**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 22–0207

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HELEN WEEMS AND JANE DOE,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General; and TRAVIS R. AHNER, in his official capacity as County Attorney for Flathead County,

Defendants and Appellants.

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# RESPONSE BRIEF OF APPELLEES

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On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Mike Menahan, Presiding.

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**APPEARANCES:**


ALEX RATE
AKILAH LANE
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
(406) 443-8590
ratea@aclumontana.org
lanea@aclumontana.org

HILLARY SCHNELLER*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

*Attorneys for Plaintiffs and Appellees*
**Pro hac vice*

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
BRENT MEAD
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
david.dewhirst@mt.gov
brent.mead2@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
(406) 384-7990
emily@joneslawmt.com

*Attorneys for Defendants and Appellants*

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## STATEMENT OF THE ISSUES

1. Whether the district court correctly held that § 50-20-109(1)(a), MCA, ("the Restriction") interferes with an individual's fundamental rights to privacy, and personal and procreative autonomy, under Article II, Section 10 of the Montana Constitution and *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.
2. Whether the district court correctly held that, pursuant to *Armstrong*, the State failed to meet its burden to demonstrate that § 50-20-109(1)(a), MCA is narrowly tailored to further a compelling governmental interest.

## STATEMENT OF THE CASE

In 1999, this Court held that a statute barring people from accessing lawful health care—abortion care—from a health care provider of their choosing unconstitutionally infringed on their right to privacy under the Montana Constitution. *Armstrong*, ¶ 75. "Health care provider," the Court noted, meant "any physician, physician-assistant certified, nurse, nurse-practitioner, or other professional" determined by the appropriate licensing authority to have the requisite training, education, or experience to provide the care the patient seeks. *Id.*, ¶ 2 n.1.

Six years later, in 2005, the legislature overhauled statutes about physician assistants, amending 30 sections, across numerous titles and chapters of the Montana code. Among other things, the legislature amended § 50-20-109(1)(a), MCA, to add

physician assistants alongside physicians as those health care providers who could lawfully provide abortion care. That legislation did not, however, codify the full scope of *Armstrong*'s holding: that an individual has a right to seek abortion care from a competent health care provider of their choosing and the State cannot restrict that right absent clear demonstration of a "medically acknowledged, *bona fide* health risk." *Armstrong*, ¶ 62. Once again categorically limiting those qualified health professionals who could provide abortion care—this time, to physicians and physicians assistants—rendered § 50-20-109(1)(a), MCA, in conflict with the Montana Constitution.

On January 31, 2018, Plaintiffs Helen Weems and Jane Doe filed this case challenging the constitutionality of § 50-20-109(1)(a), MCA, on behalf of themselves and their patients. The plaintiffs are advanced practice registered nurses ("APRNs")—registered nurses with advanced education and training, including certified nurse practitioners and certified nurse midwives—licensed to practice in Montana. App.K, ¶¶ 39, 44.[1] Ms. Weems is a certified nurse practitioner ("NP") and the owner and sole clinician at All Families Healthcare, a sexual and reproductive health clinic in Whitefish, Montana. *Id.*, ¶ 43. Ms. Doe is a certified nurse midwife ("CNM"). *Id.*, ¶ 44.

[1] Defendants-Appellants submitted appendices A through J in support of their Opening Brief, and Plaintiffs-Appellees submit appendices L through T in support of their Response.

The same day Plaintiffs filed suit, they moved for a preliminary injunction, which the district court granted on April 4, 2018. App.A.004. The State appealed.

On April 26, 2019, this Court affirmed the preliminary injunction. *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4 ("*Weems I*"). It held: "*Armstrong* leaves no doubt that early-term abortion is a 'lawful medical procedure' that may be performed for a consenting patient by a provider 'determined by the appropriate medical examining and licensing authority to be competent [to provide that service].'" *Weems I*, ¶ 19 (quoting *Armstrong*, ¶ 2 n.1, ¶ 62). This Court concluded, as the district court had, that APRNs in Montana are independent and autonomous providers who provide care within their scope of practice and for which they are trained. *Id*., ¶¶ 20-23. It confirmed that Plaintiffs demonstrated that the Restriction barred ARPNs' from providing medication abortion care and from completing the training necessary to provide aspiration abortion care. *Id.*, ¶ 26. And it held that Plaintiffs established that the enforcement of the Restriction would cause irreparable injury. *Id.*, ¶ 25.

