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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA, and SAMUEL DICKMAN, 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, the MONTANA DEPARTMENT OF PUBLIC HEALTH & HUMAN SERVICES, and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health & Human Services, Defendants.	Cause No.:_____ Judge: _____ **PLAINTIFFS' BRIEF IN SUPPORT OF *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION & MOTION TO SHOW CAUSE**

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INTRODUCTION

To avoid irreparable harm, Plaintiffs seek a temporary restraining order to prevent House Bill 721 ("HB 721"), a pre-viability abortion ban, from taking effect until this Court can consider whether a preliminary injunction should issue. It takes effect immediately upon the Governor's signature, which could occur at any moment.

On April 7, 2023, the Montana Legislature enacted HB 721, which prohibits performing an abortion using dilation and evacuation ("D&E")—by far the safest and most common method for performing pre-viability abortions after approximately 15 weeks of pregnancy—and subjects health care providers to strict criminal penalties, including a five-year prison term. HB 721 is the latest salvo in the Legislature's ongoing assault on Montanans' right to seek safe and lawful pre-viability abortions—a right guaranteed by the Montana Constitution. *Armstrong v. State*, 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364. Just last year, the Montana Supreme Court affirmed a preliminary injunction against a ban on abortions at 20 weeks after the first date of a patient's last menstrual period, because restrictions on abortion services "interfere with the fundamental right to privacy" guaranteed by the Montana Constitution unless they satisfy strict scrutiny. *See Planned Parenthood of Montana v. State by & through Knudsen*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301. Like the enjoined 20-week ban, HB 721's 15-week ban cannot survive that demanding test.

This case—and the immediate relief Plaintiffs seek—is squarely controlled by the Montana Supreme Court's decision in *Armstrong*. More than two decades ago, the Montana Supreme Court held 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, ¶ 14. That right to privacy "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.* Because HB 721 bans the safest and most common pre-viability abortion procedure after approximately 15 weeks of pregnancy, it contravenes a fundamental right guaranteed by the Montana Constitution and recognized in *Armstrong*.

The Montana Legislature well knew that HB 721 violates the Montana Constitution. Their own lawyers told them so, warning that: "Given Montana's broad right to privacy and [*Armstrong*], HB 721 may raise a constitutional conformity issue to the extent that . . . HB 721's prohibition on dismemberment abortion procedures infringes upon a woman's right to seek and obtain a pre-viability abortion." *See* Legal Review Note, House Bill 721 (February 17, 2023).

Planned Parenthood of Montana and one of its health care providers, Dr. Samuel Dickman, move to temporarily restrain and preliminarily enjoin the State of Montana, by and through Attorney General Austin Knudsen, the Montana Department of Public Health and Human Services ("DPHHS"), and DPHHS Director Charlie Brereton from enforcing these laws. Absent emergency injunctive relief, Montanans will be irreparably harmed by denial of their constitutionally protected right to access pre-viability abortion care and will suffer irreversible health consequences. This Court should therefore grant Plaintiffs' motion.

STATEMENT OF FACTS

A. Plaintiffs Provide Abortion Care Using D&E Procedures Banned By HB 721

Planned Parenthood of Montana ("PPMT") has served for decades as the largest provider of reproductive health care services to Montanans, especially low-income Montanans. Compl. ¶ 9. PPMT operates five health centers throughout Montana, all staffed with experienced clinicians.

Each of PPMT's health centers offers abortions, either through medication abortion or procedural abortion (up to 21 weeks and 6 days from the first date of a patient's last menstrual period ("LMP")). Compl. ¶¶ 8, 11. PPMT provides dilation and evacuation ("D&E") abortion procedures between approximately 15 to 21.6 weeks LMP. PPMT's D&E procedures are all performed prior to viability. Compl. ¶ 11.

Dr. Samuel Dickman, PPMT's Chief Medical Officer, performs D&E procedures in Montana. Compl. ¶ 11. But for the abortion restrictions challenged here, PPMT's and Dr. Dickman's patients would continue to be able to access, when medically appropriate, pre-viability D&E abortions from approximately 15 weeks to 21 weeks and 6 days LMP. Compl. ¶ 11.

