IN THE SUPREME COURT OF THE STATE OF MONTANA
No. _____

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

Petitioners,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY, Montana, the Honorable Gregory R. Todd, Presiding, Respondent (Writ of Supervisory Control),

and

STATE OF MONTANA, by and through Austin Knudsen, in his official capacity as Attorney General of Montana, Respondent (Writ of Injunction).

PETITION FOR WRIT OF SUPERVISORY CONTROL AND INJUNCTION EXPEDITED CONSIDERATION REQUESTED

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ATTORNEYS FOR PETITIONERS

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QUESTIONS PRESENTED

The Thirteenth Judicial District Court, Hon. Gregory R. Todd, announced on September 23, 2021 that he would issue a ruling on Petitioners' application for a preliminary injunction on or before September 30. Late in the afternoon on September 29, the State moved to disqualify Judge Todd, which by statute prevents him from taking further action in this case. The three laws Petitioners challenge—House Bills 136 ("HB 136"), 171 ("HB 171"), and 140 ("HB 140")—are set to take effect tonight at midnight. They will immediately infringe on the fundamental rights of Montanans seeking abortion care and subject Petitioners to substantial criminal penalties for providing that constitutionally protected care.

Should this Court issue an immediate stay of enforcement of these laws to preserve the status quo until a court resolves whether Petitioners are entitled to preliminary relief?

Should this Court issue a preliminary injunction preserving the status quo because Petitioners have made out a prima facie case that these laws violate the Montana Constitution and will cause irreparable harm?

INTRODUCTION

Absent immediate preliminary relief from this Court, three unconstitutional laws significantly restricting Montanans' access to abortion care will take effect at midnight without ever having been subject to judicial review. This perversion of justice results from the State's blatant disregard for the separation of powers and fundamental rights protected by the Montana Constitution. Hours before the district court was due to issue a decision on Planned Parenthood of Montana and Dr. Joey Banks's application for a preliminary injunction, the State moved to disqualify the district court judge. The sole basis for the motion was known to the State a week ago, when its lawyers heard the aside that they now claim indicates bias. Yet rather than litigating the court's imminent ruling (whatever it may be) in the normal course, the State instead sought to circumvent judicial review by precluding the district court from ruling until after the laws challenged here go into effect tonight at midnight.

Regardless of the mechanism this Court relies on to issue relief, it should preserve the status quo by immediately enjoining HB 136, HB 171, and HB 140 from taking effect until Petitioners' motion for preliminary relief can be resolved. The Court then should order briefing and argument on Petitioners' application for preliminary relief directly, or allow for its resolution before a district court judge following resolution of the State's disqualification motion.

The briefs and exhibits filed below demonstrate that Petitioners are entitled to preliminary relief on two independent and sufficient grounds. First, Petitioners have established a prima facie case that they and their patients will suffer great or irreparable harm absent preliminary relief—both through the deprivation of the constitutional rights described above and in tangible, practical ways, such as the State's threat to imprison health care providers for providing the health care their patients need and for engaging in constitutionally-protected conduct that is lawful today, but that will be unlawful tomorrow if the laws take effect, as well as the immediate infringement on women's reproductive autonomy. Second, Petitioners have made out a prima facie case that the three laws challenged here violate the Montana Constitution's rights to privacy, free speech, due process, equal protection, individual dignity, and health, safety and happiness by (1) banning certain pre-viability abortions; (2) eliminating the ability to provide medication abortions through telemedicine; (3) imposing a mandatory 24-hour delay and two-trip requirement on women seeking medication abortions; and (4) requiring providers to make false, misleading and stigmatizing statements to their patients.

For these reasons, whether through an exercise of supervisory control or under this Court's original jurisdiction, the Court should temporarily enjoin the three challenged laws so as to allow for resolution of Petitioners' motion for a preliminary injunction, either before this Court directly or on remand.

PARTIES

Petitioner Planned Parenthood of Montana ("PPMT") is a not-for-profit corporation organized under the laws of Montana and headquartered in Billings. It is the largest provider of reproductive health care in Montana, including of abortion services, and operates five health centers in Montana.

Petitioner Dr. Joey Banks is a physician licensed to practice medicine in Montana, with over 20 years' experience providing primary care and reproductive health care, and over 15 years' experience providing and supervising abortions. Dr. Banks provides health care, including abortions, at PPMT.

Respondent (writ of supervisory control) is the Thirteenth Judicial District Court, Honorable Judge Gregory R. Todd, who oversaw these proceedings and was prepared to issue a ruling on Petitioners' application for a preliminary injunction until the State moved to disqualify him for cause.

Respondent State of Montana (writ of injunction), which, through its legislature, adopted HB 136, HB 171, and HB 140, is the Defendant in the action below. The State was sued by and through Austin Knudsen, in his official capacity as Attorney General of Montana.