In July 2019, the Board of Nursing addressed the issue of abortion and APRN scope of practice. App.K, ¶ 27. The specific question before the Board was: "can Certified Nurse Practitioners certified in Family Practice (APRN-FNP) or Certified Nurse Midwives (APRN-CNM) provide medication and aspiration abortion services *without specific authorization from the Board*?" *Id.* (emphasis added). Upon motion,

the Board unanimously concluded it would "leave the rules and statutes as they are because they adequately cover this issue." *Id*., ¶ 28. That is, "specific authorization" from the Board was not needed to permit APRNs to provide abortion care; the rules governing APRNs already addressed APRNs who sought to provide abortion care just as they addressed any other care APRNs might provide. Further, the Board stated: "[m]edication and aspiration abortion procedures are not significantly different than the procedures, medications and surgeries that nurse practitioners currently perform without significant issues." *Id.*

The parties engaged in discovery between May 2018 and June 15, 2021.

Plaintiffs disclosed three experts: Suzan Goodman, M.D., M.P.H., a family medicine physician licensed in California and public health professional; Joey Banks, M.D., a family medicine physician licensed in Montana; and Laura Jenson, C.N.M., M.P.H., a certified nurse-midwife licensed in Oregon and public health professional. Drs. Goodman and Banks currently provide abortion care, as they have for many years. *See* App.M, ¶ 1; App.L, ¶ 4. Ms. Jenson trains APRNs, including about their scope of practice, and works with the Oregon Board of Nursing to review and revise that State's APRN regulations. App.N, ¶¶ 2, 4.

The State disclosed one expert witness, George Mulcaire-Jones, M.D. a family medicine physician licensed in Montana, and a rebuttal witness, Kathi Aultman, M.D., an obstetrician-gynecologist licensed in Florida. Dr. Mulcaire-Jones

does not provide abortion care. *Cf.* App.C.134-136 (Mulcaire-Jones' description of his expertise). Dr. Aultman has not provided abortion care since 1982. *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 449 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000). Her testimony about abortion has been discredited by multiple federal courts because, beginning in the late 1990s, they found she was "not current on the medical aspects of abortion aspects of abortion." *Id.*; *see also Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157, 1165 n.9 (S.D. Iowa 1998) (same), *aff'd*, 195 F.3d 386 (8th Cir. 1999); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1301 (E.D. Ark. 2019) (discounting Aultman declaration testimony as unpersuasive because Aultman "[had] no experience teaching abortion practitioners or training OBGYN residents or fellows").

Each expert, along with Plaintiffs was deposed.

On August 31, 2021, the parties cross-moved for summary judgment.

On February 25, 2022, the district court granted summary judgment to Plaintiffs and entered a permanent injunction enjoining enforcement of § 50-20-109(1)(a), MCA. App.A.016. It held that, "as in *Armstrong*," the Restriction infringed on individuals' fundamental rights to privacy, and personal and procreative autonomy. App.A.012. And it held that the State failed to "clearly and convincingly demonstrate a medically acknowledged, bona fide health risk that justifies the law's

interference with a fundamental right." App.A.014. Finally, the district court concluded that the Restriction is not narrowly tailored because it "arbitrarily excludes a group of otherwise qualified health care providers from the pool of providers Montana patients may choose to obtain an otherwise lawful medical procedure." App.A.015.

The State noticed this appeal.

