

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

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PLANNED PARENTHOOD OF MONTANA, et al.,

*Plaintiffs-Appellees,*

v.

STATE OF MONTANA,

*Defendant-Appellant.*

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**APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY**

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

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Pursuant to Mont. R. App. P. 12(6), Defendant-Appellant State of Montana (“State”) submits this Notice of Supplemental authority.<sup>1</sup>

On June 24, 2022, the Supreme Court of the United States published its decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_ (2022) (attached as Exhibit A). *Dobbs* overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *See Dobbs*, Op. at 79. As the State argued in briefing, the *Armstrong* Court inextricably linked Montana’s right to privacy to the decision in *Roe*.<sup>2</sup> *See State’s Opening Br.* at 20 n.4; *see also State’s Reply Br.* at 12.

*Dobbs* proves “pertinent and significant” to multiple points the State raised in briefing. Mont.R.App.P. 12(6).

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<sup>1</sup> Rule 12(6) reads: “When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the supreme court, by ‘Notice of Supplemental Authority,’ with copies to all parties, setting forth the citation(s) without argument. The notice shall reference either the page of the brief or the point argued orally to which the citation(s) pertain.” Accordingly, the State cites to the passages of the *Dobbs* opinion corresponding to arguments made during this appeal.

<sup>2</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

First, *Dobbs* rejected *Armstrong*'s supposition that *Roe*'s viability framework settled the personhood debate from a legal standpoint. See *Dobbs*, Op. at 49–53; State's Opening Br. at 20 n.4. (noting *Armstrong* incorrectly understood *Roe* to have settled “when a person becomes a person”).

Second, *Dobbs* concluded that “no pre-*Roe* authority ... no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise” “show[s] that a constitutional right to abortion has any foundation, let alone a deeply rooted one, in this Nation's history and tradition.” *Dobbs*, Op. at 35 (internal quotation marks and citations omitted); see also *id.* at Appendix B 103–04 (citing 1864 Terr. of Mont. Laws p.184); State's Opening Br. at 19–20; State's Reply Br. at 10–12 (explaining that at ratification, Montanans commonly understood that pre-viability abortion was not a right protected—even implicitly—by the 1972 Constitution).

Third, *Dobbs* made clear that “a right to abortion cannot be justified by a purported analogy to the rights recognized” in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and other “contraception and same-sex relationships” cases, because “the right to abortion ... uniquely involves

what *Roe* and *Casey* termed potential life.” *Dobbs*, Op. 71–72, 49, 66; State’s Opening Br. at 18; State’s Reply Br. at 13 (noting that Delegate Campbell’s reference to *Griswold* cannot sustain locating a right to abortion in the Montana Constitution.).

Fourth, *Dobbs* explained that *Casey* “abandoned [*Roe*’s] reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment’s Due Process Clause.” *Dobbs*, Op. at 55 (citing *Casey*, 505 U.S. at 846); see, e.g., State’s Reply Br. at 12 (citing *Armstrong*, ¶ 42) (arguing that *Armstrong* erred when it located a right to pre-viability abortion in Montana’s right to privacy by consulting federal authorities’ interpretation of a federal right to privacy.).

Fifth, *Dobbs* observed that “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines.” *Dobbs*, Op. at 62–63 (collecting such doctrines); see, e.g., State’s Opening Br. at 23–28; State’s Reply Br. at 13–15 (explaining that *Armstrong*’s rigid viability framework muddies courts’ ability to determine and apply the appropriate standard of review).

Sixth, *Dobbs* rejected that *Armstrong*’s viability line provides a workable judicial standard. *Dobbs*, Op. at 73; see also *id.* at 2–5 (Roberts,

C.J., concurring in judgment); State’s Opening Br. at 15–23, 30–33; State’s Reply Br. at 9–13, 15–17 (detailing the problems with *Armstrong’s* viability standard).

Seventh, *Dobbs* reaffirmed that state laws regulating abortion are “health and welfare laws” that enjoy a strong presumption of validity. *Dobbs*, Op. at 77–78; State’s Opening Br. at 23–28; State’s Reply Br. at 13–15 (arguing that not every regulation of abortion merits automatic strict scrutiny review).

Eighth, *Dobbs* concluded that “[a]bortion presents a profound moral question” and that question should “return ... to the people and their elected representatives.” *Dobbs*, Op. at 79; *see also id.* at 1–5 (Kavanaugh, J. concurring) (“In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process.”); *see e.g.*, State’s Opening Br. at 19–20; State’s Reply Br. at 10–13 (arguing that the text of the Montana Constitution and evidence from the Constitutional Convention demonstrate that abortions rights and regulations have been entrusted to the People through their elected representatives).

*Dobbs* marks an obvious watershed in federal abortion jurisprudence. But given *Armstrong*'s explicit reliance on *Roe* and other federal authorities, *Dobbs* is "pertinent and significant" authority affecting the disposition of questions raised in this case—even at the preliminary injunction stage. Given the breadth of *Dobbs*, the State invites the Court to order supplemental briefing that can fulsomely address *Dobbs*' effect on the issues presented in this appeal.

DATED this 27th day of June, 2022.

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