IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 21-0494

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

Petitioners,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY, Montana, the Honorable Gregory R. Todd, Presiding,

Respondent,

and

STATE OF MONTANA, by and through Austin Knudsen, in his official capacity as Attorney General of Montana,

Respondent.

DECLARATION OF DAVID DEWHIRST

APPEARANCES:

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**Admitted Pro Hac Vice in Thirteenth Judicial District, Cause No. 21-999*
***Application for Admission Pro Hac Vice Forthcoming*

1. I, David Dewhirst, am the Solicitor General of Montana and counsel for the State in this matter.

2. The following is based on my personal knowledge.

3. I submit this declaration in response to Petitioners' Writ and, specifically, several of the untruthful and dishonest characterizations in their filings.

4. Throughout its filings, Petitioners claim that the State and its attorneys have attempted to "short circuit" judicial review by filing the motion to disqualify Judge Todd yesterday afternoon. They claim that this motion was, in fact, a dilatory tactic, and that the State waited almost a week to file the motion. These characterizations are false, and they directly contradict the facts to which I attested, under oath and in good faith, just yesterday. In fact, Petitioners' broadsides can only be true if my affidavit of less than 24 hours ago was a lie. It was not, and I take great exception to this attack on my character and honesty. Calling me a liar today and engaging in ad hominin attacks against the State may be what the Petitioners mistake for argument, but it is not. It is sanctionable behavior, though. *See United States v. Young*, 470 U.S. 1, 9 (1985) ("[U]nfounded and inflammatory attacks on the opposing

advocate" have "no place in the administration of justice and should neither be permitted nor rewarded.").

5. Opposing Counsel conveniently omits their own dilatory actions that have led us here. Three laws are at issue; HB 136, HB 140, and HB 171. All three were signed into law on April 26, 2021. Petitioners did not file their challenge to these laws until August 16, 2021. Briefing for the motion for preliminary injunction was completed on September 17, 2021 and the hearing was conducted on September 23, 2021. Petitioners do not and cannot explain why they waited 112 days to file their initial complaint. Assumedly, waiting until the eve of implementation to file bolsters their request for a preliminary injunction. They cannot rightfully complain when the State moves *as soon as possible* to timely file supporting documents and motions necessary to ensure a fair and impartial forum for this case.

6. I will not recite verbatim the documents filed yesterday; however, they are attached as Petitioner's Exhibit F-1. In short, Judge Gregory Todd made statements at the September 23, 2021 hearing that demonstrate bias toward the State and the legitimacy of its regulatory powers at issue in this case. He did so by interjecting reference to a

completely separate, ongoing legal and political dispute between the Legislature and Judiciary. This Court is well aware of the acrimonious nature of that dispute. After reviewing the transcript, the State determined that Judge Todd is unable to set aside his feelings about that dispute and treat the State and its enactments fairly in this case.

7. The motion to disqualify Judge Todd, and accompanying documents, were filed as soon as possible. *See* Petitioner's Exhibit F-1.

8. Petitioners complain that the State's attorneys did not object at the hearing based on what the State thought it heard Judge Todd say. *See* Diamond Decl. at ¶¶ 7-11. But the State believes judges are owed more respect than that. As a representative of the State, it is my practice and belief that motions to disqualify a judge based on comments made in the courtroom must be based on the actual record and considered reflection, not made spontaneously based on what an advocate thought the court said. Such motions are serious matters and should not be undertaken on the fly.

9. Contrary to the disparaging and defamatory claims by Mr. Garybill and Ms. Diamond, the timing of the filing of the motion was entirely dictated by the receipt of the transcript. The State requested an

expedited unofficial transcript on Monday. The State was told even an expedited transcript would take a week. The State continued to engage with the court reporter, paid an expedited premium, and ultimately received the transcript after close of business on Tuesday evening, September 28, 2021. The State moved with this deliberate speed because it was well aware of the statutes' approaching implementation dates and Judge Todd's imminent decision. If the State concluded that Judge Todd was biased, it was necessary and proper to move for appropriate relief *before* Judge Todd ruled on the preliminary injunction motion, one way or the other. The State moved much faster than the normal speed of government on its motion to disqualify. The State did not choose to late-file the case, and the State did not put Judge Todd's words in his mouth. Yet those circumstances converged. As an attorney for the State, it is my duty to ensure that it receives just, equal, and unbiased treatment in court.