## STATEMENT OF THE FACTS

### I. *Armstrong* and § 50-20-109(1)(a), MCA.

*Armstrong* held that the express guarantee of privacy in Article II, Section 10 of the Montana Constitution "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. More specifically, Article II, Section 10 "protects a woman's right of procreative autonomy—i.e., here, the right to seek and obtain a lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Id*. Accordingly, absent "a medically-acknowledged *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure" from a qualified health care provider. *Id.*, ¶ 62. Where

the State can demonstrate no such risk, it has no basis on which to interfere with the fundamental right to access abortion from a chosen health care provider. *Id*.

*Armstrong* was brought by a physician assistant and challenged § 50-20-109(1)(a), MCA. At that time, the statute restricted the provision of abortion to physicians only and specifically barred physician assistants from providing abortion care. *See Armstrong*, ¶ 21. The Court held § 50-20-109(1)(a), MCA, unconstitutionally interfered with the right to obtain an abortion from a health care provider of one's choice. *Id*., ¶ 75. Throughout its opinion, the Court used the term "generic term 'health care provider' to refer to any physician, physician-assistant certified, nurse, nurse-practitioner, or other professional" determined by the appropriate licensing authority to have the requisite competencies to provide the care the patient seeks. *Id.*, ¶ 2 n.1.

Six years later, in 2005, Montana amended its statutes concerning physician assistants for the first time in over 15 years. *See* App.C.047. The bill, H.B. 737, was not—as the State misleadingly suggests—intended to "merely codif[y] this Court's decision in *Armstrong.*" State Br. 6. Its purpose was to "streamline supervision documentation requirements for physician-PA teams, correct the professional title for physician assistants in Montana law, and add a section to [the] statute that will facilitate PA inclusion on teams that provide medical care in disaster situations." App.C.032 (American Academy of Physician Assistants' letter of support to House

Committee on Human Services); *accord* App.C.60 (letter of support to Senate Public, Health, Welfare & Safety Committee). There was "a lot of clean up" in the bill. App.C.046-47 (testimony of Executive Director, Montana Board of Medical Examiners). It made changes to 30 sections, across 9 titles and 14 chapters of the Montana Code.

Among those was an amendment to § 50-20-109(1)(a), MCA—replacing the statutory prohibition on physician assistants providing abortion care with an express inclusion of physician assistants, along with physicians, as abortion providers. *See* 2005 Mont. Laws, ch. 519 (H.B. 737). The legislature did not "elect" to expand the pool of abortion providers; it tried to clean up a statute that this Court had declared unconstitutional. *Contra* State Br. 15. There was no discussion about physician assistants as abortion providers beyond acknowledgement that the *Armstrong* had been decided. *See* App.C.001-060. And there was no discussion about advanced practice registered nurses as abortion providers—or about APRNs at all. *See id*. H.B. 737 was about physician assistants, not abortion.

Nonetheless, H.B. 737's narrow amendment to § 50-20-109(1)(a), MCA, created a conflict between *Armstrong*'s broad holding and the letter of the statute. Montana law, once again, categorically restricted those qualified health professionals who could provide abortion care—now, to physicians and physician assistants. It was a felony for any other qualified provider, including APRNs, to

provide abortion care. The amendment thus did that which *Armstrong* specifically forbade: it unconstitutionally infringed upon the right of a woman to "seek and obtain a specific lawful medical procedure . . . from a health care provider of her choice. *Armstrong*, ¶ 14.

## II. The Factual Record in This Case.

As this Court has already recognized, this case is governed by, and is on all fours with, *Armstrong*. *See generally Weems I*, 2019 MT 98, 395 Mont. 350, 440 P.3d. In the more than three years since this Court affirmed the district court's preliminary injunction, the factual record has only strengthened Plaintiffs' case. It demonstrates no genuine issue of fact as to three critical issues: (1) abortion is identical to care already provided by APRNs in Montana; (2) APRNs provide abortion care with the same safety and efficacy as their physician and physician assistant counterparts; and (3) in the absence of § 50-20-109(1)(a), MCA, generally applicable nursing statutes and rules govern APRNs' provision of abortion care just as they govern APRNs' provision of other care.

