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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF MONTANA, et al. Plaintiffs, v. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, Defendant.	Cause No. DV 21–999 Hon. Michael G. Moses **DEFENDANT'S REPLY IN SUPPORT OF MONT. R. CIV. P. 56 CROSS-MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Montana's Pain-Capable Unborn Child Protection Act ("the Act" or "HB 136") protects unborn children near viability from gruesome procedures that rip apart the unborn child limb from limb and safeguards the health of Montana women from the dangers of late-term abortion. The State maintains *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, which held that the Montana Constitution protects a fundamental right to abortion, was wrongly decided. But even if this Court applies *Armstrong*, the Act is constitutional because it is narrowly tailored to advance the State's compelling interests in preventing fetal pain and protecting women's health and because it imposes a clear, objective standard on doctors performing abortions. Consequently, this Court should grant summary judgment to the State with respect to Planned Parenthood's challenge to HB 136.

ARGUMENT

I. THE ACT DOES NOT VIOLATE MONTANA'S CONSTITUTIONAL RIGHT TO PRIVACY.

Article II, Section 10 of the Montana Constitution protects "the right of individual privacy." Because the Pain-Capable Unborn Child Protection Act does not implicate this right, and because even under *Armstrong*, the Act survives strict scrutiny, this Court should grant summary judgment to the State on Planned Parenthood's right to privacy claims.

A. *ARMSTRONG* WAS WRONGLY DECIDED.

The Montana Constitution protects a right to *privacy*, not a right to *abortion*. In concluding that the Montana right to privacy protects a right to elective abortion before viability, *Armstrong* contradicts both the text of the Montana Constitution and the history and tradition of Montana abortion law. (*See* State's Br. in Supp. of Mot. for S.J. 13–14.) Rather than meaningfully engaging with these arguments, Planned Parenthood simply asserts that "the [Montana] Supreme Court

unanimously invoked Montanans' fundamental right to obtain a pre-viability abortion" in *Weems v. State by and through Knudsen*, 2023 MT 82, 412 Mont. 132. (Pls.' Reply Br. 1.) But the parties in *Weems* did not raise the issue of whether *Armstrong* should be overruled, nor did the Montana Supreme Court consider that issue. And in its preliminary injunction opinion in this case, the Supreme Court expressly reserved that issue for a later appeal on the merits. *Planned Parenthood of Mont. v. State by and through Knudsen*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301. This case will afford the Montana Supreme Court the opportunity to fully consider the State's arguments for overruling *Armstrong*.

B. REGARDLESS, THE ACT PASSES STRICT SCRUTINY.

Regardless, the Act passes strict scrutiny under *Armstrong* because it is narrowly tailored to advance the State's compelling interest in mitigating fetal pain. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). Planned Parenthood argues that "the only compelling interest recognized by the Supreme Court" is "a medically acknowledged bona fide health risk." (Pls.' Reply at 10.) But Planned Parenthood admits that the State has a compelling interest in "preserv[ing] the safety, health and welfare of a particular class of patients." (Pls.' Br. in Supp. of Mot. for S.J. at 11.) And the State's expert, Dr. Ingrid Skop, testified that obstetricians consider both the expectant mother and her unborn child patients. (Ex. H to Br. in Supp. of State's Mot. for S.J. (Depo. Ingrid Skop, MD, Vol. 1, 59:2–20 (Mar. 28, 2023)).) Therefore, fetal pain—and for that matter, fetal death—*is* a bona fide health risk for unborn children.

Moreover, the Montana Supreme Court expressly recognized in its preliminary injunction opinion in this case that the State may be able to prove a compelling interest in preventing fetal pain at trial. *Planned Parenthood of Mont.*, ¶ 41. That decision took place before expert discovery which affirms the Supreme Court's foresight. The uncontested evidence in this case now shows

that a 20-week-old fetus can "have reflexive responses to many stimuli, including needles, . . . increased heartbeat, [and] . . . other stress hormones are triggered." (Ex. D to Br. in Supp. of State's Mot. for S.J. at 37–38, 85.) It is also uncontested that anesthesia and analgesia are routinely administered directly to fetuses even younger than 20 weeks' gestation during intrauterine surgeries. (*Id.* at 156:21–157:9, 174:1–175:5; *see also* Ex. B at 88:1–25, 94:1–13.) The only factual dispute concerns whether this stress response is related to "feeling pain." And because state statutes are entitled to a presumption of constitutionality, especially where, as here, they are legislating in an area of medical and scientific uncertainty, any such uncertainty must be resolved in favor of the legislature. *See Harrison v. City of Missoula*, 146 Mont. 420, 425, 407 P.2d 703, 706 (1965) ("Any attack upon the constitutionality of a statute must bear the burden of the presumption of constitutionality."); *see also Gonzales v. Carhart*, 550 U.S. 124, 161–62 (2007) ("[S]tate and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

The State also has a compelling interest in protecting mothers' health and safety. *See Weems*, ¶ 38. It is uncontested that the larger an unborn child grows, the more difficult, risky, and physically traumatic a surgical abortion becomes for the mother. (Ex. C. to Br. in Supp. of State's Mot. for S.J. at 70–71, 137–39.)

