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

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

Alan 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

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

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

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

Attorneys for Plaintiffs

*Motions for pro hac vice forthcoming

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA and JOEY BANKS, M.D., on behalf of themselves and their patients, Plaintiffs, vs. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, Defendant.	Cause No.: _____ Judge: _____ **VERIFIED COMPLAINT**

Planned Parenthood of Montana ("PPMT") and Dr. Joey Banks, M.D. (collectively, "Plaintiffs") bring this Verified Complaint against the State of Montana, and in support thereof state the following:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action on behalf of themselves and their patients. They seek declaratory and permanent injunctive relief from four unconstitutional laws enacted by the Montana Legislature and signed by the Governor. Plaintiffs also seek preliminary injunctive relief from three of those laws in order to preserve the status quo and prevent immediate and irreparable harm.

2. These laws, individually and collectively, ban abortion at a pre-viable gestational age, restrict access to medication abortion (including prohibiting its provision by telehealth), target abortion patients and providers with burdens not imposed on other patients or providers, compel providers to present medically inaccurate information to their patients, stigmatize the decision to obtain an abortion, and bar insurance plans from covering abortion care. Moreover, these laws threaten Montana health care providers with severe criminal and civil penalties, and civil lawsuits, for providing women with access to constitutionally guaranteed health care.[1] And they do so based on unconstitutionally vague prohibitions and requirements.

3. These laws are nothing more than poorly disguised attempts to chip away at Montanans' access to safe and constitutional abortion. They will reduce the number and geographic distribution of locations in Montana where women can access safe and effective abortion care. Their combined effect is particularly cruel and prohibitive—pushing women

[1] Plaintiffs 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 laws.

seeking abortion later into pregnancy and also cutting off access to abortion at an earlier gestational age.

4. These laws clearly violate the Montana Constitution and contravene binding precedent from the Montana Supreme Court. "Article II, Section 10 of the Montana Constitution broadly guarantees each individual the 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." *Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364. Section 10 thus "protects a woman's right of procreative autonomy," including "the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Id.*

5. House Bill 136 ("HB 136" or the "20-week ban") criminalizes the provision of abortion beginning 20 weeks after the first day of a woman's last menstrual period ("LMP"), subject only to very limited and vague exceptions. *See* HB 136, 2021 Leg. Reg. Sess. (Mont. 2021) (to be codified in Mont. Code Ann. tit. 50, ch. 20) (attached hereto as Exhibit 1). It does so notwithstanding the fact that such safe and effective procedures are performed pre-viability and therefore are protected by the Montana Constitution.

6. House Bill 171 ("HB 171" or the "omnibus MAB restrictions law") restricts access to abortion provided early in pregnancy by imposing a litany of restrictions on the provision of medication abortion ("MAB"), a common procedure that is both safe and effective. *See* HB 171, 2021 Leg. Reg. Sess. (Mont. 2021) (to be codified in Mont. Code Ann. tit. 50, ch. 20) (attached hereto as Exhibit 2). The law includes requirements that patients make at least two trips for in-person appointments with the same health care provider for care that can be—and

currently is—provided by telemedicine, a 24-hour mandated delay between those visits, and other medically unnecessary requirements.

7. House Bill 140 ("HB 140" or the "ultrasound offer law") mandates that abortion providers ask patients whether they want to view "an active ultrasound" and "ultrasound image," and to "listen to the fetal heart tone"—and requires patients to sign a State-created form indicating their answers to those questions. It imposes this mandate—which has no medical purpose—to stigmatize a woman's decision to have an abortion and even when the provider believes, in her medical judgment, that those offers would be harmful to the patient. *See* HB 140, 2021 Leg. Reg. Sess. (Mont. 2021) (to be codified in Mont. Code Ann. tit. 50, ch. 20) (attached hereto as Exhibit 3).

8. House Bill 229 ("HB 229" or the "coverage ban") prohibits subsidized health insurance plans on the Affordable Care Act ("ACA") exchange in Montana from providing coverage for abortion, even though no State funds are involved. *See* HB 229, 2021 Leg. Reg. Sess. (Mont. 2021) (to be codified in Mont. Code Ann. tit. 33, ch. 22) (attached hereto as Exhibit 4).

9. Each of these laws will take effect on October 1, 2021, if not enjoined by this Court.

10. These laws violate fundamental rights of Plaintiffs and their patients under the Montana Constitution, including a woman's "right to seek and to obtain … a pre-viability abortion[] from a health care provider of her choice." *Armstrong*, ¶ 14.

11. The 20-week ban infringes the Montana Constitution's right to privacy, right to individual dignity, and right to seek safety, health, and happiness by banning constitutionally protected pre-viability abortions; it violates the Montana Constitution's equal protection

guarantee by unlawfully singling out women seeking abortions and abortion providers, and unlawfully targeting women seeking abortions beginning at 20 weeks; and it violates the Montana Constitution's due process clause because it does not give fair notice of the conduct it prohibits.

12. The omnibus MAB restrictions law infringes the Montana Constitution's right to privacy, right to individual dignity, and right to seek safety, health, and happiness by restricting access to a constitutional and safe medical procedure; it violates the Montana Constitution's equal protection guarantee by unlawfully singling out women seeking abortions and abortion providers; it violates the right to free speech guaranteed by the Montana Constitution because it compels particular speech by the provider, even when that information is false and the provider objects to the content of that speech; and it violates the Montana Constitution's due process clause because it does not give fair notice of the conduct it prohibits.

13. The ultrasound offer law infringes the Montana Constitution's right to privacy, right to individual dignity, and right to seek safety, health, and happiness by restricting access to a constitutional and safe medical procedure; it violates the Montana Constitution's equal protection guarantee by unlawfully singling out women seeking abortions and abortion providers; and it violates the Montana Constitution's guarantees of free speech, because the State lacks a compelling interest in forcing providers to ask patients stigmatizing questions irrespective of the provider's medical judgment regarding whether those questions are in the patient's best interest, and to sign a State-developed form that records the patients' answers.

14. The coverage ban infringes the Montana Constitution's right to privacy, the right to individual dignity, and the right to seek safety, health, and happiness by restricting access to a

constitutional and safe medical procedure; and it violates Montana's equal protection guarantee by singling out women seeking abortions.

15. This Verified Complaint and the claims it makes should come as no surprise to the Legislature. Its own attorneys warned that HB 136 and HB 171 likely violated women's right to privacy under the Montana Constitution. *See* HB 136 Legal Review Note ("Because HB136 prohibits abortion entirely after a fetus has reached a gestational age of 20 or more weeks, the bill raises potential conformity issues with the requirements of the . . . Montana Constitution.") (attached hereto as Exhibit 5); HB 171 Legal Review Note ("Given Montana's broad right to privacy . . . , HB 171, as drafted, may raise a constitutional conformity issue regarding the infringement of a woman's right to privacy, specifically a woman's right to seek and obtain a pre-viability abortion.") (attached hereto as Exhibit 6).

PARTIES

A. Plaintiffs

16. Plaintiff PPMT is a not-for-profit corporation organized under the laws of Montana. It is headquartered in Billings and operates five health centers: two in Billings (Planned Parenthood Heights and Planned Parenthood West), one in Missoula, one in Great Falls, and one in Helena.

17. PPMT provides clinical, educational, and counseling services. It is the largest provider of reproductive health care in Montana, serving more than 11,000 people annually. The services that PPMT provides include: pregnancy diagnosis and counseling; contraceptive counseling; provision of all methods of contraception; HIV/AIDS testing and counseling; testing, diagnosis, and treatment of sexually transmitted infections; screenings for cervical and breast cancer; gender affirming care; miscarriage management; and abortion.

18. PPMT sues on its own behalf; on behalf of its current and future physicians, medical staff, servants, officers, and agents who participate in activities that could subject them to liability under HB 136, HB 171, and/or HB 140, or that will be affected by HB 229; and on behalf of its patients seeking abortions.

19. Plaintiff Joey Banks, M.D., 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 sues on her own behalf, and on behalf of her patients seeking abortions. At PPMT, Dr. Banks provides MABs through 11 weeks LMP (both in person and through telemedicine) and procedural abortions through 21.6 weeks LMP.

20. But for the abortion restrictions challenged here, Dr. Banks and PPMT would continue to provide MABs through 11 weeks LMP (both in person and through telemedicine) and procedural abortions through 21.6 weeks LMP.

B. Defendant

21. The State of Montana is a governmental entity subject to suit for injuries to persons. Mont. Const. art. II, § 18. The State of Montana, through its Legislature, adopted HB 136, HB 171, HB 140, and HB 229.

22. Austin Knudsen is the Attorney General of Montana. He is the chief law enforcement officer of the State of Montana. Pursuant to Montana law, he exercises supervisory powers over county attorneys. Section 2-15-501, MCA. He will be responsible for the enforcement of HB 136, HB 171, HB 140, and HB 229 unless restrained by this Court. Knudsen is sued in his official capacity.

JURISDICTION AND VENUE

23. Jurisdiction is conferred on this Court by article VII, section 4 of the Montana Constitution and § 3-5-302, MCA.

24. Plaintiffs' claims for declaratory and injunctive relief are authorized by §§ 27-8-101 et seq., MCA, as well as the general equitable powers of this Court.

25. Venue is appropriate pursuant to §§ 25-2-126 & 25-2-117, MCA, because the State of Montana is a Defendant and PPMT is a resident of Yellowstone County and operates two health centers in Billings, Yellowstone County, which provide abortions, including one that provides procedural abortions.

STANDING

26. Plaintiffs have standing to bring the claims asserted in this Verified Complaint because the challenged laws infringe on their and their patients' fundamental rights under the Montana Constitution.

27. "[W]hen 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights." *Weems v. State by and through Fox*, 2019 MT 98, ¶ 12, 395 Mont. 350, 440 P.3d 4 (quoting *Armstrong v. State*, 1999 MT 261, ¶¶ 8-13, 296 Mont. 361, 989 P.2d 364).

28. Plaintiffs also have standing to bring their own due process, equal protection, and free speech claims because the challenged provisions directly infringe on Plaintiffs' rights under the Montana Constitution. *See Weems*, ¶ 14 (holding that abortion provider plaintiffs who "are impacted by the statute" have standing to challenge it). But for the challenged provisions,

Plaintiffs would provide abortion services and make decisions regarding those services according to their own medical judgments, rather than the State's decrees.

FACTUAL ALLEGATIONS

A. Abortion Care

29. Abortion, through medication or procedure, is safe and common. Nationwide, one in five pregnancies ends in abortion.[2] About one in four American women will have an abortion by the time she reaches age 45.[3]

30. MAB allows a pregnant woman to terminate an early pregnancy by taking two medications, mifepristone and misoprostol, which together induce the equivalent of an early miscarriage.

31. With procedural abortion, a medical provider uses a suction device, sometimes along with other instruments, to empty the uterus. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery" as it involves no incisions, usually does not require general anesthesia, and is almost always performed in an outpatient setting.

32. Complications from both medication and procedural abortion are extremely rare. When complications do occur, they can usually be managed in an outpatient setting, either at the time of the abortion or in a follow-up visit.

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[2] Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, at 1, Guttmacher Inst. (Sept. 2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

[3] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904, 1907 (Dec. 2017).

33. Both procedural and medication abortion are effective in terminating a pregnancy. Procedural abortions are successful 99% of the time and, according to the Food and Drug Administration ("FDA"), the success rate for MABs is 97.4%.[4]

34. For some patients, one method is medically indicated over the other. For example, MAB may be medically indicated for certain pregnant women (*e.g.*, women with certain uterine anomalies), and strongly preferred by others (*e.g.*, sexual assault survivors for whom the insertion of instruments into the vagina may cause emotional and psychological trauma, or minors who have never had a pelvic exam). And for some pregnant women in abusive relationships, access to MAB—the results of which look identical to a miscarriage—is essential to protect themselves from violence and retaliation for their decision to have an abortion.

35. Women decide to end a pregnancy for a variety of reasons, including familial, medical, financial, and personal ones. Some women decide that it is not the right time to have a child or to add to their families; some end a pregnancy because of a severe fetal anomaly; some choose not to carry a pregnancy to term because they have become pregnant as a result of rape; some choose not to have biological children; and for some, continuing with a pregnancy could pose a significant risk to their health.

36. Women seeking an abortion generally do so as soon as they are able. But logistical challenges can delay abortion access. Patients must arrange and pay for transportation, childcare, and/or lodging, and arrange to take time off from work. For low-wage workers, who often have no paid time off or sick leave, these burdens are particularly acute.

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[4] MIFEPREX (Mifepristone) Tablets Label, FDA (Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf.

37. Abortion patients who experience intimate partner violence face even more difficulty accessing abortion.[5]

38. Delay of abortion care inflicts physical, psychological, and/or financial harms on abortion patients. Although abortion is extremely safe throughout pregnancy and significantly safer than continuing pregnancy through childbirth, delaying abortion care unnecessarily increases medical risk. A patient whose care is delayed—*i.e.*, who must remain pregnant longer—will suffer both increased risks associated with remaining pregnant and comparatively increased risks associated with the abortion procedure.

39. As a result of unnecessary delay, some patients are prevented from obtaining MABs because they are pushed past the gestational age limit. Others are prevented from obtaining an abortion altogether.

40. Timely abortion care is important to public health. The American College of Obstetricians and Gynecologists has explained that abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[6]

41. The cost of the abortion procedure also increases as the pregnancy advances. If women are forced to wait to have abortions, they incur increased costs.

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[5] Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, Guttmacher Inst., at 8-9 (2010), https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/socscimed201002009.pdf.

[6] Press Release, ACOG et al., Joint Statement on Abortion Access During the COVID-19 Outbreak (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

42. If women are not able to access abortion, some may resort to unsafe means to end their pregnancies. Others may have to travel to other states with later gestational age limits, incurring greater expense and risk. And some women may be forced to carry their pregnancies to term, depriving them of their ability to decide whether and when to have a child.

43. For Montanans seeking abortion, these challenges are particularly acute given Montana's lack of providers. Approximately 90% of the counties in Montana do not have an abortion provider, and about 50% of Montanans live in those counties.

44. In addition, the size of Montana and its long winters make travel particularly difficult. It is common for patients to travel six to eight hours round trip to visit PPMT's health centers. And those challenges have been exacerbated due to the health risks caused by and public safety restrictions imposed during the COVID-19 pandemic.

45. Abortion is legal in Montana until viability. Section 50-20-109(1)(b), MCA.

46. In a normally progressing pregnancy, viability typically will not occur before approximately 24 weeks LMP.

47. Some fetuses are never viable, such as those with fetal anomalies, including anencephaly, severe brain anomalies, and severe cardiac anomalies.