### A. Abortion Care is Exceedingly Safe and Identical to Care People Access from APRNs in Montana.

Abortion is common and exceedingly safe, and APRNs provide early abortion care with the same safety and efficacy as physicians and physician assistants. App.K, ¶¶ 1, 34; App M, ¶ 7. Medication (pill) and aspiration abortion are the two most common types of early abortion care. App.K, ¶ 2; App.M, ¶ 8. Medication

abortion involves the ingestion of pills to terminate the pregnancy. App.K, ¶ 3; App.M, ¶ 9. Typically, in a medication abortion, a patient takes mifepristone, the first medication, which terminates the pregnancy, and then misoprostol, the second medication, at a location of their choosing, where they pass the pregnancy in a process virtually identical to miscarriage. *Id.* During an aspiration abortion, a clinician dilates the patient's cervix and inserts a thin tube through the cervix into the uterus. App.K, ¶ 4; App.M, ¶ 10. Administering a local anesthetic to numb the cervix is common. *See* App.C.142.[2] Gentle suction is used to evacuate the uterine contents. App.K, ¶ 4; App.M, ¶ 10. It usually takes between two and ten minutes to complete the procedure. *Id.*

Abortion complications are exceptionally low among APRNs, physicians, and physician assistants. App.K, ¶¶ 1, 35; App.M, ¶¶ 11-14. As the district court recognized, there is no clinically significant difference in complications among those providers. App.A.014 ("[T]he risk to a patient obtaining abortion services from an APRN is no greater than obtaining the services from a licensed physician or physician assistant."); *see also* App.K, ¶¶ 34, 35. Further, the district court concluded, the State's arguments about "access to local hospitals, clinic staffing, and

[2] The State cites its own expert's report as support for the statement that an abortion procedure involves "universal anesthesia." State Br. 11. Whatever "universal" anesthesia is, it is not associated with abortion care. And the State's expert does not claim it is. The report says, for abortion procedures: "A paracervical block for local anesthesia is 'nearly universal' administered and involves injecting local anesthesia into the cervical tissues." App.C.142.

access to medical equipment [have] nothing to do with whether the provider is a licensed physician, physician assistant or advanced practice registered nurse." App.A.014.

The district court also found that APRNs in Montana can and do provide care that is comparable or identical to abortion care. App.A.014 ("The risk to a patient obtaining an abortion is no greater than from procedures which APRNs currently perform[.]"); *see also* App.K, ¶¶ 23, 24. NPs and CNMs licensed in Montana lawfully provide miscarriage care using procedures and medications also used for abortion care. App.K, ¶ 23. The State's own expert, Dr. Mulcaire-Jones, testified: the "techniques and protocols" for "tak[ing] care of women who have fetal demise or miscarriage or a stillbirth" are "identical" to those used for abortion care. *Id.*, ¶ 37. The State's other expert, Dr. Aultman, likewise testified that treatment for "missed abortion"—where fetal demise has occurred, but the patient has not begun to pass the pregnancy—is "comparable" to an aspiration abortion. *Id.*; *see also id.*, ¶ 38 (Aultman testifying that managing the complications of miscarriage, fetal demise, and stillbirth—which APRNs already do in Montana—is "extremely similar to management of abortion complications."). APRNs may also provide care that carries more risk than abortion; for example, APRNs registered with the U.S. Drug Enforcement Authority may prescribe potentially dangerous and addictive drugs, and medications that carry far more risk than the medications used in a medication

abortion. App.K, ¶ 26.

Next, the district court rejected the State's superficial attempt to distinguish physician assistants (who practice pursuant to an agreement with a physician) and APRNs (who practice independently). App.A.013. Physicians need not be on site while physician assistants provide care. *See id*.; *see also* § 37-20-403(2), MCA. And "unlike physician assistants, APRNs have advanced education and training which qualifies them to practice" independently. App.A.013. Moreover, the State offered no evidence that physician involvement is the linchpin for safe abortion practice, nor that physician involvement was uniquely essential for abortion care and no other, identical care provided by ARPNs.