Montana has narrowly tailored its law to prevent as few abortions as possible, while advancing its compelling interests in preventing fetal pain and protecting maternal health. Despite uncontested evidence that fetuses may respond to stressful stimuli even earlier than 20 weeks and that anesthesia is routinely administered to unborn children earlier than 20 weeks, Montana has narrowly tailored its law to include only late-term abortions of those fetuses most likely to feel pain. Similarly, the law is narrowly tailored to protect maternal health from riskier late-term

abortions. This narrow tailoring is confirmed by the fact that Planned Parenthood typically performs *fewer than ten abortions* per year on fetuses more than 20 weeks LMP. (Ex. C at 37:4–38:1.) The State has narrowly tailored its law to protect from fetal pain and risky late-term abortions while still permitting the vast majority of current Montana abortions.

Further, Planned Parenthood admits that a fetus may be viable as early as 21 weeks LMP, (Pls.' Br. in Supp. of S.J. at 6), and that the margin of error for ultrasound dating can be as much as one to one and a half weeks (Pls.' Reply at 3). Consequently, a fetus estimated to be 20 weeks old could actually be as old as 21 or 22 weeks, and therefore viable. Thus, the State has narrowly tailored its law to protect as many viable fetuses as possible while still permitting the vast majority of abortions. Because the Act is narrowly tailored to advance the State's compelling interests in preventing fetal pain and protecting women's health, this Court should grant summary judgment to the State.

II. THE ACT DOES NOT VIOLATE EQUAL PROTECTION.

The Act does not violate equal protection principles for the same reasons that it does not violate the right to privacy. Planned Parenthood accuses the State of admitting that its equal protection claim "holds water under" *Armstrong*. (Pls.' Reply at 10.) But Planned Parenthood misstates the State's brief. The State argued that Planned Parenthood's equal protection claim "*only* holds water under *Roe*'s vacated diktat that States may not address abortion prior to viability." (State's Br. at 14) (emphasis added). But in *Weems*, the Montana Supreme Court rejected the idea that the State has no power to regulate abortion before viability. There, the district court determined that the legislature "had no place at the table" in regulating pre-viability abortion. *Weems*, ¶ 41. The Supreme Court rejected that argument: "The State has a police power by which it can regulate for the health and safety of its citizens." *Id.* Here, the Act is constitutional under

equal protection for the same reason that it is constitutional under the right to privacy: it is narrowly tailored to serve the State's compelling interests in preventing fetal pain and protecting women's health. *See supra* Part I. For this reason, this Court should grant summary judgment to the State.

III. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE.

Montana has adopted the federal vagueness standard: "The general rule is that a statute or ordinance is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *City of Choteau v. Joslyn*, 208 Mont. 499, 505, 678 P.2d 665, 668 (1984) (quoting *United States v. Harriss*, 347 U.S. 612 (1954)). Planned Parenthood argues that the Act's "medical emergency" exception fails this test. (Pls.' Reply at 10–11.) The Act defines "medical emergency" 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 . . . in order to avert the woman's death or . . . serious risk of substantial and irreversible physical impairment of a major bodily function." Mont. Code Ann. § 50-20-602(4)(a) (emphasis added).

Numerous federal courts have rightly held that a "reasonable medical judgment" standard is not unconstitutionally vague. *See, e.g.*, *Planned Parenthood of Ind. & Ky. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 601 (7th Cir. 2021) (upholding Indiana abortion reporting law because "a reasonable medical judgment standard does not render a statute void for vagueness in the abortion-regulation context"); *Karlin v. Foust*, 188 F.3d 446, 468 (7th Cir. 1999) (upholding Wisconsin abortion informed consent law because "'reasonable medical judgment' standard is not void for vagueness"); *Christian Med. & Dental Ass'n v. Bonta, No*. 5:22-cv-003355, 2022 WL 18142547, at *12 (C.D. Cal. Sept. 2, 2022) (concluding that medical providers would understand "reasonable medical judgment" standard, such that it is not unconstitutionally vague); *Summit Med. Assocs.,*

P.C. v. James, 984 F. Supp. 1404, 1442 (M.D. Ala. 1998) (explaining that "reasonable medical judgment" standard did not render Alabama partial-birth abortion law "per se vague"). This is because "reasonable medical judgment" creates an objective standard for doctors to determine whether the exception applies to a particular pregnancy complication.