B. PPMT's Provision of Abortion Care

48. PPMT provides procedural abortion, in-person MAB, and two forms of telehealth MAB: site-to-site and direct-to-patient. PPMT has provided telehealth MABs for over four years.[7] PPMT's provision of site-to-site and direct-to-patient MABs expands access to abortion care for Montanans.

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[7] See Julia E. Kohn, et al., *Introduction of Telemedicine for Medication Abortion: Changes in Service Delivery Patterns in Two U.S. States*, 103 Contraception 151, 152 (Mar. 2021).

49. There are few abortion providers in Montana, and PPMT is not able to staff abortion providers at each PPMT health center every day. Site-to-site MABs allow PPMT to bridge potential gaps in care by offering MABs at PPMT health centers where a provider is not physically present. For site-to-site MABs, a patient at a PPMT health center—accompanied by a clinical team member at that health center—connects through a telehealth visit with an abortion provider at another PPMT health center. Site-to-site MAB also decreases the amount of travel and expense required for patients, who can travel to the nearest PPMT health center, rather than to a health center where an abortion provider is physically present—which may be hours away.

50. PPMT also offers direct-to-patient MABs, which make abortion care more accessible particularly for women who do not live near any providing health center. For direct-to-patient MABs, a patient consults with a PPMT provider via telehealth from wherever in Montana the patient is located and then receives abortion medication by mail from PPMT to a Montana address—eliminating the need to travel to a PPMT health center in person and providing a safe and effective way to overcome barriers to abortion access in Montana. During the telehealth visit, providers review patients' medical history; explain the options that are available; if the patients are eligible for direct-to-patient MAB, instruct them on when to take the mifepristone and misoprostol; and counsel them on potential side effects or complications. The patients are then mailed the medications, which they take in accordance with the providers' instructions. Patients sign consent forms electronically, and are not required to have an ultrasound or blood work unless medically necessary.

51. The safety of mailing drugs (including for medication abortion[8]) is well-documented, and telemedicine is instrumental in making abortion care more accessible while lowering its costs.

52. PPMT provides abortions at each of its five health centers. The Helena and Billings Heights health centers offer procedural abortion, in-person MAB, and site-to-site MAB. The Billings West health center offers in-person and site-to-site MAB. The Great Falls health center provides site-to-site MAB. The Missoula health center provides direct-to-patient MAB.

53. PPMT provides MAB through 77 days (11 weeks) LMP.

54. Approximately 75% of abortions performed by PPMT are MABs.

55. In FY 2021, PPMT provided 935 MABs and 255 procedural abortions.[9] Of the 935 MABs provided, 715 (or about 76%) were provided using telehealth. Specifically, 140 MABs were provided direct-to-patient, and 575 MABs were provided site-to-site.

56. Of the 140 direct-to-patient MABs provided by PPMT in FY 2021, 56% were provided to women who would have been forced to drive at least one to two hours each way, assuming no stopping, traffic, or inclement weather, to reach the nearest MAB provider, and 18% were provided to women who would have been forced to drive at least two to five hours each way, assuming no stopping, traffic, or inclement weather.

57. PPMT provides procedural abortion up to 21.6 weeks LMP.

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8 *See generally* Erica Chong, et al., *Expansion of a Direct-to-Patient Telemedicine Abortion Service in the United States and Experience During the COVID-19 Pandemic*, 104 Contraception 43 (Mar. 2021).

9 FY 2021 for PPMT was July 1, 2020 through June 30, 2021.

C. The Challenged Laws

a. The 20-Week Ban (HB 136)

58. The 20-week ban prohibits abortion beginning at 20 weeks LMP—prior to fetal viability—absent very narrow (and vague) exceptions. It imposes criminal and civil penalties on health care providers who do not comply with its specifications.

59. The 20-week ban violates several provisions of the Montana Constitution. It (1) restricts pre-viability abortion in violation of the rights to privacy, individual dignity, and to seek safety, health, and happiness; (2) unlawfully singles out women seeking abortions and abortion providers, and unlawfully targets abortion beginning at 20 weeks LMP but not before, in violation of the equal protection guarantee; and (3) is unconstitutionally vague because it does not give fair notice of the conduct it prohibits.

60. By banning pre-viability abortions beginning at 20 weeks, HB 136 directly contravenes the Montana Supreme Court's binding decision in *Armstrong*.

i. Provisions

61. The 20-week ban prohibits abortions beginning at 20 weeks LMP, which is before viability. Specifically, it prohibits performing or attempting to perform "an abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious health risk to the ... mother." *See* HB 136 § 3. The law asserts, without citing any medical evidence, that fetuses are capable of feeling pain beginning at 20 weeks LMP. *Id.*

62. The 20-week ban includes only limited and ambiguous exceptions. Abortion beginning at 20 weeks LMP is permitted if the procedure is necessary to prevent a "serious health risk" to the pregnant woman, which is defined as "a condition that so complicates the mother's medical condition that it necessitates the abortion of the mother's pregnancy to avert

the mother's death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions." HB 136 §§ 2, 3. Further, "[n]o greater risk may be determined to exist if it is based on a claim or diagnosis that the mother will engage in conduct that the mother intends to result in the mother's death or in substantial and irreversible impairment of a major bodily function." *Id.* § 2. Abortion beginning at 20 weeks LMP is also permitted "in the case of a medical emergency," which is defined as "a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of the woman's pregnancy without first determining gestational age in order to avert the woman's death or for which the delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions." *Id.* §§ 2, 3. A "medical emergency" "does not include a condition that is based on a claim or diagnosis that the woman will engage in conduct that the woman intends to result in the woman's death or in substantial and irreversible physical impairment of a major bodily function." *Id.* § 2.

63. If, notwithstanding the ambiguity inherent in these definitions, a provider determines that the "serious health risk" exception applies, the 20-week ban requires the provider to "terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity" for the fetus to survive "unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function" than other methods. HB 136 § 3. The law provides no clarification or explanation regarding what method(s) of terminating a pregnancy provide the best opportunity for a *pre-viability* fetus to

survive, but rather leaves providers to interpret this incoherent requirement under the threat of criminal penalties.

64. The 20-week ban subjects providers to severe criminal penalties. Anyone who knowingly or purposefully performs or attempts to perform an abortion in violation of HB 136 is guilty of a felony punishable in accordance with § 50-20-112, MCA. Pursuant to §§ 50-20-112(1) and 45-5-102, MCA, a person that "purposely or knowingly causes the death of a fetus of another with knowledge that the woman is pregnant" constitutes deliberate homicide, which is punishable by death or life imprisonment. Under § 50-20-112(2), a person convicted of a felony other than deliberate (or mitigated or negligent homicide) is subject to up to five years in prison.

65. In addition, a civil action for actual and punitive damages may be brought against the provider by "a woman on whom an abortion has been performed or attempted in violation of [the law]" or the father. HB 136 § 5. Injunctive relief is also available to "the woman on whom an abortion was performed or attempted," her spouse, a prosecuting attorney with appropriate jurisdiction, or the attorney general. *Id.*

66. In any civil or criminal proceeding arising out of 20-week abortions and brought under the law, HB 136 § 6 presumptively makes public the identity of the woman who had the abortion unless the court can justify "why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable, less restrictive alternative exists."

ii. HB 136 Is Unconstitutional and Will Cause Immediate, Irreparable Harm

67. The 20-week ban is unconstitutional for several independent reasons.

68. *First*, it violates women's right to privacy under Article II, Section 10 of the Montana Constitution. The right to privacy protects women's fundamental right to a pre-

viability abortion. *Armstrong v. State*, 1999 MT 261, ¶ 44, 296 Mont. 361, 989 P.2d 364. By banning abortion beginning at 20 weeks LMP, HB 136 plainly infringes on this fundamental right, denying women the right to a constitutional medical procedure and prohibiting Plaintiffs from offering abortion care safeguarded by the Montana Constitution.

69. Even if the 20-week ban could withstand constitutional scrutiny (which it cannot), the exceptions to the ban are so narrow that the law would still violate the right to privacy under the Montana Constitution. *See supra* ¶ 62. The definition of "serious health risk" to the pregnant woman, for example, does not allow abortions when necessary to avert death of the mother by suicide; treat serious but not immediately life-threatening health conditions, such as pre-existing medical conditions that become exacerbated during pregnancy (*e.g.*, pregnancy-related exacerbation of breathing complications related to COVID-19 or gestational diabetes); or address a severe fetal anomaly diagnosis. The same is true of the "medical emergency" exception. Beginning at 20 weeks LMP, a patient with a health-threatening medical condition may be prohibited from obtaining an abortion or have to delay the procedure until her condition worsens to the point where immediate action is necessary, and the abortion therefore meets the medical emergency exception's exacting requirements.

70. *Second*, and for the same reasons, the 20-week ban violates the right to individual dignity guaranteed by Article II, Section 4 of the Montana Constitution, and the "inalienable right[]" to seek "safety, health and happiness in all lawful ways" guaranteed by Article II, Section 3 of the Montana Constitution, which protects the right "to make personal judgments affecting one's own health and bodily integrity without government interference" and "does not permit the government's infringement of personal and procreative autonomy in the name of political ideology." *Armstrong*, ¶¶ 72-73.

71. *Third*, HB 136 violates the equal protection of the laws guaranteed by Article II, Section 4 of Montana's Constitution. HB 136 unlawfully targets women seeking to exercise the fundamental right to have a pre-viability abortion and abortion providers. It also targets abortion beginning at 20 weeks LMP, but not abortion before 20 weeks LMP, in violation of the equal protection guarantee.

72. *Fourth*, HB 136 is unconstitutionally vague because the exceptions to the 20-week ban do not give a provider fair notice of when she or he would be subject to criminal liability for violating the law. *See, e.g.*, *State v. Stanko*, 1998 MT 321, ¶ 22, 292 Mont. 192, 974 P.2d 1132 ("A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.") (quoting *State v. Woods* (1986), 221 Mont. 17, 22, 716 P.2d 624, 627). The 20-week ban's exceptions are problematic for several reasons:

a. What constitutes a "serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions" is undefined, inherently ambiguous, and subject to disagreement among reasonable health care providers.

b. Whether a condition "*so* complicates" a woman's medical condition that it "*necessitates*" an abortion turns on two discretionary judgments, both of which are bound to differ as between reasonable medical providers, much less the "ordinary people" relevant to the constitutional standard.[10]

c. Even if the "serious health risk" exception applies, the manner in which an abortion must be performed to fall within the exception is itself unconstitutionally vague. The

[10] The exceptions also bar providers from considering the risk of psychological or emotional conditions—including self-imposed harm—notwithstanding the exceptions' goal of averting the woman's death.

law requires a provider to terminate the pregnancy in the manner that, "in reasonable medical judgment, provides the best opportunity" for the fetus to survive unless doing so would "pose a greater risk either of the death" or "substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions," of the pregnant woman. There is no method of ending a pregnancy at or around 20 weeks LMP that will provide a meaningful opportunity of survival, so it is unclear how providers can ensure the "best opportunity" for survival.

73. As a result, the 20-week ban will subject health care providers to the threat of severe criminal and civil penalties for providing abortions that they believe are excepted from the law's prohibitions.

74. The violations of Plaintiffs' and their patients' constitutional rights will cause irreparable harm. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161 ("[T]he loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued.").

iii. The 20-week ban is not supported by any compelling State interest

75. No compelling interest supports the 20-week ban.

76. The Legislature attempted to justify the 20-week ban based on the desire to avoid "fetal pain."

77. There is consensus in the medical and scientific community that, based on the most up-to-date evidence and research, it is not possible for a fetus to feel pain before at least 24 weeks LMP.[11]

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[11] *See* Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 947 (2005) ("Fetal awareness of noxious stimuli requires functional thalamocortical connections. Thalamocortical fibers begin appearing between 23 to 30 weeks' gestational age, while electroencephalography suggests the capacity for functional pain

78. The Legislature's assertion that "an abortion occurring later in pregnancy may increase the risk to the woman of the occurrence of infection, sepsis, heavy bleeding, or a ruptured or perforated uterus" also cannot support the 20-week ban.

79. Abortion, including during the second trimester, is safe. Indeed, abortion is substantially safer than continuing a pregnancy through to childbirth.

80. Increased risks cannot be the basis for an outright ban of a medical procedure without a weighing of costs and benefits to public health. Under the Legislature's oversimplified logic, heart surgeries, for example, should be banned entirely as well.

81. The State's asserted interest in protecting patients against risks related to abortions performed later in pregnancy is further undermined by the State's enactment of this ban in conjunction with other abortion restrictions that will cause substantial *delay* and *increase* the proportion of women obtaining abortions after the first trimester. *See, e.g.*, *infra* ¶ 100 (regarding the effects of HB 171's mandatory delay). The State cannot prevent women from obtaining early abortion care and then deny them the right to obtain an abortion later in pregnancy out of a purported concern for women's health.

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perception [...] probably does not exist before 29 or 30 weeks."); *see also Facts Are Important: Fetal Pain*, Am. Coll. of Obstetricians & Gynecologists, https://www.acog.org/advocacy/facts-are-important/fetal-pain (last visited August 11, 2021) ("A human fetus does not have the capacity to experience pain until after viability."); *see also* Royal College of Obstetricians & Gynecologists, Fetal Awareness: Review of Research and Recommendations for Practice (Mar. 2010), https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf (concluding that fetal pain is not possible before 24 weeks gestation, based on a review of available medical and scientific literature by a panel of experts from fields such as neuroscience, neonatology, obstetrics, and psychology).

82. Given that there is no medical or scientific support for targeting abortion beginning at 20 weeks LMP, and that the 20-week ban will not safeguard women's health, there is no State interest—let alone a compelling one—to support these restrictions.

b. The Omnibus MAB Restrictions Law (HB 171)

83. HB 171 limits women's ability to access abortion care early in their pregnancy by imposing a litany of unnecessary and burdensome restrictions on MAB. It compels providers to give patients medically inaccurate information and exposes providers to risk of felony conviction and up to 20 years' imprisonment for even negligent violations of the law. And it subjects providers to harsh civil penalties, including civil malpractice actions and suspension or revocation of their license.

84. The omnibus MAB restrictions law, if not enjoined, will eliminate or restrict access to MAB for many Montanans—indeed, HB 171 would have banned approximately 76% of MABs performed by PPMT in FY 2021. *See supra* ¶ 55.

85. The omnibus MAB restrictions law will decrease the availability of MAB by requiring patients to undergo a 24-hour mandatory delay before receiving care and make multiple in-person trips; mandating that the same provider examine the patient in person and later provide the abortion medication; banning the provision of MAB by telehealth and by mail; and imposing unnecessary reporting requirements designed to scare women from accessing abortion care.