B. D&E Abortions are the Safest and Most Common Method of Abortion After Approximately 15 Weeks LMP

D&E procedures are safe and effective. During the second trimester, which begins at approximately 14 weeks LMP, the vast majority of abortions performed nationally use the D&E method. Compl. ¶3. The American College of Obstetrics and Gynecology explains that the D&E procedure is "evidence-based and medically preferred because it results in the fewest complications for women compared to alternative procedures" available at the same stage of pregnancy. Compl. ¶ 27. The procedure involves the removal of the fetus and other products of conception from the uterus using instruments, such as forceps, in conjunction with sometimes suction. Compl. ¶ 26. Complications occur in only 0.05-4% of D&E abortions. The National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 63 (2018) (compiling medical literature on safeness of D&E abortions).

Starting at approximately 15 weeks LMP, D&E is the only abortion method available in an outpatient setting in Montana, as is the case in the United States more generally. Compl. ¶ 26. HB 721 bans all D&E abortion procedures, absent a very narrow exception for medical emergencies.

HB 721 § 3. Although HB 721 does not use medical terms and instead refers to "dismemberment abortion," its definition plainly prohibits D&E procedures. HB 721 § 2(4). Under HB 721, providers may only perform D&E abortions when they are "necessary to preserve the life of a pregnant woman whose life is endangered . . . or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function." HB 721 § 2(9). In all other instances, HB 721 criminalizes the performance of D&E procedures, classifying the procedure as a felony that subjects physicians to a $50,000 fine and a minimum imprisonment term of five years. HB 721 § 3(2). By banning the safest, most common, and most accessible abortion procedure after approximately 15 weeks of pregnancy, the law effectively operates as a ban on abortions after approximately 15 weeks LMP.

LEGAL STANDARD

Due to recent legislation (2023 Senate Bill 191, or "SB 191"), as of March 2, 2023, "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Section 27-19-201, MCA (as amended by SB 191); s*ee also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard," and "closely follow United States supreme court case law." Section 27-19-201, MCA (as amended by SB191). The new federal-style injunction standard is designed to replace Montana's statutory

preliminary injunction and TRO standard. The standard for issuing a preliminary injunction and a TRO operate on the same four-part, federal-style test. *See* SB 191, §§ 1 and 3.[1]

ARGUMENT

I. HB 721 Is Plainly Invalid Under *Armstrong*–Plaintiffs Are Likely to Succeed on the Merits

More than twenty years ago, the Montana Supreme Court held in *Armstrong* that the State may not ban pre-viability abortions. *See Armstrong*, ¶ 49. As the *Armstrong* Court explained, 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." *Id.* And "the 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." *Id.* Just last year, the Montana Supreme Court applied *Armstrong* in concluding that a law "banning pre-viability abortions beginning at twenty weeks LMP" violates "patients' fundamental right to privacy." *Planned Parenthood of Montana*, ¶ 11. In so doing, it declined to revisit *Armstrong*'s holding in light of separate developments in federal privacy law. *Id.*, ¶ 20 n.4 ("[W]e do not address the State's argument for overruling *Armstrong*"); *see also Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 11, 409 Mont. 330, 514 P.3d 1062 ("The Montana Constitution contains an explicit right to privacy provision . . . The protection afforded by this right exceeds that provided

[1] Although House Bill 695 alters the standard for seeking TROs without notice, that law does not include an effective date, and as such, will be effective on October 1, 2023. *See* MCA 1-2-201. Likewise, changes to certain TRO-related dates in Senate Bill 134 do not have an effective date either, and thus will be effective on October 1, 2023 as well.

by the federal constitution and, because it is found in the Constitution's Declaration of Rights, is a fundamental right." (citing *Armstrong*, ¶ 34)).

HB 721, which bans the most common and safest abortion method performed even earlier than the ban at issue in the 2022 case, is plainly unconstitutional. Indeed, the State's own lawyers told the Legislature as much. *See* Legal Review Note, House Bill 172 (February 17, 2023). Citing to *Armstrong*, the Legislature's legal counsel concludes, "Given Montana's broad right to privacy and [*Armstrong*], HB 721 may raise a constitutional conformity issue to the extent that . . . HB 721's prohibition on dismemberment abortion procedures infringes upon a woman's right to seek and obtain a pre-viability abortion." *Id.* It does.

HB 721 is effectively a ban on abortion at approximately 15 weeks of pregnancy, well before fetal viability. HB 721 prohibits D&E abortions, which account for the vast majority of abortions performed after approximately 15 weeks of pregnancy. Compl. ¶ 23. HB 721 therefore prohibits pre-viability abortions, and "Montana's constitutional right to privacy is implicated," *Weems v. State by & through Fox*, 2019 MT 98, ¶ 19, 395 Mont. 350, 363, 440 P.3d 4, 13 ¶ 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.

