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, v. STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General; the MONTNAA 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.: ADV-2023-231 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are the parties' competing motions for summary judgment. Raph Graybill, Michelle Nicole Diamond, Alex W. Miller, Rishita Apsani, Sean C. Chang, Lydia Turnage, Peter Kurtz, Diana O. Salgado, Dylan Cowit and Ella Spottswood represent Plaintiffs Planned Parenthood of Montana (PPMT) and Samuel Dickman, M.D. (Dickman). Melissa Cohen also represents Dickman. Montana Attorney General Austin Knudsen, Thane Johnson, Michael Russell, Michael Noonan, and Alwyn Lansing represent Defendants State of Montana (State), the Montana Department of Public Health & Human Services (DPHHS), and Charlie Brereton, in his official capacity as Director of DPHHS.

STATEMENT OF FACTS

PPMT is the largest provider of reproductive health care services in Montana. Dickman is PPMT's chief medical officer. Plaintiffs brought this lawsuit on behalf of themselves and their patients to challenge the constitutionality of two Montana statutes enacted by the 2023 Montana Legislature: House Bill 575 (HB 575) and House Bill 721 (HB 721).

HB 575 requires a determination of viability be "made in writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound" prior to any abortion procedure. Plaintiffs contend HB 575's ultrasound requirement will prevent them from providing direct-to-patient medication abortions. Plaintiffs offer direct-to-patient medication abortions up to 11 weeks from the first day of the patient's last menstrual period (LMP). Additionally, Plaintiffs challenge the constitutionality of HB 721, which prohibits dilation and evacuation (D&E) procedural abortions except in a medical emergency. Plaintiffs provide D&E abortions up to 21 weeks and 6 days LMP.

On May 3, 2023, Governor Greg Gianforte signed HB 575 into law. On May 16, 2023, the Governor signed HB 721 into law. On May 23, 2023, this Court orally granted Plaintiffs' requests for preliminary injunctions as to both challenged laws. On July 11, 2023, this Court issued a written order memorializing the preliminary injunction. Defendants appealed the preliminary injunction to the Montana Supreme Court. On October 9, 2024, the Montana Supreme Court issued an order upholding the preliminary injunction.

On September 13, 2024, Plaintiffs moved for summary judgment requesting the Court permanently enjoin both laws. On November 14, 2024, Defendants filed a response and cross-motion for summary judgment. Defendants move the Court for summary judgment as to HB 575 and to deny Plaintiffs' motion for summary judgment as to HB 721.

PRINCIPLES OF LAW

Summary judgment is warranted when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. V. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material

facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)). To avoid summary judgment, the opposing party's evidence "must be substantial, 'not mere denial, speculation, or conclusory statements.'" *Hadford v. Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 962 P.2d 1198, 1201 (quoting *Klock* at 174).

ANALYSIS

The fundamental right to privacy established in Article II, Section 10 of the Montana Constitution "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." *Armstrong v. State,* 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364. The Montana Supreme Court has consistently reaffirmed this "fundamental right to access abortion care." *Planned Parenthood of Montana v. State* (*Planned Parenthood I*"), 2024 MT 178, ¶ 31; see also *Weems v. State*, 2023 MT 82, ¶ 43, 412 Mont. 132, 529 P.3d 798. The Legislature may only restrict the "right of choice in making personal health care decisions and in exercising personal autonomy….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* at ¶ 59. Plaintiffs argue HB 575 and HB 721 violate this well-established right by banning safe, effective, and commonly employed methods of providing pre-viability abortions.

HB 575

Plaintiffs allege HB 575 infringes the fundamental right to privacy by banning their ability to provide direct-to-patient medication abortions for pre-viability abortions. HB 575 requires a determination of viability be "made in

writing by the physician or physician assistant performing an abortion and include the review and record of an ultrasound" prior to any abortion procedure. Plaintiffs contend the ultrasound requirement in HB 575 will prevent them from providing direct-to-patient medication abortions for patients unable to attend in-person appointments. For direct-to-patient medication abortions, patients connect with a PPMT provider through a secure video telehealth platform from the patient's home or a location of their choice; are screened for eligibility to participate in the direct-to-patient program; and, if the patients are eligible, have their medications mailed to a Montana address. Plaintiffs typically provide direct-to-patient medication abortions without an ultrasound. Plaintiffs offer direct-to-patient medication abortions up to 11 weeks LMP. There is no dispute all direct-to-patient medication abortions Plaintiffs provide are pre-viability abortions.