86. The omnibus MAB restrictions law will further decrease the availability of abortions by limiting the number of available MAB providers and forcing them to make the unconscionable choice between continuing to provide abortions or telling their patients false information. HB 171 imposes onerous provider qualification requirements and compels

providers who remain "qualified" under the law to choose between providing medically inaccurate information—most notably about so-called "abortion reversals" and a supposed risk of "subsequent development of breast cancer"—to patients as required by the law or complying with their ethical obligations. Some providers may choose not to provide inaccurate information and thus not to provide MABs. And to further discourage providers from offering MAB, HB 171 threatens providers with severe criminal penalties.

87. The omnibus MAB restrictions law will expose women seeking MABs to misinformation and cause them to endure additional travel, stress, expense, and medical risk. These significant restrictions on access to lawful and constitutionally protected abortions indisputably infringe on patients' right to privacy and cause irreparable harm.

88. The omnibus MAB restrictions law violates the Montana Constitution's guarantees of privacy; individual dignity; safety, health, and happiness; equal protection; and free speech. Because the law subjects providers to criminal and civil penalties based on ambiguous prohibitions, it is also unconstitutionally vague.

89. The violations of Plaintiffs' and their patients' constitutional rights will cause irreparable harm.

i. Mandatory Delay, Multiple-Trip, and Biased Counseling Requirements

90. Under the guise of an "informed consent requirement," the omnibus MAB restrictions law unconstitutionally imposes a 24-hour mandatory delay and a multiple-trip requirement (one in-person appointment for an ultrasound, blood work, and to sign forms, a second to obtain the abortion medication, and a third for a patient who returns for a follow up that providers are required to schedule); effectively bans very early MABs; and mandates the provision of inaccurate information regarding complications and so-called MAB "reversals."

91. Section 7 of HB 171 states that MABs may not be provided "without the informed consent of the pregnant woman to whom the abortion-inducing drug is being provided" and that such consent "must be obtained at least 24 hours before" the MAB medication is provided. The only exception is when, "in reasonable medical judgment," advanced informed consent would risk the death of the pregnant woman or the "substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman."

92. To obtain "informed consent," providers must use a State-created form and ensure patients obtain an ultrasound and blood work, at least 24 hours prior to the MAB. The form must include, among other requirements:

a. "the probable gestational age of the unborn child as determined by both patient history and ultrasound results used to confirm gestational age," HB 171 § 7(5)(a);

b. "a detailed list of the risks related to the specific abortion-inducing drug or drugs to be used, including but not limited to hemorrhage, failure to remove all tissue of the unborn child, which may require an additional procedure, sepsis, sterility, and possible continuation of pregnancy," *id.* § 7(5)(c);

c. "information about Rh incompatibility, including that if the pregnant woman has an Rh negative blood type, the woman should receive an injection of Rh immunoglobulin at the time of the abortion to prevent Rh incompatibility in future pregnancies," *id.* § 7(5)(d);

d. "a description of the risks of complications from a chemical abortion," *id.* § 7(5)(e), which are defined elsewhere to include everything from cardiac arrest, renal failure,

coma, subsequent development of breast cancer, death, and "any other adverse event," *id.* § 3(5); and

e. information about so-called "MAB reversals," including that "initial studies suggest that children born after reversing the effects of an abortion-inducing drug have no greater risk of birth defects than the general population and . . . that there is no increased risk of maternal mortality after reversing the effects of an abortion-inducing drug" and that "information on and assistance with reversing the effects of abortion-inducing drugs are available in [] state-prepared materials," *id.* § 7(5)(e), (i).[12]

93. The woman is also required to sign and initial an "acknowledgment of risks and consent statement," which must indicate that, among other requirements, "the woman has been given the opportunity to ask questions about the woman's pregnancy, the development of the unborn child, alternatives to abortion, the abortion-inducing drug or drugs to be used, and the risks and complications inherent to the abortion-inducing drug or drugs to be used" and that the woman was specifically (and falsely) told that "information on the potential ability of qualified medical professionals to reverse the effects of an abortion obtained through the use of abortion-inducing drugs is available at www.abortionpillreversal.com, or you can contact (877) 558-0333 for assistance in locating a medical professional who can aid in the reversal of an abortion." *See* HB 171 § 7(5).

94. The provider is also required to sign a declaration certifying she has complied with the law's requirements to provide this biased counseling. HB 171 § 7(5)(k).

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[12] Section 5 of HB 171, which requires the in-person provision of MAB, also mandates, among other requirements, that the MAB provider "independently verify that a pregnancy exists;" determine the woman's blood type and, if the woman is Rh negative, offer to administer Rhogam; and "document in the woman's medical chart the gestational age and intrauterine location of the pregnancy and whether the woman received treatment for Rh negativity[.]"

95. By requiring patients to undergo an ultrasound, receive blood work, and sign a consent form 24 hours prior to providing the MAB, HB 171 imposes a 24-hour mandatory delay on all MAB.

96. HB 171 also creates a multiple-trip requirement, including two trips before the MAB—first for the ultrasound, blood work, and forms, and then, at least 24 hours later, to pick up the medications (which can no longer be provided by mail, *see infra* ¶ 121).

97. HB 171 also requires a provider to "make all reasonable efforts" to ensure that the patient returns for a follow-up appointment seven to 14 days after the MAB, *see* HB 171 §§ 5(3) and 7(5)((j)(viii)—which would require the patient to make a *third* in-person trip.

98. PPMT currently offers several follow-up options for patients who receive MABs, which do not require visiting the health center. Patients may receive an ultrasound at a location of their choosing one to two weeks after the MAB; take an at-home urine pregnancy test four weeks after the MAB; or have their blood drawn the day they take the first pill and again one week later, also at a location of their choosing.

99. The mandatory delay, multiple-trip, and biased counseling provisions violate the Montana Constitution for several independent reasons.

100. *First*, the mandatory delay, multiple-trip, and biased counseling provisions violate the Montana Constitution's rights to privacy, individual dignity, and to seek safety, health, and happiness by infringing on women's fundamental right to pre-viability abortions.

a. Courts in Montana have already concluded that imposing a 24-hour mandatory delay violates the constitutional guarantee to a pre-viability abortion recognized in *Armstrong*. *See Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117 , at *9 (1st Jud. Dist., Mar. 12, 1999) ("[T]elling a woman

that she cannot exercise a fundamental constitutional right for a 24-hour period … is a restriction on a woman's right nonetheless, and the infringement is not supported by a compelling reason.").

b. HB 171 is even more problematic than the 24-hour mandatory delay law previously struck down because, on top of the 24-hour delay, it requires patients to make multiple in-person visits to obtain MAB (unlike the prior delay law which allowed women to initially consult with a provider via telephone, *see Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1995 Mont. Dist. LEXIS 800 (1st Jud. Dist., Nov. 28, 1995)).

c. Requiring two trips at least 24 hours apart before the MAB increases the costs and burdens associated with obtaining an MAB, and interferes with a woman's constitutional right to make health care decisions in consultation with her health care provider. As explained *supra* ¶¶ 49-50 & *infra* ¶ 122, Plaintiffs offer direct-to-patient MABs without requiring any in-person visits for eligible patients and site-to-site MABs that require only one visit to the nearest health center—neither of which they would be permitted to provide under HB 171. Under HB 171, more than 100 out of the 140 women who received direct-to-patient MABs from PPMT in FY 2021 would have had to drive anywhere from four to 20 hours round trip, assuming no stopping, traffic, or inclement weather, to obtain an MAB—which can be safely and effectively completed from the comfort of a woman's own home. *See supra* ¶ 56.

d. For those who cannot afford either the delay or the additional travel, the multiple-trip requirement outright prevents women from obtaining abortion. For many, the additional time and expense required to make multiple visits will be prohibitive.

Given the scarcity of abortion providers and the volume of patients, there is no guarantee a provider will be able to see the patient the next day in order to provide the medication. This is especially likely to be the case given that HB 171 requires that the same provider examine the patient in person and later dispense the MAB in person, which would preclude providers from meeting with patients using telehealth visits. *See infra* ¶¶ 121-122 (same-provider requirement). The resulting delay, which could span weeks, may force patients to undergo a procedural abortion when MAB would have sufficed and/or was preferred.

e. Patients affected by intimate partner violence are particularly likely to be delayed or prevented from obtaining abortion care by HB 171's requirements.

f. A core tenet of patient-centered care is that the provider, using her best professional judgment, tailors her provision of care to each individual patient's circumstances, needs, and expressed preferences and values. By mandating in-person visits 24 hours in advance of the MAB—which PPMT does not currently require—HB 171 replaces that provider judgment with an unnecessary State mandate.

g. Additionally, these provisions arguably require a second unnecessary medical procedure: the provision of Rh immunoglobulin ("Rhogam") to women seeking MABs. It is best practice and PPMT's current approach not to recommend Rhogam for women who are less than eight weeks LMP, and PPMT allows patients to sign a waiver declining the blood work if they are at or over eight weeks LMP. HB 171 arguably would require the provision of Rhogam to all women, which is costly, difficult for patients in rural areas (where Rhogam is less available), and intended to discourage women from obtaining abortions on the basis of false medical advice.

h. The law mandates that the provider, during the required in-person exam, *see infra* ¶ 121, "document in the woman's medical chart the ... intrauterine location of the pregnancy." This requirement is impossible to comply with and nonsensical in early pregnancies, as very early pregnancies are not visible on an ultrasound. More importantly, this provision effectively bans very early MABs, in direct contravention of the fundamental right to a pre-viability abortion guaranteed by the Montana Constitution.

101. *Second*, the mandatory delay, multiple-trip, and biased counseling provisions violate Montana's equal protection guarantee. These provisions unlawfully discriminate against women seeking abortions and abortion providers by limiting access to a lawful and constitutionally protected pre-viability abortion without a compelling justification. On information and belief, the State does not apply any similar mandatory delay, multiple-trip, or biased counseling requirements to other health care, including other reproductive or primary health care. For example, providers are not required to wait 24 hours before providing other, riskier procedures, such as vasectomies, circumcision, colonoscopies, or elective plastic surgery.

102. Additionally, upon information and belief, there is no comparable legal requirement that patients who receive other reproductive care, such as for miscarriages, schedule a follow-up appointment, or that their provider make "all reasonable efforts" to ensure the patient returns.

103. *Third*, the biased counseling requirements compel abortion providers to provide medically inaccurate information to their patients, which violates providers' right to free speech and their right to equal protection under the Montana Constitution.

104. The information on "revers[ing] the effects of an abortion obtained through the use of abortion-inducing drugs" is not supported by medical evidence, and thus directs the provider to make specific representations that are false. The law requires providers to endorse a particular source of medical information, regardless of whether the providers believe that information is accurate or appropriate for their patients. Not only that, it forces providers to steer patients to an experimental treatment that they may regard as risky. These requirements thus force providers to choose between their ethical obligation to provide accurate medical information and safe advice to their patients, and a felony charge under HB 171.

105. The biased counseling requirements also force abortion providers to falsely tell their patients about certain "complications" from MAB, such as developing breast cancer, that are not in fact risks of MAB.

106. Moreover, HB 171 requires providers to use a form created by the State to obtain "informed consent." Requiring this form, which PPMT has yet to see, means that providers have no control over what information is provided to their patients.

107. Accordingly, HB 171 violates the right to free speech guaranteed by the Montana Constitution because it compels speech from providers, even when that information is false and the provider objects to the content of that speech.

108. By requiring providers to give patients false and medically unsupported information, among other things, the omnibus MAB restrictions law also interferes with the provider-patient relationship.

109. Upon information and belief, the State does not compel non-abortion providers to give medically inaccurate information to their patients or steer them toward unproven treatments. For example, upon information and belief, non-abortion providers are not required to inform

their patients that they can "reverse" other medical procedures, such as vasectomies or tubal ligation.

110. *Fourth*, the requirement that providers make "all reasonable efforts" to schedule a follow-up appointment violates Montana's due process guarantee because it is unconstitutionally vague. The law does not give providers sufficient clarity to know what steps they must take in order to exhaust "all reasonable efforts" and avoid the criminal penalties imposed for violating HB 171—which include felony prosecution and a prison term of up to 20 years, including for a negligent violation.

111. Section 10 gives the Department of Health (the "Department") 60 days after HB 171's effective date to create and distribute the forms required by the law, including the "informed consent" forms. This would appear to prevent providers from providing any MAB in Montana until the Department creates the form. Subjecting providers to such ambiguity violates due process. And should abortion providers, including PPMT, effectively be banned from providing MAB for up to two months, that ban, even if temporary, would unconstitutionally restrict access to abortion in violation of the right to privacy.

112. The unconstitutional infringements on abortion access imposed by HB 171 cannot be saved by the Legislature's purported justifications. The mandatory delay, multiple-trip, and biased counseling provisions serve only to further burden access to MABs by adding additional and unnecessary steps. The biased counseling provisions also attempt to scare women out of having an MAB, and are counter to true informed consent, in that they require providers to give patients false and medically unsupported information.

113. HB 171 will not "reduc[e] the risk that a woman may elect an abortion only to discover later, with devastating psychological consequences, that the woman's decision was not fully informed," as the legislative findings section asserts.

114. PPMT already provides patients with the information they need to make an informed decision about MAB and requires patients to sign an informed consent form before undergoing an MAB. In particular, PPMT counsels patients on the options available to them, provides medical information about those options, and includes questions designed to screen patients for uncertainty or coercion.

115. Delay periods do not increase decisional certainty. Multiple studies have shown that living in a state with a mandatory delay or two-trip requirement does not increase the certainty of women seeking abortions.[13] Certainty around the decision to continue or end a pregnancy depends more on whether the pregnancy was intended than on time frame. And decisional certainty following an abortion is high.

116. There is no evidence that supposed MAB "reversals" increase the chance of a pregnancy continuing; to the contrary, there are potential risks associated with interrupting the MAB regimen.[14]

117. Requiring providers to tell patients medically unsupported information about MAB "reversals" undermines true informed consent and harms the provider-patient relationship as well as patient safety. Indeed, counseling about "reversals" could actually create a risk that

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[13] *See, e.g.*, Iris Jovel et. al., *Abortion Waiting Periods and Decision Certainty Among People Searching Online for Abortion Care*, 137 Obstetrics & Gynecology 597 (2021).

[14] *See, e.g.*, *Abortion Pill "Reversal": Where's the Evidence?*, ANSIRH, UCSF Medical Center, Bixby Center for Global Reproductive Health, (July 2020), https://www.ansirh.org/sites/default/files/publications/files/so-called_medication_abortion_reversal_7-14-2020_1.pdf.

patients proceed with an abortion before they have made a firm decision because they are under the (mistaken) belief that they can change their minds when, in fact, taking the mifepristone alone will often end the pregnancy.