10. The State filed its motion to disqualify (and supporting documents) when it did based solely and entirely on the timing of receiving the hearing transcript. Mr. Graybill's comments to the contrary are needlessly inflammatory and disparaging. Based on information and

belief, Mr. Graybill told staff at the Montana Supreme Court Clerk's office this morning that the State filed its motion to disqualify Judge Todd as a litigation tactic to delay an order on Petitioner's motion for preliminary injunction. But that presupposes an order granting a preliminary injunction. Perhaps Mr. Graybill noticed Judge Todd's biased remarks, too. Mr. Graybill does not repeat these defamatory comments to this Court, and that is good. But his comments to a Montana State Judicial Officer were nevertheless deeply inappropriate and prejudicial to the State. Remember, Petitioners waited 112 days to file this case. If Petitioners are frustrated about our current timing constraints, that frustration should be directed inward.

11. Petitioners' assertions that Judge Todd's statements were not disqualifying based on bench orders, ignores the State's request that led to those orders. *See* Diamond Decl. at ¶¶ 12-13. The Court allowed the State to file additional affidavits *because* Petitioners violated Civil Rule 6 by submitting a new affidavit and rebuttal affidavits with their reply brief, within seven days of the preliminary injunction hearing. Rather than throw out Petitioners' improperly filed affidavits, Judge Todd allowed the State to file additional rebuttal declarations. So Judge

Todd's order was actually a special dispensation for Petitioners. The State was directed to submit additional affidavits because justice required that it be permitted to respond to Petitioners' "litigation-by-ambush" tactics. Petitioners' argument that that turn of events undermines the State's disqualification motion is, once again, contradicted by the facts.

12. Similarly, Ms. Diamond's contention that the State somehow delayed in responding to her request last night for a transcript (that Petitioners never bothered to order, themselves) is entirely meritless. An attorney for the State responded to her after-hours communication in the pre-dawn light—at 5:32 AM. The State has unquestionably been diligent and acted with all prudent expedition in this matter.

13. With due respect to opposing counsel, this matter is currently subject to judicial review and will remain subject to judicial review, because to state the obvious, we remain in active litigation, before the courts. Their baseless remarks about the State's "perversion of justice" and "blatant disregard for the separation of powers" are attempts to replace with volume and bombast what they cannot provide through reasoned argument. Petitioners do not explain why they waited so long

to file their complaint. Requesting a fair and impartial judicial forum is not a perversion of justice; it is a cornerstone of due process. And it doesn't disregard the separation of powers when the State defends duly enacted laws passed by the Montana Legislature—even when those laws run counter to the preferences of Mr. Graybill's clients.

14. Petitioners do not and cannot explain how the integrity of the courts would be served by the State making cavalier motions to disqualify (that may impugn a judge's integrity) in the heat of oral argument. They do not and cannot explain when the State could have filed this motion other than when it did—once it received the hearing transcript. The simple fact is that the State filed its motion at the earliest possible moment—after it could examine the record, make a reasonable decision that it believed Judge Todd harbored disqualifying bias, and could support its motion with the transcript, itself.

15. Finally, Petitioners have not established they are entitled to the extraordinary relief of a preliminary injunction in this matter. As the State argued in its briefing, supporting declarations, and at the hearing, Petitioners cannot establish they are entitled to relief. The State's arguments were included with Petitioners' writ, and the State

encourages the Court to review those documents carefully. The State also encourages the Court to review the hearing transcript carefully. That—like the State's filings—explains thoroughly why this preliminary injunction should be denied.

