The State does not challenge the court's conclusion that Providers made out a prima facie case of irreparable harm. *See* Br. 10-11.[17] That holding was correct. "Montana law is clear that the loss of a constitutional right 'constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued.'" App.A032 (quoting *MCIA*, ¶ 15). Because Providers "established that the restrictions and regulations of the challenged laws inflict constitutional injuries on Plaintiffs and their patients," "[t]hese injuries support the issuance of a preliminary injunction to preserve the status quo during the litigation ... without any additional showing of likely success on the merits." App.A033-034.

Even setting those constitutional injuries aside, Providers and their patients would suffer concrete harm through limits on their ability to provide or access health care. Namely, patients would be unable to obtain presently lawful medical procedures, including "surgical abortions between 20 weeks LMP and viability," "medication abortions via telehealth or without a 24-hour mandatory delay," and either type of abortion "without being subjected to severe restrictions." App.A033. These restrictions would impose "medical, emotional, and social harm" on patients,

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[17] The closest the State comes to challenging Providers' actual evidence of injury is a stray aside that "driving at least one to two hours each way to obtain an abortion is not a constitutional injury." Br. 42. But the district court correctly weighed the evidence to conclude that HB171 "significantly reduc[ed]" Montanans' "access to" pre-viability abortions. App.A033.

as well as forcing Providers to fundamentally alter their practices or face criminal and other serious repercussions. *Id.* These too are irreparable harms justifying preliminary relief.

III. The Court Should Not Overrule *Armstrong* On An Appeal From A Preliminary Injunction

The State's attempt to overturn *Armstrong* is improper in the context of an interlocutory appeal of a preliminary injunction because "[t]he court does not determine the underlying merits of the case in resolving a request for preliminary injunction." *Weems*, ¶ 18. That caution holds especially true in this case because the district court separately enjoined each of the laws on grounds other than *Armstrong*. As such, the State's arguments about the correctness of that decision do not provide grounds to reverse.[18]

If this Court were to consider *Armstrong*'s continuing validity, it should reaffirm it (as the Court recently did in *Weems*). "Stare decisis is a fundamental doctrine that reflects this Court's concerns for stability, predictability, and equal treatment." *State v. Running Wolf*, 2020 MT 24, ¶ 21, 398 Mont. 403, 457 P.3d 218. Although stare decisis does not require that the Court follow a "manifestly wrong decision," abiding by past decisions is this Court's "preferred course." *Sadiku*, ¶ 13.

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[18] The State also did not argue below that *Armstrong* should be overruled, instead accepting that decision as controlling authority. *See, e.g.*, Supp.App.B12; Supp.App.I31. The Court generally does not consider arguments brought for the first time on appeal, and it should make no exception here. *See Jensen*, ¶ 19.

Applying those principles to decisions involving the right to privacy, this Court has considered, *inter alia*, the length of time an established right or law has been in place, *State v. Demontiney*, 2014 MT 66, ¶ 17, 374 Mont. 211, 324 P.3d 344 ("declin[ing] to overrule a decision that ha[d] been in effect for over twenty years"); whether the reasoning in the challenged decision is "still … persuasive," *see id.*; and reliance interests, *see State v. Long* (1985), 216 Mont. 65, 72-73, 700 P.2d 153, 158 ("[P]rinciples of law should be positively and definitively settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day." (quoting *State ex rel. Sparling v. Hitzman* (1935), 99 Mont. 521, 525, 44 P.2d 747, 749)) (Weber, J., concurring). Those factors all counsel in favor of upholding *Armstrong*.

First, this Court has reaffirmed *Armstrong* on numerous occasions since it was decided more than 20 years ago, including as recently as 2019. *See, e.g.*, *Weems*, ¶ 19 ("*Armstrong* leaves no doubt that early-term abortion is a 'lawful medical procedure.'"); *MCIA*, ¶ 28 ("[T]his Court [has] recognized that prohibiting a woman from obtaining an abortion violates her personal autonomy, and therefore, her right to privacy."); *Wiser*, ¶ 15 ("The right to privacy is a fundamental right guaranteed by the Montana Constitution."). As in *Demontiney*, the Court should

"decline to overrule a decision that has been in effect"—and repeatedly upheld—"for over twenty years." 2014 MT 66, ¶ 17.

Second, *Armstrong* was correct in holding that Montana's right to privacy includes a right to pre-viability abortions. The "unmistakable intent" of the Constitutional Convention was to "explicitly protect[] citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Armstrong*, ¶ 48. As the Convention delegates explained in justifying the need for an express right to privacy in Section 10 of the Bill of Rights:

> [W]e all recognize that the state must come into our private lives at some point; but what [Section 10] says is, don't come into our private lives unless you have a good reason for being there. We feel that this, as a mandate to our government, would cause a complete reexamination and 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.

App.C042. Given "the delegates' overriding concern that government not be allowed to interfere in matters generally considered private, and given the delegates' specific determination to adopt a broad and undefined right of individual privacy grounded in Montana's historical tradition of protecting personal autonomy and dignity," *Armstrong* was on firm ground in finding that a woman's right to obtain a pre-viability abortion is protected by the right of privacy. *Armstrong*, ¶ 45.