118. The legislative findings section of HB 171 falsely contends that the "administration of an abortion-inducing drug following spontaneous miscarriage … exposes the woman to unnecessary risks." Mifepristone and misoprostol are in fact evidence-based *treatments* for miscarriage.

119. PPMT's provision of direct-to-patient MABs has demonstrated that they can be successfully provided without in-person ultrasounds and other tests. It also has demonstrated that patients can be effectively screened for ectopic pregnancy via telemedicine, making unnecessary any need to determine the "intrauterine location" of the fetus through ultrasound.

120. Thus, performing ultrasounds or other tests prior to MABs is not necessary to protect women's health if patients are eligible for service without that care.

ii. Ban on Telehealth MAB

121. Section 5 of HB 171 mandates that the "qualified medical practitioner providing an abortion-inducing drug shall examine the woman in person," and Section 4 prohibits the provision of "abortion-inducing drug[s] via courier, delivery or mail service." HB 171 thus imposes a same-provider requirement—the practitioner who provides the abortion medication must also be the one to conduct an in-person examination of the patient—and bans telehealth MAB entirely.

122. The same-provider requirement bans PPMT's provision of telehealth MAB. With site-to-site MAB, a woman typically visits the PPMT health center closest to her home. There, she receives in-person services, including any tests deemed necessary by her provider, and an

abortion provider located at another PPMT health center meets with the patient via telehealth and prescribes the MAB. With direct-to-patient MAB, PPMT abortion providers meet with eligible patients via telehealth, and PPMT mails the eligible patients the medication for MAB. No in-person examination occurs unless medically necessary.

123. PPMT's use of telehealth to provide site-to-site MAB and direct-to-patient MAB significantly expands abortion access and, for some Montanans, makes the difference between being able to access abortion care or not. Notably, because it bans telehealth MAB entirely, HB 171 would have banned approximately 76% of all MABs provided by PPMT in FY 2021. *See supra* ¶ 55.

124. The ban on telehealth MAB restricts access to MAB without any justification and violates the Montana Constitution for several independent reasons.

125. *First*, the requirement violates the Montana Constitution's right to privacy by interfering with women's fundamental right to pre-viability abortion. For the same reasons, it also violates the Montana Constitution's rights to individual dignity and to seek safety, health, and happiness.

126. Women in Montana already face significant hurdles to accessing in-person abortion care. Approximately 90% of the counties in Montana do not have an abortion provider, and about 50% of Montanans live in those counties. *See supra* ¶ 43.

127. Given Montana's size, it is common for patients to travel six to eight hours round trip to visit PPMT's health centers. *See supra* ¶ 44.

128. To visit an abortion provider, patients often must arrange and pay for transportation, childcare, and/or lodging, and arrange to take time off work. For low-wage workers, who often have no paid time off or sick leave, these burdens are particularly acute.

129. PPMT is able to significantly expand access to abortion care by allowing patients to either travel to the PPMT health center closest to them for a telehealth MAB appointment (in the case of site-to-site MAB) or consult an MAB provider without incurring any travel-related costs or burdens (in the case of direct-to-patient MAB). Because there already are so few abortion providers in the state, telehealth MAB helps to fill gaps in care that would otherwise exist.

130. If patients are required to travel to the PPMT health center where a provider is physically located, the time and expense required will be significantly more onerous.

131. The burdens imposed by the telehealth MAB ban are exacerbated by HB 171's imposition of a 24-hour mandatory delay. As discussed above, § 7 requires patients to make multiple in-person visits and wait at least 24 hours before accessing MAB. *See supra* ¶¶ 90-98. The combination of the same-provider requirement and 24-hour mandatory delay means that a patient is required to see a provider 24 hours in advance of an MAB, and then must see that *same* provider again, notwithstanding that the provider may not be available the next day or may be working at a different PPMT health center, which could be many hours and miles further away.

132. *Second*, the same-provider requirement violates the Montana Constitution's equal protection guarantee. Upon information and belief, Montana does not impose a same-provider requirement on non-abortion patients. Montana has championed the use of telehealth in other contexts. Indeed, around the same time the Governor signed into law the omnibus MAB restrictions law, he also signed a bill that expands access to telehealth services that were originally extended because of the COVID-19 pandemic. *See* HB 43, 2021 Leg. Reg. Sess. (Mont. 2021) (to be codified in various provisions of the Mont. Code Ann.). The Governor, in signing the bill, recognized that "[t]elehealth services are transforming how care is delivered in

Montana, particularly in our frontier and rural communities."[15] And Montana allows patients to receive many other medications by mail, including everything from birth control pills to blood pressure medication to medication for diabetes and erectile dysfunction.

133. There is no justification for banning telehealth MAB. Banning this form of MAB does not "protect[] the health and welfare of a woman considering an abortion," as HB 171's legislative findings section claims.

134. PPMT's experience and peer-reviewed medical literature demonstrate that MAB can be safely and effectively administered using telehealth.

135. MAB is safe, noninvasive, does not require anesthesia, and can be done at home. The ban on the provision of telehealth MAB serves only to make abortion more difficult to obtain by requiring unnecessary in-person health center visits.

136. The in-person requirement also cannot be justified on the grounds that "the routine administration of an abortion-inducing drug following spontaneous miscarriage is unnecessary and exposes the woman to unnecessary risks associated with the abortion-inducing drug," as HB 171's legislative findings section claims.

137. There is no evidence that providing MAB after a spontaneous miscarriage "exposes the woman to unnecessary risks;" to the contrary, mifepristone and misoprostol are evidence-based *treatments* for miscarriage.

iii. Provider Qualification Requirements

138. Section 5(2) of HB 171 requires that a "qualified medical practitioner" providing MAB be "credentialed and competent to handle complications management, including

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[15] Press Release, Governor's Office, Governor Gianforte Signs Bill Expanding Telehealth (Apr. 19, 2021), https://news.mt.gov/governor-gianforte-signs-bill-expanding-telehealth.

emergency transfer, or must have a signed contract with an associated medical practitioner who is credentialed to handle complications and must be able to produce the signed contract on demand by the woman or by the department." The law in turn defines "qualified medical practitioner" as one who has the ability to, among other things, "provide surgical intervention or who has entered into a contract with another qualified medical practitioner to provide surgical intervention."

139. Complication is defined to mean "an adverse physical or psychological condition arising from the performance of an abortion, including but not limited to uterine perforation, cervical perforation, infection, heavy or uncontrolled bleeding, hemorrhage, blood clots resulting in pulmonary embolism or deep vein thrombosis, failure to actually terminate the pregnancy, incomplete abortion, pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm delivery in subsequent pregnancies, free fluid in the abdomen, hemolytic reaction due to the administration of ABO-incompatible blood or blood products, adverse reactions to anesthesia and other drugs, subsequent development of breast cancer, death, psychological complications such as depression, suicidal ideation, anxiety, and sleeping disorders, and any other adverse event."

140. These provisions bar providers who are experienced and well-equipped to provide MAB from providing such abortion care, without any medical justification. They are unconstitutional for several independent reasons.

141. *First*, HB 171's provider requirements violate the Montana Constitution's rights to privacy, individual dignity, and to seek safety, health, and happiness. They restrict women's

fundamental right to pre-viability abortions by decreasing the number and geographic distribution of MAB providers.

142. No PPMT MAB provider is credentialed to "handle" all the complications listed in HB 171. The omnibus MAB restrictions law thus will prevent these providers from offering a safe, effective, and constitutionally protected form of abortion—that they are fully qualified and prepared to provide—unless they are able to contract with another provider or providers who will attest to being able to "handle" the vague litany of complications required by the law. And it will be extremely difficult—if not impossible—to identify a practitioner who can "handle" all those complications.

143. *Second*, the provider qualifications requirement is unconstitutionally vague. HB 171's requirement that an abortion provider be "credentialed and competent" to "handle" "complications management"—with an incredibly expansive definition of "complications" that includes "death"—is vague (*e.g.*, what credentialing makes a provider competent to "handle" death?). It requires providers to guess at whether they are complying with the law while risking severe criminal penalties.

144. *Third*, the provider qualifications requirement violates Montana's equal protection guarantee. On information and belief, no similar credential or contract requirements are imposed on other health care providers, including those who provide other reproductive health care, such as pregnancy or vasectomies, or other care, such as colonoscopies or outpatient plastic surgery. Indeed, providers routinely provide care even when they would not be the provider who would treat the patient in the event of a complication.

145. HB 171's differential treatment of women and providers based on the women's decision to exercise a fundamental right is not narrowly tailored to serve any compelling State interest.

146. The Legislature has offered no compelling reasons to justify these provider qualification provisions. Nor could they, as these requirements are totally unnecessary given the safety of abortion.

147. All PPMT providers who provide abortions, including MABs, are properly credentialed, licensed, and trained. PPMT providers complete Continuing Medication Education courses annually to meet board requirements. Some providers are trained in their schooling or residency on abortions. Moreover, PPMT's providers are trained in the risks of MAB. They are able to recognize symptoms—in person or through telehealth visits—that require additional or acute care, to provide care for those complications where consistent with their training and expertise, and to refer patients for other care, including for emergency care if necessary, without the need for a contract.

148. Because it is difficult to imagine a contract that *could* cover the potential universe of complications, or a practitioner or practitioners willing to enter into such an agreement, HB 171's provider qualification provisions may effectively ban the provision of some constitutionally protected MAB, without any medical justification.

149. In some cases, HB 171's provider qualification requirements will deprive women of the ability to obtain an abortion.

iv. Burdensome MAB Reporting Requirements

150. Section 9 of HB 171 sets up an onerous reporting system that requires providers such as PPMT to provide the Department with a litany of information on their provision of

MAB. It requires MAB providers to submit reports to the Department, signed by the provider "who provided the abortion-inducing drug . . . 15 days after each reporting month."

151. The § 9 MAB reports must include, among other information:

i. the identity of the provider who provided the drug;

ii. the identity of the referring provider, if any;

iii. the pregnant woman's county, state, and country of residence;

iv. the pregnant woman's age and race;

v. the number of previous pregnancies, number of live births, and number of previous abortions of the pregnant woman;

vi. the "probable gestational age of the unborn child as determined by both patient history and ultrasound results used to confirm the gestational age;"

vii. "preexisting medical conditions of the pregnant woman that would complicate the pregnancy, if any;"

viii. whether the woman returned for a follow-up examination, including, "the date and results of the follow-up examination, and what reasonable efforts were made by the qualified medical practitioner to encourage the woman to return for a follow-up examination if the woman did not;" and

ix. information on any "complications," which include psychiatric conditions such as "depression, suicidal ideation, anxiety, and sleeping disorders."

152. Section 9(8) also provides that MAB reports "must be deemed public records and must be available to the public in accordance with the confidentiality and public records reporting laws of this state."

153. HB 171's reporting requirements are unconstitutional for several independent reasons.

154. *First*, the reporting requirements violate the Montana Constitution's rights to privacy, individual dignity, and to seek safety, health, and happiness because they restrict women's fundamental right to pre-viability abortion. These requirements impose unnecessary hurdles interfering with PPMT's ability to provide lawful and constitutionally protected pre-viability abortions, including by making the identity of abortion providers public.

155. Under current law, reports on abortion are "treated with the confidentiality afforded to medical records, subject to such disclosure as is permitted by law." Section 50-20-110(5), MCA.

156. But HB 171 requires MAB reports to be made public—including the abortion provider's name and any referring provider's name.

157. Publicly disclosing the names of abortion providers and referring providers will lead to harassment of providers, discourage providers from offering abortion, and reduce the number of abortion providers available in a state where they already are few and far between.

158. The omnibus MAB restrictions law's reporting requirements also could make public the identities of women who have obtained abortions, putting their safety at risk and chilling the ability to obtain pre-viability abortions.

159. HB 171 requires that PPMT report various patient identifiers—including the patient's county, age, race, and number of previous abortions the patient has had—which are then made available to the public. That information may be sufficient to identify women in certain communities, especially in rural communities in Montana, which is particularly problematic for patients who are subject to intimate partner violence.

160. Because HB 171 makes abortion reports public records, patients may be chilled from seeking MABs altogether.

161. *Second*, HB 171's MAB reporting requirements violate Montana's right to informational privacy, which is guaranteed by Article II, Section 10 of the Montana Constitution.

162. The right to informational privacy guarantees individuals the right to control the disclosure and circulation of personal information. *Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶ 14, 355 Mont. 49, 55, 224 P.3d 1240, 1244. The right extends to the details of a patient's medical and psychiatric history, because "[m]edical records are quintessentially 'private' and deserve the utmost constitutional protection." *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448.

163. HB 171's MAB reporting requirements expose patients' private medical and psychiatric history to the public. The law requires public disclosure of the provider who dispensed the abortion-inducing drug and patients' personal information and medical history. The law further requires public disclosure of patients' psychiatric information, including "depression, suicidal ideation, anxiety, and sleeping disorders."

164. *Third*, HB 171's MAB reporting requirements violate Montana's equal protection guarantee. On information and belief, no similar State-mandated reporting is required of any other reproductive care, including childbirth, which is far more dangerous than abortion.

165. *Fourth*, HB 171's reporting requirements are unconstitutionally vague. HB 171 requires providers to report "whether the woman suffered any complications" and any "preexisting medical conditions of the pregnant woman that would complicate the pregnancy."

166. HB 171 defines "complications" in such a broad and ambiguous way that the law could be read to require providers to report expected effects of MABs, like heavy bleeding, as

well as a host of medical events that may be wholly unconnected to abortion.[16] It is unclear whether providers would be required to report such intended (or unrelated) results as "complications."

167. Rather than adding to the sum of medical and public health knowledge, HB 171's reporting requirement would thus distort public knowledge by creating the false impression that nearly *every* MAB entails complications.

168. "Preexisting medical conditions" is similarly broad and ambiguous, yet undefined. Smoking and mental health issues could complicate a pregnancy, for example, but providers are not given any guidance as to whether they should report such commonplace and widespread factors as a "preexisting medical condition."

169. The Legislature has offered no compelling justification for the MAB reporting requirements. They cannot be justified on the basis of "promoting the health and safety of women by adding to the sum of medical and public health knowledge," as HB 171's legislative findings section contends.

170. The data that HB 171 would require providers to report, such as the identity of the referring provider or the patient's county of residence, is not medically relevant.

171. The data that HB 171 would require providers to report bears no resemblance to standard efforts to collect information regarding adverse effects.