In enacting HB 721, the Legislature did not even purport to justify the law as furthering a compelling state interest. HB 721 instead proclaims that HB 721 "must be sustained if there is a rational basis on which the Legislature could have thought that it would serve legitimate state interests." HB 721 at p. 1. That is not the law in Montana. Unless a pre-viability abortion ban is *necessary* to protect patients from a bona fide health risk, "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." *Armstrong,* ¶ 59; *Planned Parenthood of Montana*, ¶ 20 (when a "challenged law[] restrict[s] access to abortion services," strict scrutiny applies).

HB 721 identifies no such bona fide health risk. Nor could it. Overwhelming medical evidence shows that D&E procedures are very safe, with only 0.05% to 4% of procedures resulting in complications. *See supra* pp. 4-5; *see also* Cassing Hammond & Stephen Chasen, *Dilation and Evacuation*, in MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY: COMPREHENSIVE ABORTION CARE 158 (Maureen Paul et al. eds., 2009); Am. Coll. of Obstetricians & Gynecologists, Practice Bulletin No. 135: *Second Trimester Abortion*, 121(6) Obstetrics & Gynecology 1394, 1394, 1406 (2013). As the Kansas Supreme Court recently noted, a D&E procedure is the "method for performing a second-trimester abortion that is the safest in most cases." *Hodes & Nauser, MDs, P.A. v. Schmidt,* 440 P.3d 461, 500 (2019). Therefore, far from being necessary to preserve the health and welfare of patients, HB 721 undermines patient welfare by subjecting them to higher risk medical procedures to terminate their pregnancies and will deprive some Montanans of the ability to obtain an abortion entirely. Compl. ¶ 41; *Hodes*, 440 P.3d at 466 (holding that D&E ban "thwarts" state's interest in protecting women's health by "bann[ing] the most common, safest [abortion] procedure"). In depriving individuals of the ability to determine the best health care option along with their providers, the statute impermissibly interferes with the provider-patient relationship.

The bill itself contains *no* actual evidence that D&E procedures present a bona fide health risk, nor could it. The bill presents only two studies, neither of which support such a claim. HB 721 at 2. One study cited in the bill merely confirms the uncontroversial proposition that risk

factors associated with abortion increase with gestational age—it does not conclude that D&E procedures are unsafe. *See* Linda A. Bartlett, et. al., *Risk Factors for Legal Induced Abortion–Related Mortality in the United States*, 103(4) Obstetrics & Gynecology 729-737 (2004). And even then, the study's own data demonstrates that the mortality percentage for abortions performed between 13-20 weeks is exceptionally low: between 0.0017% to 0.0034%. *Id.* at 733. The other citation in the bill—an article published by the Charlotte Lozier Institute, a group of unabashed anti-abortion advocates—is even further afield. *About Lozier Institute*, https://lozierinstitute.org/about/ ("Charlotte Lozier Institute advises and leads the pro-life movement … We leverage … research to educate policymakers, the media, and the public on the value of life from fertilization to natural death."). As a threshold matter, that article is neither peer-reviewed nor published in an accredited medical journal. Furthermore, it does not even contain findings regarding the risks associated with *any* abortion procedures, let alone D&E procedures specifically; it merely discusses socioeconomic factors that cause individuals to seek abortions later in pregnancy. *See* Elizabeth Ann M. Johnson, *The Reality of Late-Term Abortion Procedures*, Charlotte Lozier Institute (Jan. 20, 2015). The bill's inability to marshal *any* evidence that D&E poses health risks exposes HB 721 for what it is: a thinly veiled ban on abortions after approximately 15 weeks of pregnancy.

II. The Remaining Factors Weigh in Favor of Immediate Relief

The remaining injunction factors weigh decidedly in Plaintiffs' favor. *First*, Plaintiffs and their patients will suffer irreparable harm—violations of their constitutional rights and irreversible health complications—if HB 721 is not enjoined. Second, the balance of equities tips heavily in Plaintiffs' favor because the State suffers no harm from allowing patients to receive safe and effective health care. *Third and finally*, a temporary restraining order would serve the public

interest by vindicating the constitutional rights of Plaintiffs' patients, and ensuring that Montanans have access to the safest methods of modern medical care.