The district court's conclusions are consistent with a broad consensus from leading medical authorities, public health organizations, and nursing professional organizations who agree that APRNs may safely provide abortion care. App.K, ¶¶ 19, 30, 32. The American College of Obstetricians and Gynecologists, the American Public Health Association, the American College of Nurse Midwives, and the National Association of Nurse Practitioners in Women's Health support APRNs' provision of abortion care. *Id.*, ¶ 32. Additionally, the U.S. Food and Drug Administration, which regulates the medication used in medication abortions, recognizes that qualified health care providers acting within their scope of practice may provide medication abortion as allowed under state law. *Id.*, ¶ 29.

### B. But for the Restriction, Montana's General Rules Governing APRN Practice Apply to Abortion.

Montana has a generally-applicable set of rules that govern APRNs, including—but for the Restriction—APRNs' provision of abortion care. The State, through the Board of Nursing, grants APRNs, including Plaintiffs, licensure, the purpose of which is "[t]o safeguard life and health." § 37-8-101, MCA. With that licensure, Montana APRNs may practice independently, and provide health services within their scope of practice as governed by those general rules. *See, e.g.*, Mont. Admin. R. 24.159.1405 (APRN practice); Mont. Admin. R. 24.159.1470 (NP practice); Mont. Admin. R. 24.159.1475 (CNM practice). "Scope of practice" is what members of a health profession are competent to do based on their training, education, and the community they are serving. *See* App.K, ¶ 14. Scope of practice requirements ensure APRNs offer safe, effective, and quality care they are competent to provide, and provides that they can be disciplined if they provide care beyond their scope. *Id.*, ¶¶ 14-15.

As the district court found, the State maintains no list of health services that APRNs may or may not provide. App.A.011. (For example, although it is undisputed that people experiencing a miscarriage in Montana can access care from an APRN, App.K, ¶ 23—and that that care is identical to abortion care, *id*., ¶ 36 —"miscarriage care" appears on no State-approved list of procedures APRNs can provide.) Rather, as the district court concluded, scope of practice for APRNs licensed to provide care

in Montana is based on State regulations and guidance, including from recognized national professional organizations recognized by the Board. *See* App.A.008.

Physicians follow a similar approach: once licensed by the State, they are entrusted to know the limits of their practice and may be subject to discipline if they provide care beyond their competence. *See* App.K, ¶ 18. The Board of Medical Examiners maintains no list of procedures that physicians—or physicians with certain specialties—may or may not provide. *Cf. id.*, ¶ 13 (Aultman testifying that, to her knowledge, Montana does not restrict the provision of abortions to physicians with particular specialties). And a single physician may not be able to handle all possible complications of care they provide. *Id.*, ¶ 18 (Aultman testimony). Instead, the State, through the Board of Medical Examiners, trusts physicians to provide care consistent with their education and training and based on guidance from their professional organizations and may discipline those who do not. *See, e.g.*, § 37-3-303, MCA (physician license authorizes licensee to practice medicine "in a manner consistent with the holder's training, skill, and experience").

Among others, the Board of Nursing recognizes the American College of Nurse Midwives, the American Association of Nurse Practitioners, the National Organization of Nurse Practitioner Faculties, and the National Association of Nurse Practitioners in Women's Health as national professional organizations for APRN scope and standards of practice. App.K, ¶ 19. None prohibit APRNs from providing

abortion care; to the contrary, the provision of abortion care is consistent with the scope of practice set out by professional organizations that guide NP and CNM practice. *Id*., ¶¶ 19-21, 32.

Had there been any doubt, in July 2019, the Board of Nursing confirmed that its existing rules cover the provision of abortion care by APRNs. *See* App.A.008-11. It further noted that medication and aspiration abortion "are not significantly different" from the medications and procedures APRNS currently provide. App.A.010-11 (quoting Board of Nursing).

### C. The Restriction Does Not Advance, and Instead Harms, People's Health.

In light of the evidence, the district court found that the State failed to "clearly and convincingly demonstrate a medically acknowledged, bona fide health risk that justifies the law's interference with a fundamental right." App.A.014.