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[16] The reporting provisions also require MAB providers to report "the amount billed to cover the treatment for specific complications, including whether the treatment was billed to [M]edicaid, private insurance, private pay, or another method, including charges for any physician, hospital, emergency room, prescription or other drugs, laboratory tests, and other costs for treatment rendered." It is possible that the MAB provider may not know whether the patient has a complication. And because it may take weeks before PPMT receives bills from other providers, such as hospitals or labs, it will be extremely difficult, if not impossible, for providers such as PPMT to report information required by the law within 15 days after the end of the reporting month.

172. "[P]romoting maternal health" is an overly broad and ambiguous reason that cannot outweigh the fundamental right to informational privacy.

c. The Ultrasound Offer (HB 140)

173. HB 140 forces providers to (1) offer patients the opportunity to view an "active ultrasound" and "ultrasound image," and to listen to the "fetal heart tone," irrespective of the provider's medical judgment regarding whether the offers are in the best interest of the patient, and (2) make their patients sign a State-created form indicating whether they chose to view or hear fetal activity. There is no medical purpose for making this suite of offers or recording a woman's answer.

174. The ultrasound offer law violates several provisions of the Montana Constitution: (1) it infringes Plaintiffs' rights to privacy, individual dignity, and to seek safety, health, and happiness; (2) it violates the equal protection guarantee; (3) and it violates the right to free speech.

i. Provisions

175. HB 140 requires "a person performing an abortion" to offer patients the opportunity to view an "active ultrasound" and "ultrasound image," and to "listen to the fetal heart tone." The patient must sign a State-developed certification form attesting that they received these offers and stating whether they chose to accept them.

176. HB 140 excepts only those abortions performed in order to: (a) save the life of the woman; (b) ameliorate a serious risk of causing the woman substantial and irreversible impairment of a bodily function; or (c) remove an ectopic pregnancy.

177. A person who performs or attempts to perform an abortion without complying with HB 140 is subject to a civil penalty of $1,000.

178. The violations of Plaintiffs' and their patients' constitutional rights will cause irreparable harm.

ii. HB 140 is Unconstitutional and Will Cause Irreparable Harm

179. HB 140 is unconstitutional for several independent reasons.

180. *First*, HB 140 violates the Montana Constitution's rights to privacy, individual dignity, and to seek safety, health, and happiness.

181. "[M]edical decisions affecting one's bodily integrity and health must often and necessarily be made in partnership with a health care provider[,]" and a "serious[] … infringement of personal autonomy and privacy [] accompanies the government usurping, through laws or regulations which dictate how and by whom a specific medical procedure is to be performed, the patient's own informed health care decisions made in partnership with his or her chosen health care provider." *Armstrong*, ¶ 58.

182. A core tenet of patient-centered care is that the provider, using her best professional judgment, tailors her counseling to each individual patient's circumstances, needs, and expressed preferences and values.

183. PPMT does not offer every woman the opportunity to view an "active ultrasound" and "ultrasound image," and to listen to a "fetal heart tone;" providers exercise their medical discretion as to what offers are in the best interest of the patient.

184. HB 140 takes that discretion away from providers, and requires them to ask every single patient if they want to view an "active ultrasound" and "ultrasound image," and listen to the "fetal heart tone," even where the provider believes, in her medical judgment, that doing so will be stigmatizing to the patient and not in her best interest. HB 140 also requires that providers obtain the patient's signature on a State-developed certification form that "indicates whether the woman viewed the active ultrasound or ultrasound image or listened to the fetal

heart tone." There is no medical purpose for these mandates. Given that HB 140 uses stigmatizing language like "unborn child," it is likely that any State-developed certification form will as well—further stigmatizing patients with no medical reason and discouraging them from seeking abortion care. In doing so, HB 140 intrudes on the provider-patient relationship and risks harm to patients.

185. HB 140 requires that abortion providers use a "certification form" developed by the Department, but it imposes no timeframe in which the Department must create the form. If the Department does not create the form by the law's effective date, it is not clear how providers, including PPMT, will be able to provide abortions. Providers should not be subjected to such ambiguity. And should providers, including PPMT, effectively be banned from providing *any* abortions in Montana, that ban, even if temporary, would unconstitutionally restrict access to abortion in violation of the right to privacy.

186. For the same reasons, HB 140 violates the Montana Constitution's right to individual dignity and inalienable right to seek safety, health, and happiness. Pregnant women seeking abortions have a fundamental right to procreative autonomy and the best medical advice of their health care providers. *See supra* ¶¶ 4, 70, 181. HB 140, by inserting the State between women and their health care providers, interferes with this fundamental right.

187. *Second*, HB 140 violates the Montana Constitution's free speech clause. By requiring providers to give the State's suite of offers, the law both compels providers to make certain statements and regulates providers' speech on the basis of its content.

188. *Third*, the ultrasound offer law violates Montana's right to equal protection. The law deprives women who seek abortions and abortion providers the full benefits of the medical "partnership" protected by the right to privacy, whereas other pregnant patients and their

providers retain access to that protected relationship. And no similar State-mandated requirement exists for other pregnancy care, so the law cannot be justified by reference to maternal health.

189. The State lacks any compelling interest in these mandates—indeed, the Legislature, in enacting HB 140, offered none in the text of the law.

190. There is no conceivable medical reason to force providers to ask patients whether they want to see an "active ultrasound" and "ultrasound image," and to hear audio of the fetus, and then to document the patient's decision.

191. These offers stigmatize a woman's exercise of a fundamental right and do nothing to protect a woman's health.

d. The Coverage Ban (HB 229)

192. HB 229 forces individuals on insurance plans funded by the Affordable Care Act ("ACA") to pay out of pocket for nearly all abortions.

193. HB 229 violates several provisions of the Montana Constitution: (1) it infringes the rights to privacy, individual dignity, and to seek safety, health, and happiness; and (2) it violates the equal protection guarantee.

i. Provisions

194. Under the ACA, states are required to establish health insurance exchanges. These exchanges are virtual marketplaces where consumers and small business owners and employees can shop for and purchase private health insurance coverage and, where applicable, be connected to public health insurance programs.

195. Exchanges may be established either by the state itself or by the Secretary of Health and Human Services as a federally-facilitated exchange ("FFE").

196. Montana uses an FFE, where its exchange is federally established, run, and funded.

197. HB 229 prohibits a qualified health plan offered on a health insurance exchange established in Montana pursuant to the ACA from providing abortion coverage.

198. The law only allows for plans to provide coverage for an abortion procedure performed when: (1) "the life of the mother is endangered by a physical disorder, physical illness, or physical injury," including a life-threatening condition caused by or arising from the pregnancy itself; and (2) the pregnancy is a result of rape or incest. *See* HB 229 § 1.

199. On information and belief, there are three health plans offered on the Montana health insurance exchange, one of which covers abortion outside of HB 229's exceptions but no longer would be permitted to do so if HB 229 goes into effect.

ii. HB 229 Is Unconstitutional and Will Cause Immediate, Irreparable Harm

200. HB 229 is unconstitutional for several independent reasons.

201. *First*, HB 229 violates the Montana Constitution's rights to privacy, individual dignity, and to seek safety, health, and happiness.

202. The coverage ban burdens Montanans' fundamental right to a pre-viability abortion by forcing individuals on exchange insurance plans to pay out of pocket for abortion procedures, with only very narrow exceptions.

203. Out-of-pocket costs for such care can range from several hundred to thousands of dollars.[17]

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[17] *See, e.g.*, Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, Kaiser Family Foundation (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/.

204. For the same reasons, HB 229 violates Montana's right to individual dignity and to seek safety, health, and happiness. Pre-viability abortions are constitutionally protected medical procedures to which pregnant women have a fundamental right, and HB 229 seeks to prevent women from obtaining comprehensive health insurance that covers (constitutional) abortion care.

205. *Second*, HB 229 violates Montana's equal protection guarantee. Montana allows other individuals to buy comprehensive policies on the exchange covering all of their health care needs but prohibits women who seek to exercise their fundamental right to an abortion from doing so, without any compelling justification for such discrimination.

206. There is no justification for the coverage ban. Montana courts have already said that regulations limiting insurance coverage for abortions "do[] nothing to further the state's interest in maternal health," and that any State interest "in preserving potential life" prior to "the last three months of pregnancy" is outweighed by a "mother's interest in necessary medical care." *See Jeannette v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (Mont. Dist. Ct. May 19, 1995).

207. Because there is no compelling State interest in abridging fundamental rights, HB 229 violates the Montana Constitution.

208. The Legislature also cannot justify the infringement by claiming that it is intended to forbid government funding of abortion, or by citing to supposed anti-abortion public sentiment. No State funding is at issue.

209. In addition, any argument by the Legislature (as asserted in HB 229's preamble) that "the provision of federal funding for health insurance plans that provide abortion coverage is nothing short of taxpayer-funded and government-endorsed abortion" cannot constitute a

legitimate State interest because the Hyde Amendment already precludes the use of federal funds for abortion except in instances of rape, incest, or if the pregnancy endangers a woman's life. *See, e.g.*, Appropriations Act of Oct. 21, 1993, Pub. L. 103-112, 107 Stat. 1113.

210. Furthermore, the ACA requires health exchange plans that offer abortion coverage to segregate funds paying for abortion procedures from all other federal funds used to subsidize covered premium costs. 42 U.S.C. § 18023(b)(2). The Montana Legislature's insistence in the HB 229's preamble that this coverage is "an unprecedented change in federal abortion funding policy that fails to take into account the Hyde Amendment" is simply untrue. The State cannot have a legitimate interest in stopping "taxpayer-funded and government-endorsed abortion" because Congress has already legislated to prohibit federal funds from covering abortions in the ACA marketplace.

211. Moreover, the State's "need to represent the anti-abortion views of a portion of its population," as stated in the law's preamble, cannot constitute a compelling State interest or else the State could "justify almost any action imaginable on the basis that some of its citizens felt it was appropriate." *Ellery*, 1995 WL 17959705.

212. The violations of Plaintiffs' and their patients' constitutional rights will cause irreparable harm.

e. The cumulative impact of laws on Plaintiffs and their patients

213. HB 136, HB 171, HB 140, and HB 229 individually violate Plaintiffs' and their patients' constitutional rights by restricting access to constitutionally protected pre-viability abortion care, and by stigmatizing and discriminating against pregnant women who are seeking to exercise this fundamental right and providers seeking to perform abortions.

214. Taken together, they attack Montanans' fundamental rights from all angles. The laws target Montanans' access to MAB (an abortion option available earlier in pregnancy) as well as procedural abortion (an abortion option available to women both earlier and later in pregnancy).

215. Not only do the laws create additional unnecessary hurdles to pregnant women's access to constitutionally protected abortion, they also replace providers' medical judgment with State-mandated requirements that are unsupported by science.

216. The cumulative burden of the four laws is particularly great in Montana, where access to abortion is already limited.

217. The risks associated with limiting or delaying access to abortion are substantial. If pregnant women are unable to access abortion when needed or desired, they will face greater risk and cost; they will experience the side effects of pregnancy itself, such as nausea, for a longer period; they may have more difficulty hiding their pregnancy, which could expose some patients to increased risk of disclosure to an abusive or unsupportive partner, family member, or employer; and they may become ineligible for certain types of abortion or abortion altogether.

CLAIMS FOR RELIEF

First Claim
Violation of the Right to Privacy
Of Article II, Section 10 of the Montana Constitution

218. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

219. Article II, Section 10 of the Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This right includes the fundamental "right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health

care provider of her choice." *Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364.

220. Article II, Section 10 of the Montana Constitution also includes a right to informational privacy, which guarantees individuals the right to control the disclosure and circulation of personal information, including medical records and psychiatric history. *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448.

221. Any violations of these rights are subject to strict scrutiny by the Court.

222. HB 136, HB 171, HB 140, and HB 229 violate the right to privacy of women seeking pre-viability abortions in Montana without being narrowly tailored to effectuate a compelling State interest, in violation of Article II, Section 10 of the Montana Constitution.

223. HB 171 violates the right of informational privacy of Plaintiffs and their patients without being narrowly tailored to effectuate a compelling State interest, in violation of Article II, Section 10 of the Montana Constitution.

Second Claim
Violation of the Right to Equal Protection of the Laws
Of Article II, Section 4 of the Montana Constitution

224. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

225. Article II, Section 4 of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws."

226. HB 136, HB 171, HB 140, and HB 229 violate the right to equal protection of the laws of Plaintiffs and their patients because they discriminate against women seeking to exercise their fundamental right to seek pre-viability abortions and abortion providers without being narrowly tailored to effectuate a compelling State interest, in violation of the equal protection guarantee in Article II, Section 4 of the Montana Constitution. *See Snetsinger v. Montana Univ.*

Sys., 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (explaining that strict scrutiny applies if the distinctions drawn by a law affect fundamental rights).

227. HB 136, HB 171, HB 140, and HB 229 violate the right to equal protection of the laws of Plaintiffs and their patients because they discriminate against women. They have a disproportionate impact on women and are based on impermissible stereotypes about women's decision making, in violation of the equal protection guarantee in Article II, Section 4 of the Montana Constitution.

228. HB 136 also violates the right to equal protection of the laws of Plaintiffs and their patients because it targets abortion beginning at 20 weeks LMP, but not abortion before 20 weeks LMP, in violation of the equal protection guarantee in Article II, Section 4 of the Montana Constitution.

Third Claim
Violation of the Inalienable Right to Seek Safety, Health, and Happiness Of Article II, Section 3 of the Montana Constitution

229. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

230. Article II, Section 3 of the Montana Constitution provides that all Montanans have the "[i]nalienable rights" to "seek[] their safety, health and happiness in all lawful ways."

231. HB 136, HB 171, HB 140, and HB 229 violate the right of Plaintiffs and their patients to seek "safety, health and happiness in all lawful ways" because the laws infringe on Montanans' right to a constitutionally protected procedure, a pre-viability abortion, and on the provider-patient relationship, in violation of Article II, Section 3 of the Montana Constitution.

Fourth Claim
Violation of the Right to Individual Dignity
Of Article II, Section 4 of the Montana Constitution

232. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

233. Article II, Section 4 of the Montana Constitution provides that all Montanans have the right to individual dignity.

234. HB 136, HB 171, HB 140, and HB 229 violate the right to individual dignity of Plaintiffs and their patients in violation of Article II, Section 4 of the Montana Constitution.

Fifth Claim
Violation of the Right to Free Speech
Of Article II, Section 7 of the Montana Constitution

235. Plaintiffs hereby reaffirm and re-allege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

236. Article II, Section 7 of the Montana Constitution provides that "[n]o law shall be passed impairing the freedom of speech[.]"

237. HB 171, by requiring providers to present false information about MAB, including about supposed complications and so-called "reversals," violates Plaintiffs' right to freedom of speech, as guaranteed by Article II, Section 7 of the Montana Constitution.