BACKGROUND

On August 16, 2021, Petitioners sought to preliminarily enjoin HB 136, HB 171, and HB 140. These statutes will take effect tonight at midnight, and if

allowed to do so will fundamentally limit abortion access in Montana in clear violation of the Montana Constitution's right to privacy and this Court's holding in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. HB 136 bans pre-viability abortions beginning 20 weeks after a woman's last menstrual period ("LMP"), subject only to narrow and vague exceptions. HB 171 restricts access to medication abortion in numerous ways, including by banning entirely the provision of medication abortion through telehealth, imposing a 24-hour mandatory delay and two-trip requirement on patients seeking medication abortions, and requiring providers to give medically inaccurate information to patients. HB 140 interferes with the provider-patient relationship and stigmatizes patients seeking abortions by requiring providers to ask patients if they wish to view active and still ultrasound images and listen to fetal cardiac activity and then have patients sign a State-created form indicating what they chose. HB 136 and HB 171 impose criminal penalties on health care providers like Petitioners, and violations of HB 140 carry substantial civil penalties. As Petitioners' briefing in the district court made clear, Petitioners and their patients will suffer irreparable harm if these laws are not enjoined because the laws infringe on their constitutional rights, including Montanans' fundamental right to a pre-viability abortion and providers' free speech and due process rights; unlawfully interfere with the provider-patient

relationship; and severely burden patients' health and safety. *See* Ex. B-1, Br. Supp. Mot. Prelim. Inj. ("Br."); Ex. D, Reply Supp. Mot. Prelim. Inj. ("Reply").

The case was assigned to Judge Donald L. Harris on August 23, 2021 after Judge Jessica T. Fehr disqualified herself. On August 30, 2021, the State moved to substitute Judge Harris, and the case was reassigned to Judge Gregory R. Todd. After Petitioners' motion for a preliminary injunction was fully briefed, Judge Todd scheduled a show cause hearing for September 23, 2021. At that show cause hearing, Judge Todd allowed both sides to fully present their case, gave the State the last word during oral argument even though Petitioners are the moving party, and allowed the State to file 46 pages of additional materials five days after the conclusion of the hearing. Diamond Decl. ¶ 15; *see also* Transcript of Sep. 23, 2021 Hearing ("Hearing Tr.," attached as Ex. A to Diamond Decl.) 30:21-31:11 ("the State would certainly appreciate another chance to speak as well" . . . [Court:] "yes, I will allow considerable leeway here."); 70:22-75:21; 82:1-3 ("Here's what I'm going to do: State, you can submit whatever affidavits you want to that."). The State was represented by three attorneys. Diamond Decl. ¶ 7; *see also* Hearing Tr. 5:20-24. None of them objected to or in any way raised concerns about Judge Todd's conduct or his management of the hearing. Diamond Decl. ¶¶ 9-10; *see also* Hearing Tr. 36:18-25. At that hearing, Judge Todd informed the parties that he would issue a decision on Petitioners' request for preliminary relief before

October 1, 2021, the effective date of the three challenged laws. Diamond Decl. ¶ 14; *see also* Hearing Tr. 75:24-25 ("I will issue a decision before next Friday, so within a week."); 82:3-4 ("[B]ecause of the time constraints that I -- for the sake of all the matters here, I'm going to decide within a week.").

At 4:37 p.m. on September 29, 2021—less than 32 hours before the unconstitutional laws are scheduled to go into effect—the State filed a motion, accompanied by an affidavit from counsel to the State, Mr. David Dewhirst, to disqualify Judge Todd for cause pursuant to § 3-1-805, MCA. *See* Ex. F, Mot. Disqualify; Ex. F-1, Br. Supp. Mot. Disqualify ("Disqualify Br.") & Dewhirst Aff. The State based that motion on a single offhand comment Judge Todd made during the hours-long preliminary injunction hearing, which Judge Todd noted did not affect the matter before the Court, and the hearing continued on in due course. *See* Hearing Tr. at 36:19 ("But that's a different topic[.]"); 36:22-23 ("[T]hat's not in discussion here today."). In particular, following the State's assertion about the role the legislature and medical bodies have in setting medical standards, Judge Todd said: "Like they've done in the judiciary as well." *Id.* at 36:18-19. The State, in its motion, claimed that the Judge's comment indicated "personal bias and prejudice against the State." Disqualify Br. at 2. It contended that Judge Todd's comment referred to "an ongoing political and legal dispute between the Judiciary

and the Legislature that arose in the context of leaked judicial emails showing many state judges opining on the constitutionality of pending legislation." *Id.* at 3.