Ms. Weems' provision of abortion care since the district court granted the preliminary injunction over four years ago also demonstrates that, in practice, there is no credible health reason to bar APRNs from providing abortion care within their scope. With the injunction in place, she has been able to obtain comprehensive training and achieve competence in abortion care provision— just as she would any other care she provides. App.K, ¶ 53. And, today, Ms. Weems continues to provide abortion care to her patients—care that would otherwise be unavailable to pregnant people in the five-county catchment surrounding Whitefish, Montana. *See id.*, ¶ 55.

Plucking abortion out of the generally applicable scheme that governs APRN practice, and barring APRNs from providing this care, instead, harms pregnant people. In general, abortion services are tied to provider availability—i.e., which providers actually provide abortion care, not the total number of physicians or physicians there may be in the state. *Id.*, ¶ 47. Patients must often travel great distances to access a provider; and, in addition to finding the funds and means to travel, must arrange for time off from work, make family arrangements, and ensure they have the funds to pay for care. *Id.*, ¶ 6. The Restriction further reduces the already small pool of abortion providers in the State, compounding the burdens pregnant people face when seeking abortion services. *See id.*, ¶ 47. It increases costs and travel, and contributes to needless delay, which forces people to endure the comparatively higher risks of continued pregnancy. *See id.*, ¶ 49-52.

## STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, based on the same criteria under Montana Rule of Civil Procedure 56 as the district court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 322 P.3d 1029. A motion for summary judgment must be granted when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c). Although the moving party has the burden of establishing the absence of any genuine issue of material fact, the opposing party must come

forward with "material and substantial evidence" to defeat the motion. *Motarie v. N. Mont. Joint Refuse Disposal Dist.* (1995), 274 Mont. 239, 242, 907 P.2d 154, 156 (internal citations omitted). "[C]onclusory or speculative statements" are not enough. *Id*.

A statute is entitled to a presumption of constitutionality *unless* it interferes with a fundamental right. *Bieber v. Broadwater Cnty.* (1988), 232 Mont. 487, 490-91, 759 P.2d 145, 147-48 ("Unless the classification touches on a fundamental right (such as religious freedom, freedom of speech or association, privacy or right to travel) . . . the constitutionality of the statutory discrimination is presumed." (internal citations and quotation marks omitted, emphasis added)); *see also Peterson v. Great Falls Sch. Dist. No. I & A* (1989), 237 Mont. 376, 380, 773 P.2d 316, 318 ("As a fundamental right is not involved, the constitutionality of the statute is presumed and the State need only show a rational relationship to a legitimate State interest.") (internal citations omitted). Where no fundamental right is at issue, the party making the constitutional challenge bears the burden of providing, beyond a reasonable doubt, that the statute is unconstitutional.[3] *See Bd. of Regents of Higher Educ. v. State*, 2022 MT 128, ¶ 10, 409 Mont. 96, 512 P.3d 748 (applying the "beyond a reasonable doubt" standard to constitutional challenge to a statute where a

[3] In any event, the record is clear that, beyond a reasonable doubt, the Restriction is unconstitutional.

fundamental right was not at issue). Where, as here, the party challenging a statute demonstrates it interferes with a fundamental right, the burden shifts to the State to show the statute furthers a compelling state interest and is narrowly tailored to advance that interest. *Armstrong*, ¶ 16; *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112, 122.

## SUMMARY OF THE ARGUMENT

§ 50-20-109(1)(a), MCA, bars people from accessing abortion care from a qualified provider of their choice and is unconstitutional under a straightforward application of Armstrong. Applying *Armstrong* here, this Court preliminarily enjoined the Restriction's enforcement. *Weems I*, ¶ 27. More than three years later, on a fully developed record, there remains no credible evidence that the Restriction fares any better than the physician only-law struck down in *Armstrong*.

There was no genuine dispute on three key points. First, abortion care is identical to care APRNs may already lawfully provide in this state. Second, abortion is exceedingly safe, and APRNs can safely provide abortion care on par with their physician counterparts. Third, nursing statutes and rules govern APRNs provision of health care—including, but for the Restriction, APRNs' provision of abortion care. The Board of Nursing agreed in 2019, when it confirmed that APRNs already provide care similar to abortion care and that existing rules cover abortion care provided by APRNs.

