

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

Michelle Nicole Diamond*
Alan E. Schoenfeld*
Rishita Apsani*
Sean Chang*
Rachel Craft*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
michelle.diamond@wilmerhale.com
alan.schoenfeld@wilmerhale.com
rishita.apsani@wilmerhale.com
sean.chang@wilmerhale.com

Peter Kurtz*
Wilmer Cutler Pickering Hale and Dorr LLP
17th Street Plaza, 1225 17th St Suite 2600
Denver, CO 80202
(720) 274-3135
peter.kurtz@wilmerhale.com

Arjun K. Jaikumar*
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000
arjun.jaikumar@wilmerhale.com

Melissa Cohen*
Dylan Cowit*
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
(212) 541-7800
melissa.cohen@ppfa.org
dylan.cowit@ppfa.org

Diana O. Salgado*
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Ste. 300
Washington, DC 20005
(202) 973-4862
diana.salgado@ppfa.org

Attorneys for Plaintiffs

** Motions for Pro Hac Vice Admission
Forthcoming*

**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: _____

VERIFIED COMPLAINT

Planned Parenthood of Montana (“PPMT”) and Dr. Samuel Dickman, M.D. (collectively, “Plaintiffs”) bring this Verified Complaint against the State of Montana, the Montana Department of Public Health and Human Services (“DPHHS”), and Director Charlie Brereton, in his official capacity as Director of DPHHS, 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 against 2023 House Bill 721 (“HB 721” or “the D&E Ban”), an unconstitutional law enacted by the Montana Legislature. Plaintiffs also seek a temporary restraining order and preliminary injunctive relief in order to preserve the status quo and prevent immediate and irreparable harm.

2. HB 721 bans abortion using the procedure known as dilation and evacuation (“D&E”). *See* HB 721, 2023 Leg. Reg. Sess. (Mont. 2023) (to be codified in Mont. Code Ann. tit. 50, ch. 20) (attached hereto as Exhibit 1).

3. D&E is the safest and most common method of abortion after approximately 15 weeks after the first day of a woman’s last menstrual period (“LMP”), and the only method offered in an outpatient setting in Montana.¹ HB 721 is effectively a ban on abortion at 15 weeks LMP and bans pre-viability abortions.

4. The D&E Ban clearly violates the fundamental right to privacy guaranteed by the Montana Constitution. “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*

¹ Plaintiffs use “women” as shorthand for people who are or may become pregnant, but people of other gender identities, including transgender men and nonbinary and gender-nonconforming people, may also become pregnant, seek abortion services, and be harmed by the laws.

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. The Montana Legislature’s own attorneys concluded that HB 721 violates the Montana Constitution. *See* HB 721 Legal Review Note (“Given Montana’s broad right to privacy and the foregoing precedent [of *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[.]”) (attached hereto as Exhibit 2).

6. HB 721’s prohibition on abortions using the D&E method will take effect immediately, as soon as it is signed by the Governor. HB 721 § 11(1).

7. To avoid irreparable harm from this constitutional violation, Plaintiffs seek declaratory and injunctive relief against the enforcement of HB 721.

PARTIES

A. Plaintiffs

8. 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.²

9. PPMT provides clinical, educational, and counseling services. It is the largest provider of reproductive health care in Montana, especially for low-income Montanans, and serves more than 11,000 people annually. The services that PPMT provides include pregnancy diagnosis

² The Billings Heights health center has been closed since late December 2021 due to ongoing repairs stemming from a burst pipe. Patients are referred to other PPMT health centers or other providers when they call seeking medical services at the Billings Heights health center during its temporary closure. The Billings Heights health center will reopen once the repairs are complete.

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.

10. 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 721; and on behalf of its patients seeking abortions.

11. Plaintiff Samuel Dickman, M.D., is a physician licensed to practice medicine in Montana and PPMT's Chief Medical Officer, with extensive experience providing primary care and reproductive health care, including providing and supervising the provision of abortions. Dr. Dickman sues on his own behalf and on behalf of his patients seeking abortions. At PPMT, Dr. Dickman provides procedural abortions, including using the D&E method beginning at approximately 15 weeks LMP through 21 weeks 6 days (or 21.6 weeks) LMP. But for HB 721, Dr. Dickman and PPMT would continue to provide abortions using the D&E method through 21.6 weeks LMP.