238. HB 140, by requiring providers to offer patients the opportunity to view an "active ultrasound" and "ultrasound image," and to listen to "the fetal heart tone," and to sign a State-developed form that records the patients' answers, violates Plaintiffs' right to freedom of speech, as guaranteed by Article II, Section 7 of the Montana Constitution.

Sixth Claim
Violation of the Right to Due Process of Law
Of Article II, Section 17 of the Montana Constitution

239. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-217 as if set forth fully herein.

240. Article II, Section 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."

241. "A statute is unconstitutionally vague and void on its face if 'it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.'" *State v. Hamilton*, 2018 MT 253, ¶ 20, 393 Mont. 102, 428 P.3d 849 (quoting *State v. Brogan* (1995), 272 Mont. 156, 168, 900 P.2d 284, 291). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, 303 P.3d 755 (quoting *City of Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025).

242. The exceptions to HB 136 are void on their face as they fail to give a person of ordinary intelligence fair notice that she falls within an exception to conduct that HB 136 criminalizes.

243. Several aspects of HB 171—including its definitions, follow-up appointment requirements, provider qualifications requirements, and reporting requirements—are void on their face as they fail to give a person of ordinary intelligence fair notice of conduct that HB 171 criminalizes.

PRAYER FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that HB 136, HB 171, HB 140, and HB 229 violate the rights of Plaintiffs and their patients, as protected by the Montana Constitution, and therefore are void and of no effect;

2. Issue a permanent injunction prohibiting Defendant, its agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the challenged provisions of HB 136, HB 171, HB 140, and HB 229;

3. Issue a preliminary injunction prohibiting Defendant, its agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the challenged provisions of HB 136, HB 171, HB 140, and HB 229 pending final judgment.

4. Grant Plaintiffs' attorneys' fees and costs pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine; and/or

5. Grant such further relief as may be just and proper.

Respectfully submitted this 16th day of August, 2021.

GRAYBILL LAW FIRM, PC

Raphael J.C. Graybill
300 4th Street North
PO Box 3586
Great Falls, MT 59403

VERIFICATION

I, Joey Banks, being first duly sworn, upon oath depose and say:

1. I am a Plaintiff in the action set forth above.

2. I verify the foregoing Verified Complaint for and on behalf of Plaintiffs.

3. I have personal knowledge that the facts and information set out in the foregoing Verified Complaint are true; that the facts therein have been assembled by counsel and Plaintiffs; and that the allegations therein are true and correct to the best of my knowledge.

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

Joey Banks

Subscribed and sworn to before me this 13 day of August, 2021.

(NOTARIAL SEAL)

SUNDI JO HAMILTON
NOTARY PUBLIC for the
State of Montana
Residing at Missoula, MT
My Commission Expires
November 08, 2024.

Sundi J Hamilton

Printed Name: Joey Banks

Sundi Jo Hamilton

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

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

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

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

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

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

Attorneys for Plaintiffs

*Motions for pro hac vice forthcoming

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA and JOEY BANKS, M.D., on behalf of themselves and their patients,	)	Cause No.: DV 21-00999
	)	Judge: Jessica T Fehr
Plaintiffs,	)	
vs.	)	**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
STATE OF MONTANA, by and through Austin Knudsen, in his official capacity as Attorney General,	)	
Defendant.	)	

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INTRODUCTION

Plaintiffs seek a preliminary injunction to prevent three unconstitutional laws from taking effect during the pendency of this litigation. For the reasons explained below, Plaintiffs establish a prima facie case that these laws violate the Montana Constitution. And absent a preliminary injunction, Plaintiffs and their patients face immediate, irreparable harm, including the threat of criminal prosecution, substantial civil penalties, and dramatic and irreversible health consequences.

The relief sought straightforwardly follows from the Montana Supreme Court's decision, more than two decades ago, that the right to privacy in "Article II, Section 10 of the Montana Constitution broadly guarantees each individual the 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." *Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370. That provision "protects a woman's right of procreative autonomy," including "the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Id.*

Despite this unequivocal constitutional protection, the State Legislature now aims to upend years of settled precedent through a multifront offensive against reproductive health care. The three laws from which Plaintiffs request preliminary relief—House Bills 136, 171, and 140—clearly violate *Armstrong* and numerous protections secured by the Montana Constitution. Among other things, these laws ban abortion at a pre-viable gestational age; impose drastic and unwarranted restrictions on access to medication abortion, including by imposing a 24-hour mandatory delay, requiring patients make at least two trips to the health center to see the same provider, and effectively banning medication abortion provided through telehealth; require health care providers to give medically inaccurate information to patients; and stigmatize those patients able to access abortion under this restrictive regime for their decision. Working together, the laws take aim at the full scope of abortion care the Montana Constitution guarantees—creating obstacles that operate to push women seeking abortion later into pregnancy and then cutting off access to abortion at an earlier gestational age. They also threaten Montana health care providers with severe

criminal sanctions and other penalties for providing women[1] with access to constitutionally guaranteed health care, in a blatant attempt to make lawful reproductive care inaccessible and to intimidate providers into no longer providing that care.

Worse, the legislators who drafted these laws knew that the laws would violate the Montana Constitution. Their *own lawyers* told them that enacting such restrictions on abortion ran headlong into "Montana's unique constitutional guarantee of the right to privacy" and "raises potential conformity issues with the requirements of the ... Montana Constitution." *See* Legal Review Note, House Bill 171 (Jan. 15, 2021); *see also* Legal Review Note, House Bill 136 (Dec. 31, 2020).

The challenged laws also trample on the Montana Constitution's guarantees of due process, equal protection, individual dignity, freedom of speech, and the right to seek safety, health, and happiness. To remedy these constitutional violations, Planned Parenthood of Montana and one of its healthcare providers, Dr. Joey Banks, move to preliminarily enjoin the State of Montana, by and through Attorney General Austin Knudsen, from enforcing these laws before they take effect on October 1, 2021. Absent an injunction, women in Montana will be irreparably harmed by being denied constitutionally protected abortion care, and Plaintiffs will be irreparably injured by the State's intrusion into the provider-patient relationship. This Court should, accordingly, grant Plaintiffs' motion.

STATEMENT OF FACTS

A. Plaintiffs Have Long Served The Community

Planned Parenthood of Montana, Inc. ("PPMT") is a non-profit Montana corporation that for decades has served as the largest provider of reproductive health care services to Montana residents, especially low-income Montanans. *See* Compl. ¶¶ 16-18; Stahl Aff. ¶ 5. PPMT operates five health centers staffed with experienced clinicians, who conduct both in-person and telehealth visits. *See* Stahl Aff. ¶¶ 4-6. Abortions are provided at each of PPMT's health centers, either through medication abortion ("MAB") (up to 11 weeks from the first date of a patient's last menstrual period ("LMP")) or procedural abortion (up to 21.6 weeks LMP). *See* Compl. ¶¶ 52-53, 57; Stahl Aff. ¶ 7. PPMT offers MABs to patients in three separate ways: (1) an in-person visit to a health center; (2) site-to-site telehealth, in which a patient at a health center meets by video

[1] Plaintiffs 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.

with a provider located at another health center; and (3) direct-to-patient telehealth, in which a patient connects over video with a provider from wherever she is located and then, if eligible, is mailed the required medications to a Montana address. Compl. ¶¶ 48-50. Procedural abortions and MABs are both common, safe procedures. Compl. ¶¶ 29-32. Nationwide, one in five pregnancies ends in abortion. Compl. ¶ 29. About one in four American women will have an abortion by the time she reaches age 45. *Id.* Complications from both medication and procedural abortion are extremely rare. Compl. ¶ 32. When complications do occur, they can usually be managed in an outpatient setting, either at the time of the abortion or in a follow-up visit. *Id.*

Dr. Joey Banks provides abortion care through PPMT that would be prohibited by the challenged laws. Dr. Banks is trained and licensed to provide both procedural and medication abortions, and performs procedural abortions in Montana up to 21.6 weeks LMP. Compl. ¶ 19; Banks Aff. ¶ 8. She prescribes the drugs needed for MABs to patients throughout Montana, including through both site-to-site and direct-to-patient telehealth, and may decide (based on medical judgments about her patients' needs) not to offer a patient the opportunity to view and listen to active fetal ultrasounds. *See* Compl. ¶¶ 19, 183; Banks Aff. ¶¶ 50-53. But for the abortion restrictions challenged here, PPMT's and Dr. Banks's patients would continue to obtain, when medically appropriate, pre-viability procedural abortions at or beyond 20 weeks LMP. Likewise, those patients would continue to obtain MABs through site-to-site and direct-to-patient telemedicine when medically appropriate. And PPMT providers would continue to rely on their medical judgment when counseling patients, including in deciding whether to tell patients they may view active and still fetal ultrasounds, and listen to any accompanying audio.

B. The Challenged Laws Interfere With The Provider-Patient Relationship

1. *HB 136*

In direct contravention of *Armstrong*, House Bill 136 ("HB 136") prohibits abortions at or after 20 weeks gestation—prior to fetal viability—absent very narrow (and vague) exceptions.[2] Violations carry extreme criminal consequences. *See* HB 136, § 4; Compl. ¶ 64.

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[2] Specifically, HB 136 prohibits performing or attempting to perform "an abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious health risk to the ... mother" or due to a medical emergency. *See* HB 136 § 3. By defining a fetus as "capable of feeling pain" at 20 weeks LMP, HB 136 effectively prohibits abortions beginning at 20 weeks LMP, which is pre-viability. *See* McNicholas Aff. ¶¶ 33-35.

2. *HB 171*

House Bill 171 ("HB 171") limits women's ability to access abortion care early in their pregnancy by imposing numerous burdensome and medically inappropriate restrictions on MABs. As described in detail below and in accompanying Affidavits, HB 171 imposes a mandatory 24-hour delay on MABs; requires multiple, unnecessary in-person visits with the same provider; prohibits the provision of medication abortion through telehealth and by mail; subjects providers to unnecessary and onerous qualification requirements; and compels providers to give their patients inaccurate, misleading information that a medication abortion can be "reversed" under the guise of "informed consent" (among other things). *See* HB 171. Taken together, HB 171 would severely restrict if not eliminate access to MAB, which comprised 75% of the abortions PPMT performed in FY2021, and prohibit all site-to-site and direct-to-patient MABs. *See, e.g.*, Stahl Aff. ¶¶ 10, 17-26.[3]

3. *HB 140*

House Bill 140 ("HB 140"), with limited exceptions,[4] requires "a person performing an abortion on a pregnant woman" to tell the woman that she may view "an active ultrasound" and "an ultrasound image," and "listen to the fetal heart tone," then requires the patient to sign a State-created form indicating whether she chose to view or listen to fetal activity. *See* HB 140 § 1(1). The law thus forces providers to provide care according to the specifications set forth in the law, irrespective of the provider's medical judgment regarding the appropriateness of these offers, and stigmatizes abortions. Violations carry substantial civil penalties. *See id.* at § 1(5).

LEGAL STANDARD

A preliminary injunction should issue when any one of the grounds enumerated in § 27-19-201, MCA is met. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 17, 395 Mont. 350, 358, 440 P.3d 4, 10; *Stark v. Borner* (1987), 226 Mont. 356, 359, 735 P.2d 314, 316. Two grounds are relevant here.

First, a preliminary injunction is warranted when an applicant is "entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or

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[3] FY 2021 for PPMT was July 1, 2020 through June 30, 2021.

[4] The law excepts abortions performed with the intent to: (a) save the life of the woman; (b) ameliorate a serious risk of causing the woman substantial and irreversible impairment of a bodily function; or (c) remove an ectopic pregnancy.

continuance of the act complained of, either for a limited period or perpetually." § 27-19-201(1), MCA. In the context of constitutional challenge, an applicant need only establish a prima facie case of a violation of her rights; indeed, "the trial court should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had." *Weems*, ¶ 18 (internal quote omitted).

Second, an injunction is warranted when "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." § 27-19-201(2), MCA. "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 414, 473 P.3d 386, 392; *see also Weems*, ¶ 25.

ARGUMENT

I. The Challenged Laws Are Unconstitutional

The challenged laws violate fundamental rights of Plaintiffs and their patients under the Montana Constitution. As explained below, HB 136, HB 171, and HB 140 infringe the right to privacy, right to individual dignity, right to seek safety, health, and happiness, and right to equal protection. Additionally, HB 136 and HB 171 violate the due process clause, and HB 171 and 140 violate the right to free speech. Because Plaintiffs have made the necessary prima facie showing of a constitutional violation, a preliminary injunction should issue.

A. HB 136 Violates Numerous Provisions Of The Montana Constitution

HB 136's criminalization of certain pre-viability abortions (1) infringes on the right to privacy and is not narrowly tailored to serve a compelling state interest; (2) is unconstitutionally vague; (3) violates Montanans' right to seek safety, health, and happiness by restricting access to a lawful medical procedure; and (4) violates the Montana Constitution's equal protection clause.[5]

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[5] As explained in the Complaint, HB 136's targeted attack on women's access to abortion also violates the Montana Constitution's guarantee of individual dignity. Compl. ¶ 70; *see also Armstrong*, ¶ 72 ("Respect for the dignity of each individual—a fundamental right, protected by Article II, Section 4 of the Montana Constitution—demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions."). The statute should also be enjoined on this ground.

1. *HB 136 Violates The Right To Privacy*

HB 136 cannot be reconciled with the Montana Constitution's right to privacy. *Armstrong*, ¶ 62. Because HB 136 prohibits certain pre-viability abortions, *supra*, at 3, "Montana's constitutional right to privacy is implicated," *Weems*, ¶ 19. The State must therefore demonstrate that the restriction is narrowly tailored to serve a compelling interest—meaning the law 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.*

Armstrong plainly controls here. In that case, the Montana Supreme Court held that the State may not ban pre-viability abortions. *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"); *see also id.* ("[T]he State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term."). In fact, the State's lawyers told them as much. *Supra*, at 2.[6]

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[6] The legislature's decision to ignore HB 136's constitutional infirmities is all the more glaring given that every federal appellate court faced with a pre-viability abortion ban (including ones with exceptions like those at issue here) has held it unconstitutional—despite applying the less protective standard set forth in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). *See, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019) (striking down 15-week ban with exceptions), *cert. granted in part sub nom. Dobbs v. Jackson Women's Health*, No. 19-1392, 2021 WL 1951792 (May 17, 2021); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) (striking down 6-week ban with exceptions); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down 6-week ban with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (striking down 12-week ban with exceptions), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1231 (9th Cir. 2013) (striking down 20-week ban, with exceptions), *cert. denied*, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996) (striking down 22-week ban with exceptions), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-69 (9th Cir.