Based on this record, the district court was correct to conclude that the Restriction unconstitutionally interferes with an individual's right to access abortion care from a chosen provider. The State failed to meet its burden to "clearly and convincingly" demonstrate that the Restriction was necessary to avert a "medically-acknowledged, *bona fide* health risk." *Armstrong*, ¶ 62. In fact, rather than serving patients' health, the Restriction compounds the burdens that pregnant people face when seeking abortion services, contributing to needless delay, additional costs and travel, and comparatively higher risks of continued pregnancy and childbirth. Moreover, the State failed to show that the Restriction was narrowly tailored to further any compelling health interest.

The State rehashes arguments this Court rejected in *Weems I* in an attempt to distinguish this case from *Armstrong* and distract from the sole constitutional question in this case. These efforts cannot mask the State's meager defense of the Restriction and this Court should again reject them.

## ARGUMENT

### I. The District Court Correctly Held that the Restriction Violates the Constitutional Rights to Privacy and Procreative Autonomy.

*Weems I* recognized that this case was identical to *Armstrong* in all relevant respects and the State's attempts to distinguish it were futile. That remains true. The State's argument that the right to access abortion from a chosen health care provider is not at issue here, and its lackluster defense of the Restriction under strict scrutiny,

essentially repeats what it argued—and this Court—rejected in *Weems I*. Today, the record is even more clear that the Restriction interferes with fundamental rights and that is not narrowly tailored to effectuate a compelling government interest.

As in *Armstrong* and *Weems I*, the district court was correct to hold that § 50-20-109(1)(a), MCA, interferes with Plaintiffs' patients' rights to privacy and procreative autonomy by barring people from accessing abortion care from their chosen health care provider. And it was correct to conclude that State failed to clearly and convincingly demonstrate a medically acknowledged bona fide health risk for this interference, or that the interference was narrowly tailored to advance any such compelling health interest. This Court should affirm.

**A. The Restriction Interferes with the Fundamental Right to Abortion.**

The State is wrong that the "right to privacy is not implicated" and the "decision to seek and obtain an abortion is not at issue" here. *See* State Br. 41. This case puts squarely at issue the right to privacy and the decision to seek and obtain an abortion from a chosen health care provider in precisely the same way as in *Armstrong* and *Weems I*. This Court has already come to that straightforward conclusion *in this case*. The State cannot escape it with citations to federal cases that have no application here or to Montana cases that only confirm *Armstrong* applies. *See* State Br. 41-43.

*Armstrong* held that the privacy guarantee in Article II, Section 10 of the Montana Constitution encompasses the right of personal and procreative autonomy, including to seek and obtain abortion care from a health care provider of their choice. *Armstrong*, ¶ 14. This "most stringent protection of citizens right to privacy [] exceed[s] even that provided by the federal constitution." *Id*., ¶ 34 (internal citations omitted). The Court emphasized that "[f]ew matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health. *Id.*, ¶ 53. *Weems I* confirmed that "*Armstrong* leaves no doubt" that abortion is "lawful" health care that may be provided "for a consenting patient by a provider" who is qualified. *Weems I*, ¶ 19 (internal citations and quotation marks omitted). Accordingly, as the district court correctly observed: "The Montana Constitution protects not only a patient's right to seek and obtain lawful medical procedures, but also the patient's right to choose the health care provider who performs the procedure" when that provider is qualified. App.A.012.

The Restriction here directly interferes with that right. It makes it a crime for clinicians other than physicians or physician assistants to provide abortion care. It is an absolute bar to individuals accessing lawful abortion care from a chosen health care provider when that provider is an APRN. So, as this Court already concluded in *Weems I*, the Restriction threatens the right to abortion just as the law challenged

in *Armstrong* did. *Weems I*, ¶¶ 1, 19; *Armstrong*, ¶¶ 62-63. The district court was correct to come to the same conclusion. App.A.012-14.