In *Karlin*, for example, the Seventh Circuit examined a medical-emergency exception to a Wisconsin abortion statute with almost identical language to the Montana statute at issue here. 188 F.3d at 455–56. The Wisconsin statute imposed a 24-hour informed-consent waiting period unless the woman has "a condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or . . . serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." *Id.* The court held that a "'reasonable medical judgment' standard is not void for vagueness" because it "clearly conveys to physicians that their emergency medical determinations will be judged on an objective basis," "physicians are accustomed to having their medical decisions adjudged under an objective standard," and the statute "provides an adequate safeguard against any risk of arbitrary and unfair enforcement." *Id.* at 468.

Plaintiffs rely on *Women's Medical Professional Corp. v. Voinovich,* which held that a statute requiring a physician to determine "in good faith and in the exercise of reasonable medical judgment' that the abortion is necessary" was unconstitutionally vague because it contained a dual subjective and objective standard. 130 F.3d 187, 204 (6th Cir. 1997), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). More recently, however, the Sixth Circuit upheld a health exception to Ohio's partial-birth abortion statute imposing an objective,

"reasonable medical judgment" standard under the undue-burden test. *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 444–51 (6th Cir. 2003). Here, Montana's exception is objective.

The Ninth Circuit has not weighed in on this issue. While the Ninth Circuit struck down an Idaho parental consent law imposing a reasonable medical judgment standard in *Planned Parenthood of Idaho, Inc. v. Wasden*, it did so because the statute required the physician to exercise that judgment to determine whether there was sufficient time to obtain a judicial bypass order—a determination that the court characterized as "unknowable"—376 F.3d 908, 913 (9th Cir. 2004), and based on "the essential holding of *Roe*," *id.* at 930. And at least one district court within the Ninth Circuit has upheld a provision containing a "reasonable medical judgment" standard against a vagueness challenge in the context of a physician-assisted suicide law without so much as citing *Wasden*. *Christian Med. & Dental Ass'n*, 2022 WL 18145247, at *12.

This Court should follow the Seventh Circuit's decision in *Karlin*, as well as the Sixth Circuit's decision in *Taft*, both of which upheld a medical-emergency provision similar to the Montana statute here. *Karlin* at 459; *Taft*, 353 F. 3d 436. The Act's "reasonable medical judgment" standard allows a physician to choose between multiple "reasonable options" for a patient's treatment. *Karlin* at 464. "[A]ssessing the seriousness of a risk to a patient's health and the necessity of immediate treatment is something that physicians are called upon to do routinely," and such a requirement "does not render the medical emergency provision impermissibly vague." *Id.* at 464–65. Plaintiffs' own expert agrees, testifying that making recommendations to patients based upon his assessment of the risk of death or serious bodily injury is a routine part of his practice.[1] (Ex. G at 32:13–33:9.) And while physicians may occasionally disagree "as to whether

[1] Outside the First Amendment context, a plaintiff may not argue in a pre-enforcement facial challenge that a "statute is vague as to one or more hypothetical scenarios." *Planned Parenthood of Ind. & Ky.*, 7 F.4th at 603 (quoting *United States v. Cook*, 970 F.3d 866, 873 (7th Cir. 2020)).

a specific situation rises to the level of posing a significant threat to a woman's health sufficient to necessitate an immediate abortion, the fact that one physician would choose to perform the emergency abortion under those circumstances while others would not, does not necessarily mean the former physician is acting unreasonably." *Id.* Nor does any such disagreement "render the medical emergency provision impermissibly vague." *See Karlin*, 188 F.3d at 464–65. For these reasons, the Court should grant summary judgment to the State on Planned Parenthood's vagueness claim.

CONCLUSION

Because the Unborn Child Protection Act withstands strict scrutiny and is not unconstitutionally vague, the Court should grant summary judgment to the State with respect to Planned Parenthood's claims against HB 136.

DATED this 9th day of June, 2023.

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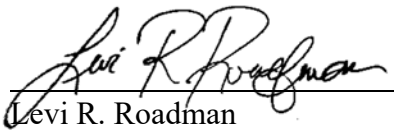

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