B. Defendants

12. The State of Montana ("the State") 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 721.

13. 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 721 unless restrained by this Court. Knudsen is sued in his official capacity.

14. DPHHS is an agency of the State of Montana that is subject to and bound by the laws and Constitution of the State of Montana. Mont. Const. art. II, §§ 9, 18. DPHHS has responsibility for implementing provisions of HB 721 and has authority to bring civil actions for violations of HB 721. HB 721 §§ 5(4), 8.

15. Charlie Brereton is the Director of DPHHS. Director Brereton is the agency's chief executive officer and is responsible for implementing and enforcing provisions of HB 721. Mont. Admin. R. 37.1.101; HB 721 §§ 5(4), 8. Brereton is sued in his official capacity.

JURISDICTION AND VENUE

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

17. 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.

18. Venue is appropriate pursuant to § 25-2-126(1) MCA, because the State of Montana is a Defendant. Additionally, PPMT operates a health center and DPHHS is located in Helena, Lewis and Clark County.

STANDING

19. Plaintiffs have standing to bring the claims asserted in this Verified Complaint because the challenged laws infringe on fundamental rights under the Montana Constitution.

20. “[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*, ¶¶ 8-13); *See id.*, ¶ 14 (holding that abortion provider plaintiffs who “are impacted by the statute” have standing to challenge it).

FACTUAL ALLEGATIONS

A. Abortion Care

21. Abortion is one of the safest medical procedures in the United States and is markedly safer than carrying a pregnancy to term and giving birth. Nationwide, one in five pregnancies ends in abortion.³ About one in four American women will have an abortion by the time she reaches age 45.⁴

22. Abortion patients decide to end pregnancies for a variety of reasons, including familial, medical, financial, and personal ones. Some 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.

23. As in the nation as a whole, the vast majority of abortions in Montana are performed during the first trimester of pregnancy, up to approximately 13 weeks 6 days LMP.⁵ Nevertheless, a significant number of Montanans seek abortions between 14 and 21.6 weeks LMP.

³ 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.

⁴ 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).

⁵ While there is no hard and fast medical cutoff, the first trimester is typically understood to be the first 13 weeks LMP. See Am. Coll. of Obstetricians & Gynecologists, *How Your Fetus Grows During Pregnancy* (Apr. 2018). The second trimester spans approximately 14 through 27 weeks LMP, and the third trimester then runs from 28 weeks to delivery, which typically happens around week 40. *Id.*

24. Patients who seek abortion during the second trimester may do so due to delays in suspecting and testing for pregnancy; delays in obtaining funds necessary for the procedure and related expenses (e.g., travel, childcare, lost wages); medical conditions requiring hospital referral, and delays in obtaining a referral; because the identification of most major anatomic or genetic anomalies in the fetus occurs in the second trimester; and because of the difficulties locating and traveling to a provider.⁶ The geographic size of Montana and its long winters make travel particularly difficult for patients, and it is common for patients to travel six to eight hours round trip to visit PPMT's health centers.

25. During the first trimester of pregnancy, there are two types of abortion: medication and procedural.⁷ A medication abortion, which is currently available up to 11 weeks LMP in Montana, typically involves taking two types of medication (pills), usually one day apart. Procedural abortions in the first trimester are performed by dilating (opening) the cervix and using suction to remove the uterine contents.

26. Starting at approximately 15 weeks LMP, suction alone may no longer be sufficient to perform a procedural abortion. Providers may thus begin using the D&E method, which involves the removal of the fetus and other products of conception from the uterus using instruments, such as forceps, in conjunction with suction. As a final step, a provider may use suction to ensure that the uterus is completely evacuated. This process generally takes approximately 10 minutes. Starting at approximately 15 weeks LMP, D&E is the only abortion method available in an outpatient setting in Montana.

⁶ Am. Coll. of Obstetricians & Gynecologists, Practice Bulletin No. 135: *Second Trimester Abortion*, 121 *Obstetrics & Gynecology* 1394 (2013).

