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

OPPOSITION TO MOTIONS FOR SUPPLEMENTAL BRIEFING

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INTRODUCTION

The Court should deny the State's and Proposed Amicus's motions for supplemental briefing on *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). These motions are untimely and seek briefing on irrelevant issues not before the Court. Handed down more than six weeks ago, *Dobbs* concerns the protections for abortion provided by the federal constitution. *Dobbs* has nothing to do with the State's appeal of a preliminary injunction premised on numerous violations of the Montana Constitution—a posture in which this Court does not "determine the underlying merits of the case." *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4. These requests for supplemental briefing are simply the State's latest effort to purge longstanding privacy protections from the Montana Constitution. Briefing on inapposite federal authority in service of overturning settled precedent would only confuse the state law issues presently before the Court. Because motions for supplemental briefing "will not be routinely granted" and there is no "extraordinary justification" for belated further briefing, the Court should deny the requests. Mont. R. App. P. 12(10).[1]

[1] Counsel for the State confirmed that the State's motion seeks relief identical to that of the Proposed Amicus's motion. Planned Parenthood and Dr. Banks ("Planned Parenthood") have, accordingly, filed a consolidated response.

ARGUMENT

The threshold defect in the motions is that they come too late. Briefing in this matter closed on April 15. The case was classified for submission on briefs to a five-Justice panel on May 11. The U.S. Supreme Court issued *Dobbs* on June 24. Three days later, the State filed a notice of supplemental authority "invit[ing] the Court to order supplemental briefing that can fulsomely address *Dobbs*[.]" *See* State's Notice of Supplemental Authority, DA 21-0521 (June 27, 2022).[2] Dissatisfied with the Court's decision not to accept the initial invitation, the State and the Proposed Amicus then filed duplicative motions for supplemental briefing more than a month later, on August 2, with no explanation for the delay. An eleventh hour proffer of irrelevant arguments impedes the orderly resolution of this appeal and should not be permitted.[3]

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[2] The notice of supplemental authority was itself improper because it included pages of argument on the purported effect of *Dobbs*. *See* Mont. R. App. P. 12(6) (requiring such a notice to "set[] forth the citation(s) *without argument*" (emphasis added)).

[3] For similar reasons, the Proposed Amicus's request for leave to file an amicus brief is untimely. Numerous amici filed briefs in support of Planned Parenthood at the same time Planned Parenthood filed its answering brief. The Proposed Amicus could have also filed a brief indicating his interest in the matter within the briefing schedule, or even shortly after *Dobbs* was issued. Planned Parenthood would not have opposed such a request on timeliness grounds. But the Proposed Amicus instead delayed until months after the close of briefing and the event that supposedly precipitated his wish to be heard.

The substance of the motions fares no better. Under Rule 12(10), motions for supplemental briefing "will not be routinely granted," and require "extraordinary justification." Briefing on *Dobbs* has no justification at all because it would address irrelevant issues not before the Court.

First, Planned Parenthood brought claims premised only on violations of the Montana Constitution. *See* Supp.App.A (Complaint). The district court then concluded that the challenged laws violated the Montana Constitution's guarantees of equal protection, due process, free speech, individual dignity, and privacy, in addition to causing Planned Parenthood, Dr. Banks, and their patients irreparable harm. *See* App.A022-023, 029-030, 030-034. *Dobbs*, by contrast, is a federal court decision concerning the federal constitution. 142 S. Ct. at 2242 (stating that "the Due Process Clause of the Fourteenth Amendment" to the U.S. Constitution does not protect abortion). Because it does not address the distinct protections afforded by Montana's Constitution, *Dobbs* cannot affect the merits of Planned Parenthood's claims or the irreparable injuries prevented by the preliminary injunction, any one of which would suffice to affirm the decision below.

The State and Proposed Amicus must instead resort to the most tenuous of connections, claiming that the discussion of federal authority in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, means that this Court "must consider

Dobbs" in determining whether to affirm the preliminary injunction. Dewhirst Decl. ¶ 6, DA 21-0521 (Aug. 2, 2022).

That assertion is false. To start, the State continues to ignore that the challenged laws are unconstitutional under multiple provisions of the Montana Constitution and would have caused such serious harms that the Court need not even address the right to privacy to resolve this appeal. *See, e.g.*, Planned Parenthood's Answering Brief at 9, 21-22, DA 21-0521 (Mar. 24, 2022). But more importantly, after considering federal authority on the right to privacy, *Armstrong* specifically held that "*[n]otwithstanding*, *and independently of the federal constitution*, where the right of individual privacy is implicated, Montana's Constitution affords *significantly broader protection than does the federal constitution*." ¶ 41 (emphasis added). The Court then rejected federal precedent on abortion, concluding that the Montana Constitution "requires more than that the State simply not impose an undue burden on a person's exercise of his or her right of individual privacy," the governing standard at the time under federal law. *Id.*

The State's theory for why *Dobbs* is relevant to this case inverts *Armstrong*'s reasoning, suggesting that the subsequent overruling of federal authority this Court explicitly declined to follow undermines more expansive state law protections grounded in the unique text and history of Montana's Constitution. In other words,

this Court rejected the federal approach at the time of *Armstrong* because it did not reflect Montana's independent and stringent individual privacy protections; the State now argues that the Court should revisit *Armstrong* because federal privacy protections are even weaker now than they were before. Such an argument stands Montana precedent on its head, particularly because this Court reaffirmed just last week that "[t]he protection afforded by" Montana's "explicit right to privacy" continues to "exceed[] that provided by the federal constitution." *Stand Up Montana v. Missoula Cty. Pub. Schools*, 2022 MT 153, ¶ 11 (citing *Armstrong*, ¶ 34).

Second, this appeal arises from the grant of a preliminary injunction. As explained in Planned Parenthood's answering brief, the State's attempt to overturn *Armstrong*—the only argument to which it claims *Dobbs* is relevant—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; *accord Stand Up Montana*, ¶ 6 (holding that this Court will not "determine the underlying merits of the case giving rise to the preliminary injunction"). *Dobbs* is thus doubly irrelevant.

CONCLUSION

For the foregoing reasons, the Court should deny the motions for supplemental briefing.

Respectfully submitted this 8th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, Raph 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 1,138 words, as calculated by the undersigned's word processing program.

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CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 08-08-2022:

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