But even if this Court were to consider the purported justifications for HB 136, the law is 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," there is widespread medical consensus that fetal pain is not possible before at least 24 weeks LMP. *See* McNicholas Aff. ¶¶ 37-38. Because HB 136 is not rooted in "bona fide" medical or scientific evidence, it is not narrowly tailored to any compelling state interest, and so violates Article II, Section 10 of the Montana Constitution.

2. *HB 136 Is Unconstitutionally Vague*

Although the Court need look no further than *Armstrong* to enjoin HB 136, the 20-week ban should be enjoined for the independent reason that it fails to give sufficient notice of the conduct the law purports to make a felony.[7] To be sure, "[t]he Legislature is not required to define every term it employs when constructing a statute." *State v. Martel* (1995), 273 Mont. 143, 150, 902 P.2d 14, 18. But the due process clause "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, 295, 198 P.3d 803, 806 (internal citations omitted). Plaintiffs have made a prima facie showing that HB 136 cannot meet this standard, because it "require[s healthcare providers] to speculate as to whether [their] contemplated course of action may be subject to criminal penalties," *City of Billings v. Albert*, 2009 MT 63, ¶ 16, 349 Mont. 400, 402, 203 P.3d 828, 831, leaving Plaintiffs dependent on the whims of those charged with enforcing the law, *see Martel*, 273 Mont. at 148-150, 902 P.2d at 18.

The discretionary judgments HB 136 mandates—each of which may well differ as between reasonable health care providers—simply do not provide the notice that the Montana Constitution requires, especially where a felony prosecution is at stake. Take the exception for a woman's

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1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630 (M.D.N.C. 2019) (striking down 20-week ban with exceptions), *affirmed on other grounds*, 1 F.4th 280, 284 (4th Cir. 2021), *as amended* (June 23, 2021). If these pre-viability laws could not be justified under the federal undue burden standard, HB 136 certainly fails the more rights-protective test set forth in *Armstrong*.

[7] HB 136 provides that "[a] person who purposely or knowingly performs or attempts to perform an abortion in violation of [this law] is guilty of a felony." HB 136 § 4.

health. *See* Banks Aff. ¶¶ 13-14. Whether a situation "*so complicates* the mother's medical condition that it *necessitates* the abortion" is inherently ambiguous, subjective, and subject to different (yet reasonable) opinions. *See id.* ¶¶ 14-15. So too for the determination of what procedures "in reasonable medical judgment" would "provide[] the best opportunity" for the *pre-viability* fetus to survive, and when the failure to provide an abortion would cause a "serious risk of substantial and irreversible physical impairment of a major bodily function." *See id.* ¶¶ 14, 17-18. To hinge criminal liability on such terms "not only permits, but requires the kind of arbitrary and discriminatory enforcement that the due process clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent." *State v. Stanko*, 1998 MT 321, ¶ 28, 292 Mont. 192, 974 P.2d 1132, 1136.

Stanko held that a similarly ambiguous statute was unconstitutionally vague. The phrase at issue read, in relevant part, "[a] person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed *no greater than is reasonable and proper* under the conditions existing." *Stanko*, ¶ 19 (emphasis added). The Court noted that whether an offense had occurred "will always be a question of judgment at the time based on the conditions at the time." *Id.*, ¶ 26. Just as in *Stanko*, HB 136 unconstitutionally leaves the determination of whether an abortion qualifies for the health exception as a "question of judgment" and does not comport with due process.[8]

3. *HB 136 Violates The Right To Seek Safety, Health, And Happiness*

Article II, Section 3 of the Montana Constitution protects the "inalienable right[]" to seek "safety, health and happiness in all lawful ways." *Armstrong*, ¶ 72. As the Montana Supreme

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[8] To the extent the bounds of the exceptions can be discerned at all, they are unconstitutionally narrow because they do not permit providers to use "appropriate medical judgment" in deciding when an abortion is necessary "for the preservation of the life or health of the mother." *See Stenberg v. Carhart*, 530 U.S. 914, 938 (2000); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (describing "medical judgment" as involving consideration "of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"). The definition of "serious health risk" to the pregnant woman, for example, does not allow abortions when necessary to avert death of the mother by suicide; treat serious but not immediately life-threatening health conditions; or address a severe fetal anomaly diagnosis. The same is true of the "medical emergency" exception. Beginning at 20 weeks LMP, a patient with a health-threatening medical condition may be prohibited from obtaining an abortion or have to delay the procedure until her condition worsens to the point where immediate action is necessary, and the abortion therefore meets the medical emergency exception's exacting requirements.

Court held in *Armstrong*, this provision protects the right "to make personal judgments affecting one's own health and bodily integrity without government interference" and "does not permit the government's infringement of personal and procreative autonomy in the name of political ideology." *Id.*, ¶¶ 72-73; *see also Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 23, 382 Mont. 256, 231, 368 P.3d 1131, 1166 ("In pursuing one's own health, an individual has a fundamental right to obtain and reject medical treatment."). Yet that is precisely what HB 136 seeks to do by taking away the right to pre-viability abortion guaranteed by the Montana Constitution. HB 136 thus violates Section 3 on the same basis that it violates the right to privacy.[9]

4. *HB 136 Violates The Equal Protection Clause*

Article II, Section 4 states that "[n]o person shall be denied the equal protection of the laws." This provision is more protective of individual rights than the Fourteenth Amendment. *See Cottrill v. Cottrill Sodding Serv.*, (1987) 229 Mont. 40, 42, 744 P.2d 895, 897. Strict scrutiny applies if the distinctions drawn by a law affect fundamental rights. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 450. Here, HB 136 unlawfully discriminates against women who choose to exercise their fundamental right to privacy by limiting access to constitutionally protected, pre-viability abortions, and particularly against women seeking abortions beginning at 20 weeks LMP. Further, the law discriminates against the providers who offer that constitutionally protected health care. For the reasons described above, this differential treatment cannot be justified by a compelling state interest. *See supra*, at 6-7; *see also Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *27 (1st Jud. Dist. May 19, 1995) (holding that a law violates the equal protection clause when "some women are excluded from benefits to which they are otherwise entitled solely because they seek to exercise [the] constitutional right" to an abortion).

B. HB 171 Is Unconstitutional

While HB 136 seeks to limit women's ability to exercise their right to an abortion *later* in pregnancy, HB 171 limits their ability to obtain an abortion *earlier* in pregnancy. Working together, the laws thus take aim at the full scope of abortion care the Montana Constitution

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[9] The other laws challenged here violate Section 3 for similar reasons. HB 140 inserts the State between women and their health care providers by elevating government-mandated shaming over medical judgments; and HB 171 greatly reduces access to (lawful) MABs. *See* Compl. ¶¶ 100, 125, 141-142, 154-160, 180-186.

guarantees—pushing women seeking abortion later into pregnancy and then cutting off access to abortion at an earlier gestational age. Yet even considered alone, HB 171 imposes a morass of medically unnecessary restrictions on MABs which, individually and collectively, limit women's ability to access abortions. It also violates the Montana Constitution's guarantees of privacy, due process, equal protection, and free speech, and should therefore be enjoined.

1. *HB 171 Violates Patients' Right To Privacy*

i. HB 171 Restricts Access To Lawful Abortions

As with HB 136, Plaintiffs have made a prima facie showing that HB 171 restricts women's right to pre-viability abortions in violation of the right to privacy. To start, Sections 5 and 7 infringe on patients' right to privacy by requiring that a provider conduct an extensive, in-person examination of the patient and obtain the patient's informed consent via a State-created form at least 24 hours before that same provider prescribes an MAB.[10] Section 10 then gives the State 60 days *after* HB 171's effective date to create and distribute the forms required by the law, which would appear to prevent providers from prescribing any MAB in Montana until the form is available. Because MAB is preferred by or medically indicated for some patients, this alone suffices to violate the right to privacy. Banks Aff. ¶ 23. But even after the State creates its mandatory forms, the consequences of these provisions for abortion access will be severe. Whereas some patients can currently have an MAB without traveling to a health center at all and others can do so by traveling to the health center closest to them, Sections 5 and 7 would require all patients to make *multiple* trips to a health center (which might be hundreds of miles away) over *multiple* days. *See* Banks Aff. ¶¶ 24-27.[11] Yet many patients who obtain MABs cannot afford the time and expense of travelling across a state as large as Montana to reach an abortion provider even once, much less two or more times. *See* Banks Aff. ¶ 25. Others face considerations like

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[10] Specifically, HB 171 provides that "[i]nformed consent to a chemical abortion must be obtained at least 24 hours before the abortion-inducing drug is provided to the pregnant woman" and, as part of that process, requires the patient to undergo an ultrasound. *See* HB 171 § 7(2), (5)(a). This ultrasound requirement independently violates the right to privacy because MABs can be safely provided without an ultrasound in certain circumstances, as PPMT's experience demonstrates. *See* McNicholas Aff. ¶¶ 51-52; Stahl Aff. ¶ 20. Requiring an ultrasound for every MAB thus interferes with the constitutional right to make health care decisions in consultation with a health care provider.

[11] Beyond functionally barring direct-to-patient MABs through the in-person examination requirements, HB 171 expressly prohibits the provision of abortion-inducing drugs via courier, delivery, or mail service. *See* HB 171 § 4.

intimate partner violence or mobility limitations that restrict their ability to do so. *See* Compl. ¶¶ 34, 37, 100. Further, given the scarcity of health centers and abortion providers, and the volume of patients seeking pre-viability abortions, it is unlikely an individual provider will be able to see the patient a second time 24 hours after "informed consent" is obtained, forcing patients to delay far longer than 24 hours. *See* Stahl Aff. ¶¶ 19-20. This additional delay, which could span weeks, may push patients past the timeframe for MAB. *See* Banks Aff. ¶ 26; *see also Planned Parenthood of Missoula v. State*, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *10-11 (1st Jud. Dist., Mar. 12, 1999) (noting that the scarcity of abortion providers in Montana means that "a 24-hour delay may well mean a delay of one to two weeks"). These provisions impose a mandatory delay disguised as "informed consent," which, as another Montana district court recognized, violates the state Constitution's privacy guarantee. *See Planned Parenthood of Missoula*, 1999 Mont. Dist. LEXIS 1117, at *22 (striking down a 24-hour mandatory delay law).

Sections 7(5)(f), (h), and (v) then infringe on the right to privacy by mandating that providers give their patients false information about "reversing" MABs. As numerous courts and trusted medical authorities like the American College of Obstetricians and Gynecologists and the National Academies of Science, Engineering, and Medicine have concluded, there is no evidence that MABs are reversible. *See* Banks Aff. ¶¶ 29-32; *see also Planned Parenthood of Tenn. & N. Miss. v. Slatery*, No. 3:20-CV-00740, 2021 WL 765606, at *14 (M.D. Tenn. Feb. 26, 2021) (describing information about possibility of abortion "reversal" as "untruthful and/or misleading"); *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."). Forcing providers to tell their patients false information about the possibility of reversal—and to direct them to a private website full of misinformation—distorts patient decisionmaking, risks patient safety, and undermines the informed consent process. Consistent with ethical informed consent practices, Plaintiffs counsel their patients that they must be firm in their decision to have an abortion before beginning an MAB. Banks Aff. ¶ 32. Sections 7(5)(f), (h), and (v) undermine this message, requiring Plaintiffs to simultaneously tell patients that the effects of MAB drugs can be reversed should the patient change her mind. This infringes on the right to privacy because, as *Armstrong* explained, a person makes medical decisions "largely upon her or his personal trust in the education, training, experience, advice, and professional integrity of the health care provider he or she has chosen." *Armstrong*, ¶ 58. The intimacy and necessity of that trust makes even more

serious "the infringement of personal autonomy and privacy that accompanies the government usurping, through laws or regulations which dictate how and by whom a specific medical procedure is to be performed, the patient's own informed health care decisions made in partnership with his or her chosen health care provider." *Id.*[12]

Section 5(2) also requires abortion providers to be "credentialed and competent to handle complications management," or have a contract with another practitioner credentialed to handle "complications." The law defines "complications" broadly, to include a plethora of conditions ranging from anxiety to sleep disorders to death. *See* HB 171 § 3(5); *see also* McNicholas Aff. ¶¶ 60-69. PPMT providers are, of course, trained in the risks associated with MAB and are able to recognize symptoms—in person or through telehealth visits—that require additional or acute care, directing patients to seek emergency care when needed. *See* Compl. ¶ 147; Banks Aff. ¶ 40. But no PPMT provider (and potentially no provider anywhere) has the capability to handle all the listed complications, meaning they must comply with the provision by contracting with another provider. Stahl Aff. ¶¶ 22-23; McNicholas Aff. ¶¶ 68-69. And given the law's broad, ambiguous language, it is difficult to imagine a contract that could cover the potential universe of complications, to say nothing of the hardship of finding a practitioner willing to enter into such an agreement. Stahl Aff. ¶ 22; Banks Aff. ¶¶ 41-42. The law thus effectively bars providers who are experienced and well-equipped to provide MAB from providing any abortions at all, without any medical justification.

As if imposing such hurdles to abortion access were not enough, Section 9 then imposes onerous, medically inappropriate reporting requirements that could expose the personal information of patients and providers, putting their safety at risk and chilling patients' ability to obtain pre-viability abortions. Most egregiously, the law requires that PPMT report the identity of the provider who dispensed the abortion-inducing drug and various patient identifiers, including the patient's county, state, country of residence, age, race, and number of previous abortions the patient has had. HB 171 § 9(2). Reports filed under the law must be made available to the public. HB 171 § 9(8). For patients, the risk of identification and the associated stigma—and for

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[12] HB 171 further attempts to discourage women from obtaining abortions on the basis of false medical advice regarding RH immunoglobulin, and arguably requires the provision of Rh immunoglobulin to women seeking MABs, even when this costly procedure is not medically necessary. *See* Compl. ¶ 100; Banks Aff. ¶ 33.

providers, the certainty—may chill their willingness to obtain or provide pre-viability abortion care. *See* Banks Aff. ¶¶ 45-46. This risk is especially acute for patients who live in less populated counties and/or are subject to intimate partner violence. *See id.* ¶ 45.[13]

ii. HB 171 Is Not Narrowly Tailored To Any Compelling State Interest

The State gives multiple justifications for HB 171's restrictions, but none suffice. Because the State's rationales are not rooted—as required by the Montana Constitution—in medically recognized, bona fide health risks, the law is not narrowly tailored to any compelling interest. *See Armstrong*, ¶¶ 59, 62.