The State waited six days from the hearing to file its motion to disqualify Judge Todd, which guaranteed that he could not issue the ruling that the parties were told to expect the very next day. By law, if any party files "an affidavit *alleging* facts showing personal bias or prejudice of the presiding judge," that judge "shall proceed no further in the cause." Section 3-1-805, MCA (emphasis added). The State's motion thus precludes Judge Todd from ruling on Petitioners' preliminary injunction motion before the challenged laws take effect tonight. Accordingly, absent emergency relief from this Court, the State will get its desired result—but through blatant gamesmanship, rather than any ruling on Petitioners' motion.

ARGUMENT

I. This Court Has Jurisdiction To Enjoin The Challenged Laws

The Court can grant Petitioners' requested relief either through a writ of supervisory control or a writ of injunction.

First, supervisory control is justified "when urgency or emergency factors exist making the normal appeal process inadequate" and "the case involves purely legal questions," so long as one of three additional factors is met. M. R. App. P. 14(3). As relevant here, supervisory control may be exercised in cases involving

"[c]onstitutional issues of state-wide importance." M. R. App. P. 14(3)(b). Here, each of those factors is met: The normal appeals process is inadequate, as the State's transparent attempt to avoid answering for its unconstitutional conduct mere hours before the challenged laws will take effect has frustrated the district court's effort to timely rule on Petitioners' request for preliminary relief. The issues now presented are purely legal, including the question of whether this Court should issue an injunction preserving the status quo. Finally, this matter plainly involves constitutional issues of statewide importance. Petitioners have made a prima facie case that each of the challenged laws violate their constitutional rights and the constitutional rights of their patients by showing how the laws cannot survive strict scrutiny, as *Armstrong* requires. The State has chosen not to even attempt to justify these laws under strict scrutiny. The "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 296 P.3d 1161, 1165. Absent relief to preserve the status quo, Petitioners and providers across Montana will be forced to substantially curtail access to a constitutionally-protected medical procedure or face serious criminal penalties.

Second, Section 2, Article 7 of the Montana Constitution and Rule 14 grant this Court original jurisdiction to issue writs of injunction. *See* Art. 7, § 2; M. R.

App. P. 14(2). To do so, this Court must find that at least one of three "criteria, which are set forth in the disjunctive," is present. *Barrus v. Montana First Jud. Dist. Ct., Broadwater Cty.*, 2020 MT 14, ¶ 21, 398 Mont. 353, 361–62, 456 P.3d 577, 5821 (quoting *Langford v. State* (1997), 287 Mont. 107, 111, 951 P.2d 1357, 1360). Here, all three factors are met. First, "the State is a party to the action." *Id.* Second, "the issue is of public interest" because "the public has an interest in establishing and maintaining the validity of state actions—or in establishing that a state action is invalid—in a proceeding" involving "the State's ability to enact, amend and enforce state legislation." *Langford*, 287 Mont. at 112. Third, "the rights of the public are involved"—indeed, the entire matter in dispute is whether the State will be permitted to short circuit judicial review and infringe on Montanans' fundamental rights. *Barrus*, ¶ 22.

Because these factors are present, the question then becomes whether original proceedings are "justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper." *Barrus*, ¶ 21. That requirement is also met. Because of the timing of the State's motion for disqualification, "due consideration in the trial courts" is simply

impossible before the laws take effect tonight. Nor is "due appeal to this court" feasible in the event of an adverse decision.

Barrus itself is instructive. In that case, the petitioner sought to enjoin the State from forcibly administering medications. *Barrus*, ¶¶ 6-12. The district court rejected his challenge, and the State immediately sought to proceed with the administration of medication. *Id.* This Court concluded that a writ of injunction was the appropriate means by which to review the district court's order and contest the State action because "Barrus would have no adequate remedy of appeal if this Court were to allow him to be involuntarily medicated prior to review." *Id.* ¶ 22. Here, absent the Court's intervention, Montanans will be *denied* time-sensitive medical care, but the import is the same. Just as Barrus's rights to bodily autonomy would be irreparably infringed without a writ of injunction, so too will Petitioners' patients' "right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference" be violated unless this Court acts. *Armstrong*, ¶ 14.

Accordingly, the Court may properly consider this matter either as a petition for supervisory control or as a petition for writ of injunction.

II. This Court Should Temporarily Enjoin HB 136, HB 171, And HB 140 Pending Resolution Of Petitioners' Application For A Preliminary Injunction

Regardless of the mechanism this Court relies on to issue relief, it should immediately issue an injunction blocking HB 136, HB 171, and HB 140 from taking effect until Petitioners' application for preliminary relief can be resolved. Petitioners filed their verified complaint and application for preliminary injunction well in advance of the laws' effective date, and have since litigated this case with dispatch. Indeed, until a little more than twelve hours ago, the district court was prepared to timely rule on Petitioners' requested relief. Yet, through the machinations described above, the State has achieved through abuse of process what it could not obtain on the merits. Without a temporary injunction issued by this Court, Petitioners simply have no means to obtain relief protecting their patients and staff from immediate irreparable harm.