This Court has already rejected the State's response that "the framers intentionally excluded abortion from the Constitution and left to the Legislature the prerogative to permit, prohibit, or regulate it." Br. 17; *see Armstrong*, ¶¶ 43-44. The Court should reaffirm its previous, correct conclusion about the import of those debates. The State also suggests that Delegate Dahood's statement that abortion "is a legislative matter insofar as we are concerned" precludes constitutional protection. Br. 19. That statement, however, concerned whether to extend inalienable rights from persons "born" to persons "conceived" in Section 3, not the right of privacy at issue in Section 10. App.C001. Moreover, that proposal was overwhelmingly defeated by a vote of 71 to 15. *Id.* at 002. Such non-enactment history is notoriously disreputable. *Cf., e.g.*, *Matter of W.J.H.* (1987), 226 Mont. 479, 484, 736 P.2d 484, 487 ("[T]he defeat of a relevant amendment is of uncertain value in interpreting legislation which was passed"); *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws"). Although "the State can speculate" based on the statements of a single delegate "that this reflects an unwillingness to protect this type of conduct, one can also speculate that the delegates believed it was already protected under the privacy clause," or had any number of other reasons for voting down the amendment. *Gryczan*, 283 Mont. at 451, 942 P.2d at 123.

Third, stare decisis allows for "some assurance that important legal principles involving [citizens'] highest interests shall not be changed from day to day." *Long*, 216 Mont. at 72-73, 700 P.2d at 158 (Weber, J., concurring). Reaffirming *Armstrong* will ensure that Montanans, who have relied on the Court's protection of the right to pre-viability abortions, can continue to make weighty choices without fear that such protection will suddenly change. A contrary result would disrupt Montanans' lives and reproductive health decisions, undermining citizens' ability to rely on this Court's jurisprudence. The State's claim that "[w]omen may still access abortions under *federal* law," Br. 23 (emphasis added), has no bearing on that inquiry.

The State's final arguments against *Armstrong* are similarly unavailing. *Armstrong* did not create unworkable precedent by "seemingly call[ing] into question every regulation of every medical provider." Br. 21. Providers are not arguing that the State cannot regulate medical practitioners. Instead, they are simply noting that regulations infringing the right to pre-viability abortions must pass strict scrutiny. Indeed, *Wiser* shows that this Court has not adopted the unconstrained reading the State asserts is so problematic. *See Wiser*, ¶¶ 15-20. And that "seven *different* justices" now sit on this Court provides no reason to abandon stare decisis, Br. 16. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("[I]t is not alone sufficient that we would decide a case differently now than we did then."); *see also*

Running Wolf, ¶¶ 44-45 (Rice, J., concurring in part). No Montana decision has ever recognized such a cynical view of stare decisis.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Respectfully submitted this 24th day of March, 2022.

/s/ Raphael Graybill
Raphael J.C. Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

CERTIFICATE OF COMPLIANCE

The undersigned, Raphael J.C. Graybill, certifies that the foregoing brief complies with the requirements of Rule 11, M. R. App. P., is double spaced, except for footnotes, quoted, and indented material, and it is proportionally spaced utilizing a 14-point Times New Roman typeface. The total word count for this document is 9924 words, as calculated by the undersigned's word processing program.

/s/ Raphael Graybill
Raphael J.C. Graybill
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-24-2022:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kristin N. Hansen (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: State of Montana
Service Method: eService

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Patrick Mark Risken (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Gene R. Jarussi (Attorney)
Bishop, Heenan & Davies
1631 Zimmerman Tr, No. 1
Billings MT 59102
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: eService

Emily Jayne Cross (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Delegates
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B
Helena MT 59601
Representing: ACLU of Montana Foundation, Inc., National Women's Law Center, Center for Reproductive Rights
Service Method: eService

Kyle Anne Gray (Attorney)
P.O. Box 639
Billings MT 59103
Representing: Delegates
Service Method: eService

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Delegates
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., National Women's Law Center, Center for Reproductive Rights
Service Method: eService

Lindsay Beck (Attorney)
1946 Stadium Drive, Suite 1
Bozeman MT 59715
Representing: American College of Obstetricians and Gynecologists, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, Montana Chapter, American College of Medical Genetics and Genomics, American College of Nurse-Midwives,

American College of Osteopathic Obstetricians and Gynecologists, American College of Physicians, American Gynecological and Obstetrical Society, American Medical Association, American Medical Women's Association, American Society for Reproductive Medicine, American Urogynecologic Society, Council of University Chairs of Obstetrics and Gynecology, American Academy of Pediatrics, National Association of Nurse Practitioners in Women's Health, Society for Adolescent Health and Medicine, Society for Maternal-Fetal Medicine, Society for Reproductive Endocrinology and Infertility, Society of Family Planning, Society of OB/GYN Hospitalists
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Asian Institute on Gender-Based Violence, Aspen, Caminar Latino, Custer Network Against Domestic Abuse, Inc., District 4 Human Resources Development Council, Domestic and Sexual Violence Services, Idaho Coalition Against Sexual & Domestic Violence, Latinos United for Peace and Equity, Legal Voice, Montana Coalition Against Domestic and Sexual Violence, Richland County Coalition Against Domestic Violence, National Coalition Against Domestic Violence
Service Method: eService

Mike Dennison (Interested Observer)
Service Method: Conventional

Kimberly Parker (Attorney)
1875 Pennsylvania Avenue NW
Washington DC 20006
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Hana Bajramovic (Attorney)
123 William St., Floor 9
New York NY 10038
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Alice Clapman (Attorney)
1110 Vermont Ave, NW Ste 300
Washington DC 20005
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Nicole Rabner (Attorney)
1875 Pennsylvania Avenue NW
Washington DC 20006
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Alan Schoenfeld (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007

Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Michelle Diamond (Attorney)
7 World Trade Center, 250 Greenwich Street
New York NY 10007
Representing: Planned Parenthood of Montana, Joey Banks
Service Method: Conventional

Electronically Signed By: Raphael Jeffrey Carlisle Graybill
Dated: 03-24-2022