The State first claims that HB 171 seeks to "protect[] the health and welfare of a woman considering an abortion." *See* HB 171 § 2. But this broad and ambiguous description cannot constitute a "narrowly defined instance[]" in which the State has a compelling interest in protecting pregnant women from a medically-acknowledged, bona fide health risk, as MAB is an extraordinarily safe treatment. *See Armstrong*, ¶ 59; McNicholas Aff. ¶ 14 (noting that the risks of the drugs used in MABs are similar in magnitude to the risks of taking commonly prescribed and over-the-counter medications). And because abortion is safer the earlier in pregnancy it is provided, laws like HB 171 that delay patients access to MAB undermine their health and welfare. *See* McNicholas Aff. ¶ 44.

The State also asserts that a provider should examine a pregnant woman prior to an MAB "to confirm the gestational age of the [fetus]." HB 171 § 2(2). But such an examination serves no medical purpose; peer-reviewed medical literature and PPMT's experience demonstrate that MABs can be provided in appropriate cases based on self-reported LMPs without any difference in complication rate. *See* McNicholas Aff. ¶¶ 49-51.[14]

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[13] The reporting requirements separately violate patients' constitutional right to informational privacy. *See Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶ 14, 355 Mont. 49, 55, 224 P.3d 1240, 1244; *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448 ("Medical records are quintessentially 'private' and deserve the utmost constitutional protection.").

[14] The State suggests an in-person exam is also necessary because a woman may have had a miscarriage at the time she presents for the abortion, and "the routine administration of an abortion-inducing drug following spontaneous miscarriage is unnecessary and exposes the woman to unnecessary risks associated with the abortion-inducing drug." HB 171 § 2(2). This is medically inaccurate; mifepristone and misoprostol are in fact used for medical management of miscarriage. *See* McNicholas Aff. ¶ 56.

The State next claims that a compelling interest in "reducing the risk that a woman may elect an abortion only to discover later, with devastating psychological consequences, that the woman's decision was not fully informed" supports the delays and deceptions the law mandates. HB 171 § 2(4). But there is no evidence to support the State's paternalistic suggestion that pregnant women are incapable of making informed decisions regarding their health care, nor that healthcare providers are currently providing inadequate information to their patients. And mandatory delays do not increase decisional certainty. *See* McNicholas Aff. ¶ 41.

The State further attempts to justify HB 171 by claiming its restrictions are necessary to ensure that women "receive[] comprehensive information on abortion-inducing drugs, including the potential to reverse the effects of the drugs if the woman changes the woman's mind, and that a woman submitting to an abortion does so only after giving voluntary and fully informed consent to the procedure." HB 171 § 2(5). But there is no evidence that MABs are reversible, and mandating the provision of false information undermines informed consent and harms the provider-patient relationship. *See supra*, at 11-12; *see also* McNicholas Aff. ¶¶ 57-58.

In a final attempt to justify the restrictions, the law asserts that HB 171 "adds to the sum of medical and public health knowledge." HB 171 § 2(6). Even assuming a genuine interest in improving public health knowledge is compelling, HB 171 is not tailored (let alone narrowly tailored) toward this goal.[15] Making public the identity of providing and referring clinicians adds nothing "to the sum of medical and public health knowledge." And collecting "complications" under an extremely broad rubric that includes normal, expected effects (such as "heavy bleeding") as well as later medical events that have nothing whatsoever to do with the abortion (such as "subsequent development of breast cancer") is a transparent attempt to drum up fear and misinformation, not "add to the sum of public health knowledge." McNicholas Aff. ¶¶ 59-67.[16]

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[15] As *Armstrong* held, the only State interests that can justify an abortion restriction are those arising out of the need 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. The State's broadly framed interest in "medical and public health knowledge" falls outside of this "narrowly defined instance[]" of permissible regulation, *id.*

[16] For reasons similar to those discussed in this section, and as explained further in the Complaint, HB 171 also violates the Montana Constitution's right to individual dignity. Compl. ¶¶ 94, 114, 133, 146.

2. *HB 171 Violates Montana's Equal Protection Clause*

HB 171 further violates the Montana Constitution because it imposes myriad requirements and limitations on MAB when it does not do so for medical procedures posing similar risks. It thus subjects women seeking MABs to additional travel, time, expense, and stress—to the point of precluding access for some women altogether—as compared to persons seeking analogous forms of medical care. For example, HB 171 does not impose the same provider qualification or public reporting requirements on childbirth. *See Armstrong*, ¶ 49 (suggesting that individuals who "choose[] to terminate [a] pre-viability pregnancy" are similarly situated to those who "cho[o]se to carry the fetus to term"); *see also* Compl. ¶¶ 144, 164 (noting that no such requirements attach to other forms of health care with similar risks). HB 171's disfavorable treatment of those persons is not narrowly tailored to serve any compelling state interest—as discussed above, there is no medical reason for requiring pregnant women seeking MABs to endure the additional requirements that HB 171 uniquely imposes on them. As a result, although some pregnant women may continue to put their "personal trust in the education, training, experience, advice, and professional integrity of the[ir] health care provider," *id.* at 384, women seeking to exercise the fundamental right to a pre-viability abortion are denied that opportunity. Such differential treatment cannot be squared with the Equal Protection Clause. *See Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *27.[17]

3. *HB 171 Violates Montana's Free Speech Clause*

Article II, Section 7 of the Montana Constitution states that "[n]o law shall be passed impairing the freedom of speech or expression." Although distinct from the protections afforded by the First Amendment, the Montana Constitution offers the same speech protections as does the federal constitution. *See City of Helena v. Krautter* (1993), 258 Mont. 361, 363-34, 852 P.2d 636, 638. As a result, laws compelling speech and content-based regulations of speech are both subject to strict scrutiny and presumptively invalid. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-98 (1988); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("[F]reedom of speech prohibits the government from telling people what they must say.").

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[17] HB 171 also subjects providers of abortion care to numerous restrictions not imposed on other medical practitioners. *See supra*, at 10-15. These distinctions—which ignore how safe MAB is relative to other medical procedures, *supra* at 13—violate Plaintiffs' right to equal protection under the law.

HB 171 violates the right to free speech guaranteed by the Montana Constitution because it compels speech from providers, even when that information is false and the provider objects to the content of that speech. The law requires providers to give "information about the possibility of reversing the effects" of the MAB, including that information on "revers[ing] the effects of an abortion obtained through the use of abortion inducing drugs is available at www.abortionpillreversal.com" or by calling "(877) 558-0333 for assistance in locating a medical professional who can aid in the reversal of an abortion." HB 171 § 7(5)(f), (v). As discussed above, these statements are not supported by medical evidence, and thus direct the provider to make specific representations that are false. *See* McNicholas Aff. ¶¶ 57-58. Further, the law requires providers to endorse a particular (private, unverified) source of medical information advocating an unproven treatment, regardless whether the providers believe that information accurate or appropriate for their patients. These requirements force providers to choose between their ethical obligation to provide accurate medical information to their patients and a felony charge under HB 171 § 11. *See* Banks Aff. ¶¶ 30, 32. Because "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," these provisions are unconstitutional. *Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, ¶ 47, 198 P.3d 284, 296 (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)).

4. *HB 171 Is Void For Vagueness*

HB 171 is void for vagueness because it leaves many of its key provisions so vague that ordinary people would not be able to understand what conduct is prohibited, despite punishing violations with up to 20-year prison terms. For example, HB 171 §5(3) requires providers to make "all reasonable efforts" to ensure that a patient returns for a follow-up appointment but does not contain any explanation of what "all reasonable efforts" means. HB 171 §§ 5(2), 3(5), and 3(10) suffer from similar problems. They require that an MAB provider "be credentialed and competent to handle complications," but HB 171 § 3(5) defines "complications" so broadly—including a range of conditions from anxiety to sleep disorders to death—that a provider would lack fair notice of when he or she would be subject to criminal liability for violating the law. And the law does not even attempt to define what it means to "be credentialed and competent to handle" this extensive, amorphous category of matters. Just as the speed limit statute at issue in *Stanko* was unconstitutionally vague because of the lack of clarity around what was "reasonable and proper,"

subjecting persons to the whims of those charged with enforcing the law, HB 171's vagueness violates the Montana Constitution.

C. HB 140 Is Unconstitutional

HB 140 compels providers to tell all abortion patients—whether they are seeking MAB or a procedural abortion—that they may view an active ultrasound and ultrasound image of the fetus and listen to the "fetal heart tone." It then requires that patients sign a State-created certification form that "indicates whether the woman viewed the active ultrasound or ultrasound image or listened to the fetal heart tone." HB 140 § 1. Like HB 171, HB 140 requires providers to use a "certification form developed by the [State]" but unlike HB 171, it imposes no timeframe in which the State must create the form—meaning that if the State does not create the form by the law's effective date, it is not clear how providers, including PPMT, will be able to provide *any* abortions in Montana. These requirements violate the constitutional rights to privacy, equal protection under the law, and free speech, because the State lacks a compelling interest in mandating such an intrusion on the provider-patient relationship.

1. *HB 140 Violates Montana's Right To Privacy*

HB 140 precludes providers from making decisions according to their best medical judgment. Plaintiffs do not ask every patient if she wants to view an active and still ultrasound, and to listen to any audio, which is required by the new law. Banks Aff. ¶ 50. This directive has no medical purpose and serves only to stigmatize patients. *Id.* ¶¶ 51-52. Moreover, asking patients to sign a State-developed certification form indicating that they chose not to view an ultrasound or listen to fetal activity may further stigmatize patients with no medical reason and discourage them from seeking abortion care. *Id.* ¶ 52.

These requirements infringe on patients' right to procreative autonomy and the provider-patient relationship. By overriding providers' judgments and forcing patients to sign State-created forms, HB 140 "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 right to privacy. *Armstrong*, ¶ 58.

No compelling interest justifies these mandates. The State cannot demonstrate an "obligation to legislate or regulate 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" because

there is no conceivable medical reason to force providers to tell patients they may see and hear an ultrasound in all circumstances. *Armstrong*, ¶ 59. And the law's own exceptions highlight its lack of narrow tailoring; if there were a medical justification for forcing doctors to make such an offer, there would be no reason to except any abortions outside of medical emergencies in which there was no time for an ultrasound.

2. *HB 140 Violates The Montana Constitution's Free Speech Clause*

HB 140 also violates Montana's right to free speech. The law both compels providers to convey certain information in the State's language and regulates providers' speech on the basis of its content. In other words, the law "requires [a provider] to change the content of his speech or even to say something where he would otherwise be silent." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (citing *Riley*, 487 U.S. at 795). And as explained above, there is simply no legitimate justification for these requirements; telling patients they may view and listen to an active ultrasound when a provider deems it against the patient's best interests does nothing to protect a woman's health. The only conceivable reason for the ultrasound offer requirement is to shame or pressure women who seek to exercise a right protected by the Montana Constitution to abandon that right.

3. *HB 140 Violates Montana's Right To Equal Protection*

Finally, HB 140 violates the Montana Constitution's equal protection clause by discriminating against people seeking to exercise their right to seek pre-viability abortions. As noted above, strict scrutiny applies if the distinctions drawn by a law affect fundamental rights. *Snetsinger*, ¶ 17. That is the case here. HB 140 targets patients who seek to exercise their fundamental right to procreative autonomy and deprives those women of the honest medical advice of their health care providers, whereas other pregnant patients retain access to the full benefits of the medical partnership protected by the right to privacy. This differential treatment contravenes Montana's Equal Protection Clause. *See Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *27; *see also supra*, at 9, 15. Thus, HB 140 must be narrowly tailored to serve a compelling government interest. For the reasons described above, *see supra*, at 17-18, it is not. Instead, the law is transparently designed to discourage the exercise of the fundamental right it targets.[18]

[18] For these reasons and as explained further in the Complaint, HB 140 also violates the Montana Constitution's right to individual dignity. *See* Compl. ¶ 186.

II. Plaintiffs And Their Patients Will Suffer Irreparable Harm Absent A Preliminary Injunction

Although Plaintiffs have made more than the prima facie showing of a constitutional violation necessary for an injunction to issue, preliminary relief should issue for a second, independent reason: absent an injunction blocking the laws challenged here, Plaintiffs and their patients will be irreparably harmed. Courts in this state have long recognized that violations of constitutional rights—in particular to privacy and free speech—cause irreparable harm. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 286 P.3d 1161, 1165 ("[T]he loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."); *Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction."). If allowed to take effect, the challenged laws will deprive Plaintiffs and their patients of their rights, as well as causing them irreparable medical, emotional, and social harm.

Consider first the injuries to Plaintiffs' patients if the unconstitutional legislation goes into effect during the pendency of this case. Absent preliminary relief, HB 136 will preclude women from obtaining abortions beginning at 20 weeks LMP but before viability. Patients will thus be denied a fundamental right and forced to carry their pregnancies to term, travel out of state (if they can afford to do so), or attempt to self-induce, which often includes dangerous means. There could hardly be a clearer case of irreparable injury. HB 171 then takes aim at the (common, exceedingly safe) MABs that make up the vast majority of abortions in Montana. The numerous Montana women who seek to obtain MABs through direct-to-patient visits would be forced to travel hundreds of miles for a series of visits in which they would be subjected to a battery of unnecessary procedures and false health information. Indeed, any woman seeking an MAB would need to incur additional travel, stress, expense, and potential risk to her health because of HB 171's efforts to turn a straightforward prescription into a state-mandated, multi-trip, days-long ordeal. These significant restrictions on access to lawful abortions indisputably infringe on patients' right to privacy, and thus cause irreparable harm.

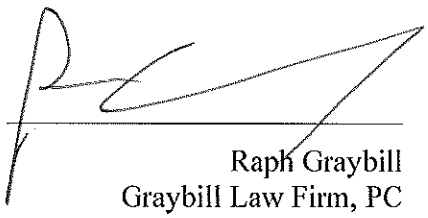
And those are just the injuries patients stand to suffer. Providers, to give one of the more egregious examples, would be forced by HB 171 to provide false and harmful information about supposed abortion "reversals," while counseling their patients—who "typically seek[] out and may consent to the most risky and intimate invasions of body and psyche, largely upon her or his

personal trust in the education, training, experience, advice, and professional integrity of the health care provider he or she has chosen," *Armstrong*, ¶ 58. And it will subject providers to the risk of felony prosecution if they fail to comply with the "reversal" mandate or any of HB 171's other medically unnecessary requirements. HB 140 imposes further harms, compelling Plaintiffs to speak even when, in their best medical judgment, they should remain silent, and dictating what must be said. That is the prototypical violation of the right to free speech, and irreparably injures Plaintiffs.

CONCLUSION

Plaintiffs have made a prima facie showing that their and their patient's constitutional rights will be violated absent an injunction, and that Plaintiffs and their patients will suffer clear, irreparable harm if preliminary relief is not granted. Accordingly, this Court should issue an order to show cause why a preliminary injunction should not be granted and, following a hearing, enter a preliminary injunction.

Respectfully submitted this 16th day of August, 2021.



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