In response, Defendants argue, for the first time in this litigation, HB 575 does not interfere with Plaintiffs' ability to provide direct-to-patient medication abortions up to 11 weeks LMP because "[t]here is no reality where the law can be read to require an ultrasound to determine if an unborn child at up to 11 weeks gestational age is viable." However, Defendants' argument directly contradicts its own prior arguments in this litigation and the plain language of the statute. Defendants now argue the "statute's clear terms prohibit an abortion of a 24-week-old viable unborn child and require an ultrasound at or near this viability threshold to ensure that its life is not needlessly taken."

Defendants did not cite to any language in the statute limiting the viability determination requirements to abortions "at or near [the] viability threshold." On the contrary, the plain language of the statute states a viability

determination *must be made* prior to an abortion procedure. Specifically, the entire text of §1(6) of the statute reads:

> (a) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.
> (b) A determination of viability *must be*:
>
> (i) made in writing by the physician or physician assistant performing an abortion and *include the review and record of an ultrasound*; *and*
>
> (ii) based on the best available science and survival data, with viability presumed at 24 weeks gestational age and any period of time after that. A calculation of gestational age must take into account a margin of error and, if uncertainty exists regarding viability, there is a presumption of viability.

(emphasis added). The plain language of the statute requires the determination of viability must be made in writing, include an ultrasound, and be based on presumed viability at 24 weeks gestational age.

The State argues, "[t]o accept [Plaintiffs'] argument, one would have to believe that the Legislature intended to mandate an ultrasound at gestational weeks 1-11, just to make sure that the unborn child was not viable, even though the Legislature explicitly stated that viability is presumed at 24 weeks." However, if the Legislature did *not* intend to mandate an ultrasound at gestational weeks 1-11, it could include limiting language in the statute. It did not. Instead, just as the Legislature explicitly stated viability is presumed at 24 weeks, it also explicitly stated a viability determination must be made in writing and include an ultrasound.

While Defendants now aggressively argue interpreting the statute to require ultrasounds for abortions provided well before viability "defies logic," the Court notes Defendants defended this apparently illogical interpretation at the

preliminary injunction stage and before the Montana Supreme Court on appeal. The State has now conceded requiring an ultrasound prior to all abortion procedures "simply would not make any sense." However, a plain reading of the statute requires an ultrasound prior to all abortion procedures without an exception for instances when there is no possibility of fetal viability. Because the remainder of Defendants arguments in support of HB 575 rely on an erroneous interpretation of the statute, the Court finds no need to address them.

Properly interpreting HB 575, Plaintiffs argue the statute infringes the fundamental right to privacy by banning their ability to provide direct-to-patient medication abortions for pre-viability abortions. Plaintiffs offer direct-to-patient medication abortions up to 11 weeks LMP, well before the 24-week viability presumption. Prior to the statutory change, Plaintiffs were able to provide direct-to-patient medication abortions without an ultrasound for patients unable to travel to an in-person appointment for various reasons. If all patients are required to obtain an ultrasound prior to an abortion procedure regardless of potential fetal viability, Plaintiffs argue many patients will be unable to access abortion care.

According to the State, an ultrasound requirement does not restrict access to abortion care because ultrasounds are widely available in Montana. However, this argument does not overcome Plaintiffs' contention the statute creates an additional medically-unnecessary barrier to abortion care. Moreover, distance from a health center is only one reason Plaintiffs have raised to explain why certain patients are unable to attend in-person appointments. Plaintiffs have also provided evidence of patients unable to attend in-person appointments for other reasons including financial circumstances, disabilities, or risk of

experiencing intimate partner violence. Because access to abortion care is a fundamental right, any restriction on access must survive strict scrutiny.