That presents precisely the kind of "extraordinary" situation justifying the exercise of this Court's jurisdiction and the issuance of temporary relief to maintain the status quo. Indeed, this Court has found extraordinary writs justified even when far longer periods of time remained for litigation to proceed in the ordinary course. *See Langford*, 287 Mont. at 122 (finding "emergency circumstances or other conditions making trial court consideration and subsequent appellate review

an inadequate remedy" when "less than two months remain[ed]" before petitioner's scheduled execution).

III. Following An Immediate Stay, The Court Should Allow For Resolution Of Petitioners' Application For A Preliminary Injunction—Either Before This Court Directly Or On Remand

Petitioners are entitled to preliminary relief on two independently sufficient bases. *See* § 27-19-201, MCA (identifying five disjunctive grounds for issuing preliminary relief). First, Petitioners' submissions to the district court establish a prima facie case that that absent preliminary relief, their patients will suffer the irreparable harm of being denied access to constitutionally protected abortion care. Petitioners themselves face serious legal jeopardy as a result of the laws set to take effect, including significant criminal penalties. Second, Petitioners have made the requisite prima facie showing that the challenged laws violate numerous provisions of the Montana Constitution.[1]

First, Petitioners have demonstrated that they will suffer "great or irreparable injury" if the challenged laws go into effect on October 1, 2021. *Weems v. State by & through Fox*, 2019 MT 98, ¶ 17, 395 Mont. 350, 358, 440 P.3d 4, 10; Section 27-19-201(2), MCA; *see also* Br. at 19-20; Reply at 18-19. Montana courts "have recognized harm from constitutional infringement as adequate to

[1] Petitioners attach all of the briefing and exhibits presented to the district court as Appendix I. Petitioners attach the complete transcript of the show cause hearing as Exhibit A to the Declaration of Michelle Nicole Diamond filed herewith.

justify a preliminary injunction," and Petitioners have established that the challenged laws will inflict constitutional injuries on them and their patients. *Weems*, ¶ 25. Most importantly, the challenged laws will substantially curtail access to abortion in Montana. In particular, if the challenged laws take effect tonight, women in Montana will not be able to obtain abortions between 20 weeks LMP and viability; they will not be able to obtain medication abortions via telehealth or without a 24-hour mandatory delay or two-trip requirement; and they will not be able to obtain any abortion care without the State interfering in the provider-patient relationship to pressure them to abandon their rights. And the challenged laws criminalize—or, in the case of HB 140, heavily penalize—activities that are currently lawful in Montana.

Second, Petitioners have made out a prima facie case on the merits. Specifically, Petitioners have demonstrated that the challenged laws, both individually and taken together, violate a woman's fundamental right to a pre-viability abortion, deny women access to constitutionally protected abortion care, and unlawfully intrude on the provider-patient relationship. Section 27-19-201(1), MCA; *see* Br. at 5-18; Reply at 8-17. Indeed, the State does not dispute that HB 136 bans at least some pre-viability abortions, and this Court has already held that the Montana Constitution precludes such infringements on the right to privacy. *See Armstrong*, ¶ 49 (holding that the "right of procreative

autonomy" in the Montana Constitution contains within it "a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation"). HB 171 imposes numerous burdensome restrictions on medication abortions—including a 24-hour delay and a two-trip requirement, and prohibitions on the provision of medication abortion through telehealth and by mail—and compels providers to give their patients inaccurate information under the guise of "informed consent." Finally, HB 140 interferes with the provider-patient relationship by requiring providers to ask patients if they wish to view active and still ultrasound images and listen to fetal cardiac activity and then have women sign a state-created form that indicates what they chose. These requirements infringe women's right to privacy, intrude on the protected provider-patient relationship, and compel providers' speech.

The Court should issue an immediate stay to preserve the status quo and protect the substantial constitutional rights at issue in this case. Following the issuance of an immediate stay, the Court should either order briefing and argument before this Court directly to resolve the pending application for a preliminary injunction, or remand to the Thirteenth Judicial District Court for further proceedings.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' request for an emergency writ of supervisory control or a writ of injunction and issue an immediate stay blocking HB 136, HB 171, and HB 140 from taking effect until Petitioners' application for preliminary relief can be resolved. The Court should then either order briefing and argument on Petitioners' application for preliminary relief directly, or allow for its resolution before a district court judge.

Respectfully submitted this 30th day of September, 2021.

/s/ Raphael Graybill
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CERTIFICATE OF COMPLIANCE

The undersigned, Raphael J.C. Graybill, certifies that the foregoing petition complies with the requirements of Rule 11 and 14, 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 3493 words, as calculated by the undersigned's word processing program.

/s/ Raphael Graybill
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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 Petition - Writ to the following on 09-30-2021:

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