⁷ 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.

27. Complications from procedural abortion in general are extremely rare. Complications occur in around 0.05% to 4% of second-trimester D&E abortions.⁸ The American College of Obstetrics and Gynecology has stated that the D&E method 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.⁹ 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.

28. If women are not able to access abortion care, some may resort to attempting to self-manage their abortion without medical assistance, at potential risk to their health. Others may have to travel to other states to attempt to obtain an abortion, incurring greater expense and risk. And some may be forced to carry their pregnancies to term, depriving them of their ability to decide whether and when to have a child, and exposing them to all the risks that come with carrying a pregnancy to term and going through childbirth.

C. The D&E Ban

a. Provisions of HB 721

29. HB 721 criminalizes the performance of what the State calls a “dismemberment abortion.” The definition of “dismemberment abortion” in HB 721 makes clear that the law prohibits what medical professionals commonly refer to as D&E.

30. HB 721 § 2(4) defines “dismemberment abortion” as:

a procedure that involves (a) the use or prescription of any instrument, medicine, drug, or other substance or device to intentionally terminate

⁸ The Nat’l Acads. Scis., Eng’g, & Med., *The Safety and Quality of Abortion Care in the United States* 63 (2018) (compiling medical literature on safeness of D&E abortions).

⁹ Press Release, Am. Coll. Obstetricians & Gynecologists, ACOG Statement Regarding Abortion Procedure Bans (Oct. 9, 2015), <https://www.acog.org/news/news-releases/2015/10/acog-statement-regarding-abortion-procedure-bans>.

the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn human being; and (b) dilation of the cervix, insertion of grasping instruments, and removal of disarticulated fetal parts from a living unborn human being.

31. The D&E Ban subjects providers to severe criminal penalties. Anyone who knowingly or purposefully performs or attempts to perform an abortion using the D&E method in violation of HB 721 is guilty of a felony and “shall be punished by a fine in an amount not to exceed \$50,000, imprisonment for a term of not less than 5 years and not more than 10 years, or both.” HB 721 § 3(2).

32. In addition, HB 721 provides that a provider who violates the D&E Ban “commits unprofessional conduct, and the person’s license to practice medicine in Montana must be suspended for a minimum of 1 year pursuant to Title 37.” HB 721 § 5(1).

33. HB 721 contains only a narrow exception for an abortion performed “in a medical emergency,” which expressly “does not include mental or psychological conditions.” HB 721 §§ 3(1), 9(b).

b. HB 721 Is Unconstitutional and Will Cause Immediate, Irreparable Harm

34. HB 721 violates women’s right to privacy under Article II, Section 10 of the Montana Constitution and directly contravenes the Montana Supreme Court’s binding decision in *Armstrong*.¹⁰

35. The right to privacy protects women’s fundamental right to a pre-viability abortion. *Armstrong*, ¶ 44. Starting at approximately 15 weeks LMP, D&E is the only abortion method available in an outpatient setting in Montana. By banning the use of the D&E method, HB 721 effectively bans abortion beginning at approximately 15 weeks LMP. The D&E Ban thus plainly

¹⁰ For similar reasons, HB 721 infringes on the fundamental rights of Plaintiffs and their patients to individual dignity; and to seek safety, health, and happiness.

infringes on the fundamental right to privacy, denying women the right to a constitutional medical procedure and prohibiting Plaintiffs from offering abortion care safeguarded by the Montana Constitution.

36. The violations of Plaintiffs' 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.”).

c. The D&E Ban Is Not Supported by Any Compelling State Interest

37. No compelling interest supports the D&E Ban. Indeed, no compelling interest is offered in the text of the statute.

38. The Legislature attempted to justify the D&E Ban by asserting a “legitimate interest in regulating abortion generally and the performance of the dismemberment abortion procedure specifically.”