Irreparable Injury. Plaintiffs and their patients are certain to suffer irreparable harm in the absence of preliminary relief. *Armstrong v. State*, 1999 MT 261, ¶ 13, 296 Mont. 361, 367, 989 P.2d 364, 370 ("Plaintiff health care providers have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing."). HB 721 will take effect immediately upon the Governor's approval, which could happen at any moment. Unless the State is enjoined from enforcing HB 721, individuals seeking abortions in Montana after approximately 15 weeks of pregnancy, including Plaintiffs' patients, will face irreparable, immediate injuries to their constitutional rights and to their health and safety. It is well-settled that the deprivation of constitutional rights—including the right to privacy—is itself irreparable harm. *See Planned Parenthood Montana,* ¶ 60 (20-week abortion ban results in irreparable injury by infringing on the right of privacy); *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."); *Weems*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms … unquestionably constitutes irreparable injury."). Absent preliminary relief, HB 721 will prevent Montanans from accessing the safest and most common form of pre-viability abortion available after approximately 15 weeks of pregnancy, a right of access guaranteed by the Montana Constitution. Furthermore, Plaintiffs' patients face irreparable harm to their health. Montanans may be forced to travel out of state to attempt to obtain an abortion (if they can afford to do so),

attempt to self-induce an abortion without medical assistance at potential risk to their health, or carry their pregnancies to term against their will and with all the attendant risks of a full-term pregnancy and childbirth. Compl. ¶ 41. Plaintiffs themselves also face severe criminal penalties under the law for continuing to provide evidence-based medical care, absent immediate relief from the Court.

Balance of Equities & Public Interest. The remaining factors—balance of equities and public interest—also weigh heavily in Plaintiffs' favor. These factors "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). As to the balance of equities, Plaintiffs and their patients face immediate irreparable harm absent preliminary relief, while the State will not be harmed by the issuance of an injunction that preserves the status quo. At the outset, Defendants have no legitimate interest in enforcing a law that the Legislature's own lawyers concede is unconstitutional. *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) ("The 'government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented.'") (citation omitted); *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (holding that government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations"). The status quo protects the ability of Plaintiffs and their patients to make evidence-based medical decisions free from government intervention, consistent with the values of privacy, bodily autonomy, and individual dignity secured by the Montana Constitution's Declaration of Fundamental Rights. *Armstrong*, ¶ 59 ("[T]he right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is 'deeply rooted in this Nation's history and tradition.'") (quoting *Moore v. City of*

E. Cleveland, 431 U.S. 494 (1977)). The State, by contrast, loses nothing by way of immediate relief preserving the status quo, given that there is no bona fide health risk.

The public interest in preserving the status quo and in ensuring access to safe, constitutionally protected health care services pending adjudication of a preliminary injunction is strong. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted); *see also Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("'[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the . . . law, especially when there are no adequate remedies available.'" (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)). Here, granting a temporary restraining order followed by a preliminary injunction will serve the public interest by ensuring that Montanans continue to have access to constitutionally protected abortions and safe, effective medical care. Injunctive relief would also allow Montanans to make private medical decisions with their health care providers free from government interference or the specter of criminal penalties.

III. ***Ex Parte* Relief Is Justified**

Plaintiffs seek an *ex parte* TRO as contemplated by § 27-19-315, MCA. Plaintiffs have provided notice to all Defendants on April 10, 2023. However, the law's immediate effective date does not allow meaningful time for the Defendants to respond before Plaintiffs and their patients begin suffering irreparable injury. Allowing for a briefing schedule as contemplated by the Rules of Civil Procedure, followed by a hearing, will not conclude in time to prevent irreparable harm caused by implementation of HB 721, which the Governor may bring into effect at any moment. Irreparable injury will result unless the status quo is maintained until this Court can conduct a show cause hearing.

CONCLUSION

Plaintiffs are likely to prevail on the merits of their claim that HB 721 violates the Montana Constitution's right to privacy. Plaintiffs have also demonstrated that they and their patients will suffer clear, irreparable harm if preliminary relief is not granted. The balance of equities and public interest weigh in favor of granting preliminary relief. Accordingly, this Court should issue a temporary restraining order enjoining enforcement of HB 721, and set a hearing at which time Defendants must show cause why a preliminary injunction should not issue during the pendency of this action.

Respectfully submitted this 10th day of April, 2023.

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