It is not enough for the State to argue the restriction is a minor one. Under a strict scrutiny analysis, the State must demonstrate HB 575 is narrowly tailored to address "a medically acknowledged, bona[]fide health risk, clearly and convincingly demonstrated." *Planned Parenthood of Montana v. State* ("*Planned Parenthood I*"), 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301 (quoting *Armstrong*, ¶¶ 34, 62). As addressed above, the State does not ague requiring an ultrasound prior to every abortion procedure addresses a *bona fide* health risk. Instead, they argued such a requirement "simply would not make any sense." Thus, the State clearly has not met its burden of identifying a compelling interest in HB 575's ultrasound requirement. Because HB 575 infringes Plaintiffs' and their patients' fundamental right to privacy and fundamental right to access abortion care without a medically acknowledged, *bona fide* health risk, it is unconstitutional.

HB 721

Plaintiffs challenge the constitutionality of HB 721, which prohibits dilation and evacuation (D&E) procedural abortions except in a medical emergency. A D&E procedure involves a medical provider removing the contents of the uterus using suction and instruments such as forceps. D&E abortions are the most common method of abortion after approximately 15 weeks LMP. Plaintiffs allege D&E abortions are the only method available in Montana in an outpatient setting at that stage in pregnancy. Therefore, Plaintiffs allege HB 721 would effectively ban pre-viability abortions in Montana beginning after approximately 15 weeks LMP. Additionally, HB 721 contains a provision

making violation of the statute a felony punishable by a fine or imprisonment of up to ten years. Plaintiffs provide D&E abortions up to 21 weeks and 6 days LMP.

Defendants argue the Court should deny Plaintiffs' motion for summary judgment as to HB 721 because there are genuine issues of material fact. The State does not dispute HB 721 bans a common method for providing pre-viability abortions. Therefore, by restricting access to abortion services, HB 721 infringes Montanan's fundamental right to privacy and strict scrutiny applies. See *Planned Parenthood I,* 2022 MT 157, ¶ 20, 409 Mont. 378, ¶ 20, 515 P.3d 301, ¶ 20. The State must demonstrate HB 721 is narrowly tailored to address "a medically acknowledged, *bona fide* health risk, clearly and convincingly demonstrated." *Id.* The State argues HB 721's ban on D&E procedures is necessary to prevent "psychological risks to the pregnant woman" because D&E "has been shown to lead to serious mental health issues."

However, the State's argument in support of HB 721's ban on D&E procedures is fatally flawed because the State's purported evidence is largely unrelated to D&E procedures specifically. Studies on the outcomes of abortion generally are not relevant to whether there is a medically acknowledged, *bona fide* health risk justifying banning a specific abortion procedure. Notably, the studies which do refer to D&E abortions do not conclude the procedure has greater negative psychological outcomes than the other methods studied. The State has not met its burden under a strict scrutiny analysis because the State's purported evidence does not address a medically acknowledged, *bona fide* health risk specifically related to D&E abortions.

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Finally, the State argues it has a legitimate interest in "eliminating particularly gruesome and barbaric medical procedures." However, under strict scrutiny analysis, the State must demonstrate a "compelling" interest rather than a mere "legitimate" interest. Because the State has presented this argument under the rational basis review legitimate interest standard, it does not require further analysis. It is also not necessary to address the State's proposed alternative procedures because the ban on D&E procedures without a medically acknowledged, *bona fide* medical risk is unconstitutional regardless of whether alternatives may be available.

Accordingly,

ORDER

IT IS HEREBY ORDERED Plaintiffs' motion for summary judgment is **GRANTED.**

IT IS HEREBY FURTHER ORDERED Defendants' motion for summary judgment is **DENIED.**

DATED this 7th day of March 2025.

/s/ Mike Menahan
MIKE MENAHAN
District Court Judge

cc: Raph Graybill, via email
Michelle Nicole Diamond, via email
Alex W. Miller, via email
Rishita Apsani, via email
Sean C. Chang, via email
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