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

40. The State's asserted interest in protecting patients against risks related to abortions performed later in pregnancy is undermined by the State's enactment of this ban shortly after other abortion restrictions that will cause substantial delay and *increase* the proportion of women obtaining abortions after the first trimester. *See, e.g.*, HB 171, 2021 Leg. Reg. Sess. (Mont. 2021) (codified at Mont. Code Ann. tit. 50, ch. 20). The State cannot prevent patients from obtaining early abortion care and then deny them the right to obtain an abortion later in pregnancy out of a purported concern for their health.

41. The State's asserted interest in protecting patients against risks related to abortions, particularly those performed using the D&E method, is further undermined by the fact that HB

721 actually *increases* the risks to patients' health by prohibiting patients with pregnancies at or after approximately 15 weeks LMP from accessing the safest and most common method of abortion, and the only method offered in an outpatient setting in Montana. The D&E Ban would force patients to choose from alternatives that all pose higher risks to their health than a D&E procedure, including induction abortion, a self-managed abortion, or carrying the fetus to term and childbirth.

42. Given that there is no medical or scientific support for targeting abortion beginning at approximately 15 weeks LMP, and that the D&E Ban will not safeguard but would actually harm women's health, there is no state interest—let alone a compelling one—to support these restrictions.

CLAIMS FOR RELIEF

COUNT I

(Declaratory Judgment – Violation of the Right to Privacy of Article II, Section 10 of the Montana Constitution)

43. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1- 42 as if set forth fully herein.

44. 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*, ¶ 14.

45. Any violation of this right is subject to strict scrutiny by the Court.

46. HB 721 violates the right to privacy of Montanans 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.

COUNT II

(Declaratory Judgment – Violation of the Right to Seek Safety, Health, and Happiness of Article II, Section 3 of the Montana Constitution)

47. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-42 as if set forth fully herein.

48. 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.”

49. HB 721 violates 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—in violation of Article II, Section 3 of the Montana Constitution.

COUNT III

(Declaratory Judgment – Violation of the Right to Individual Dignity of Article II, Section 4 of the Montana Constitution)

50. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶ 1-42 as if set forth fully herein.

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

52. HB 721 violates the right to individual dignity of Plaintiffs’ patients in violation of Article II, Section 4 of the Montana Constitution.

PRAYER FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that HB 721 violates the rights of Plaintiffs and their patients, as protected by the Montana Constitution, and therefore is void and of no effect;
2. Issue a permanent injunction prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the challenged provisions of HB 721;
3. Issue a preliminary injunction prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the challenged provisions of HB 721 pending final judgment;
4. Issue a temporary restraining order prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the challenged provisions of HB 721 pending issuance of a preliminary injunction;
5. Grant Plaintiffs' attorneys' fees and costs pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine; and/or
6. Grant such further relief as may be just and proper.

Respectfully submitted this 10th day of April, 2023.

GRAYBILL LAW FIRM, PC

Raphael J.C. Graybill
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

VERIFICATION

I, Samuel Dickman, being first duly sworn, upon oath depose and say:

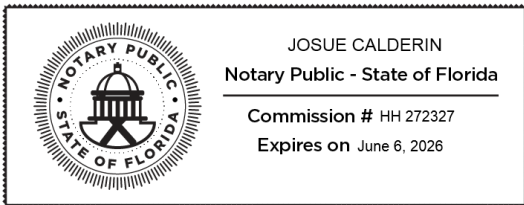
- 1. I am a Plaintiff in the action set forth above.
- 2. I verify the foregoing Verified Complaint for and on behalf of Plaintiffs.
- 3. I have personal knowledge that the facts and information set out in the foregoing Verified Complaint are true; that the facts therein have been assembled by counsel 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.

Samuel Dickman
Samuel Dickman, M.D.

Subscribed and sworn to before me this 9th day of April, 2023.

(NOTARIAL SEAL)
State of Florida County of Hillsborough 04/09/2023

Josue Calderin Online Notary



Josue Calderin Printed Name: Josue Calderin
Josue Calderin
HH 272327
06/06/2026
Online Notary

Sworn to (or affirmed) and subscribed before me by means of online notarization, this 04/09/2023 by Samuel Dickman.

Personally Known OR Produced Identification
Type of Identification Produced PASSPORT

Notarized online using audio-video communication