16. As the Court knows, duly enacted laws enjoy the presumption of constitutionality. And courts must construe statutes so as to avoid an unconstitutional interpretation. That presumption is real and has teeth. First, it speaks to the strong public interests that courts subvert when they enjoin duly enacted laws—even temporarily. And second, it speaks to the immensity of Petitioners' burden. In this case, they must prove that these statutes are unconstitutional beyond a reasonable doubt. So even at the preliminary injunction stage, the presumption of constitutionality colors whether they have made a prima facie case that they are entitled to relief or will suffer irreparable harm. Petitioners have not made even a prima facia case that these statutes violate—beyond a reasonable doubt—any constitutional rights.

17. This matter is also not appropriate for a writ of supervisory control for several reasons. Specifically, Rule 14 *requires that the case involve purely legal questions. See MT Shooting Sports v. 1st Judicial*

District, OP 21-0377 (Sept. 28, 2021) citing *Mont. Quality Educ. Coalition v. Mont. Eleventh Judicial Dist. Court*, No. OP 16-0494 (Mont. Oct. 27, 2016) (absence of a purely legal question is grounds for denial). Petitioners present two questions for review; whether a (1) TRO or a (2) preliminary injunction are appropriate to preserve the status quo. On the face of the petition, these are not purely legal questions—they involve factual determinations (such as whether Petitioners will, in fact, suffer irreparable harm). As the Court is no doubt aware, the relevant facts in this case are hotly contested. No fewer than 15 affidavits/declarations have already been filed related to the preliminary injunction motion. *See* Petitioners Exhibits B-1, B-2, B-3, B-4, C-1, C-2, C-3, C-4, C-5, C-6, D-2, D-3, D-4, E-1, E-2. Resolution of the legal questions cannot occur without resolution of these factual disputes—even at the preliminary injunction stage.

18. Lastly, it is worth stating clearly what the Court will be enjoining if it grants Petitioners' request. If it enjoins HB 140, it will be enjoining the right of pregnant women to see an ultrasound or hear a fetal heartbeat, information that could shape or confirm the woman's decision to abort or carry her child. If the Court enjoins HB 171, it will

be enjoining the right of women to know a wide range of highly relevant information about their pregnancy, the risks of abortion, and the possibility that their decision to abort might be reversed if they change their mind. It will be leaving women less protected in the event of complications. It will leave them less protected and more vulnerable to forced abortions—particularly those victims of human and sexual trafficking. And it will stymie a data collection regime that will otherwise be the envy of every other state in the nation, allowing the State of Montana and other states, academic bodies, public health authorities, and medical boards to better understand the benefits and risks of medical abortion. If it enjoins these two laws, HB 140 and HB 171, it will lower the standard of care for pregnant Montana women. If the Court enjoins HB 136, it will be removing the protections for pain-capable unborn babies, protections that prevent them from suffering the indescribable pain of being dismembered, crushed, and killed. Protecting these innocents in this manner is a government interest of the highest order.

19. If these laws become effective tomorrow, the standard of care will be elevated for women, and they will be in more control of their own healthcare decisions.

20. The Court should deny the writ and Petitioners' requests for injunctive relief.

21. The State respectfully requests oral argument on Petitioner's writ. The State can prepare and present oral argument on short notice.

22. I declare under penalty of perjury that the foregoing is true and correct.

DATED the 30th day of September, 2021.

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By: */s/ David M.S. Dewhirst*
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11, I certify that the foregoing is printed with proportionately-spaced, size 14 Century Schoolbook font, is double spaced, and contains 2,101 words, excluding cover page, certificate of service, and certificate of compliance, as calculated by Microsoft Word.

DATED this 30th day of September, 2021.

/s/ David M.S. Dewhirst
DAVID M.S. Dewhirst
Solicitor General

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

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Date: September 30, 2021

/s/ Rochell Standish
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