The State is wrong to characterize this case as about whether people can access abortion care from other clinicians—namely, physicians and physician assistants licensed in the State. *Contra* State Br. 16 (stating the "real" issue is that many physicians and physician assistants do not currently provide abortion care).[4] The Montana Constitution guarantees the fundamental right to access abortion from a *qualified health care provider of an individual's choice*—not simply a physician or a physician assistant. *Weems I*, ¶¶ 1, 19; *Armstrong*, ¶ 62. An analogous version of the State's cramped argument could have been made in *Armstrong*. But, this Court held, the "real issue" was whether patients could choose to access abortion care from P.A. Cahill—not whether patients could seek abortion care from physicians. *See Armstrong*, ¶ 63. The fact that P.A. Cahill and Dr. Armstrong provided care in the *same clinic* underscores *Armstrong*'s concern was not simply with a right to abortion from to any provider, but that patients have a right to choose their specific health

[4] The State cannot seriously mean what it says here. It asserts there are 8,000 physicians and physician assistants "qualified by law to perform abortions" because there are 8,000 physicians and physician assistants licensed in Montana. State Br. 16. That number includes clinicians with specialties as disparate as allergy and immunology, dermatology, ophthalmology, pathology, and psychiatry, and physicians and physician assistants who may have no education or training in abortion care. Of course, Montana law does not permit physicians and physician assistants to provide care beyond their education, training, and experience. *See, e.g.*, § 37-3-303, MCA. But, as written, the State elevates credential above any education and training: a physician or physician assistant is "qualified by law" to provide abortion care, but an APRN, when educated and trained to provide abortion care, cannot. That position has nothing to do with protecting people's health.

care provider, as long as that provider is competent according to the appropriate licensing authority.

The case is also not about whether people have an "unqualified right to obtain medical care, free of regulation." *Contra* State Br. 32. But for the Restriction challenged here, licensed APRNs would remain subject to the same regulation when they provide abortion care as any other health care. App.A.009-11. Nor is it about whether people have a right to access health care from unlicensed individuals, *Wiser v. State*, 2006 MT 20, ¶¶ 16-18, 331 Mont. 28, 129 P.3d 133, or to access unlawful medical care, *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 22, 366 Mont. 224, 286 P.3d 1161. *Contra* State Br. 41-43. This Court has already rejected the State's effort to distinguish this case from *Armstrong* and align it with *Wiser* and *Montana Cannabis*. *Weems I*, ¶ 19.

In fact, *Wiser* and *Montana Cannabis* confirm *Armstrong* controls here. *Wiser* holds that the Montana Constitution encompasses no "fundamental right to seek medical care from un-licensed professionals." *Wiser*, ¶ 18. In reaching that conclusion, *Wiser* recognized that *Armstrong* "specifically defined the right [to privacy] as guaranteeing access to a chosen health care provider who has been determined 'competent' by the medical community and 'licensed' to perform the procedure desired." *Id.*, ¶ 16 (quoting *Armstrong*, ¶ 62). Here, of course, and pursuant to the State's invitation, the Board of Nursing expressly determined its

existing regulatory scheme sufficient to cover competency related to abortion care. And no party disputes, as *Wiser* observed, that the State has a general police power "by which it can regulate for the health and safety of its citizens." *Id.*, ¶ 19 (internal citations omitted). That is precisely why the Board exists.

*Montana Cannabis* affirms *Armstrong*'s holding that an individual has a right to obtain *lawful* health care from a health care provider of one's choosing but holds that does not encompass a right to medical marijuana. *Mont. Cannabis*, ¶¶ 26-28 (citing *Armstrong*, ¶¶ 65, 75). *Montana Cannabis* distinguishes *Armstrong* on the ground that *Armstrong* recognizes the right to access care that is legal—namely, abortion. *Id*.

These cases also resolve the State's hypothetical about accessing abortion from a priest, personal assistant, or occupational therapist. *See* State Br. 32. None of these professionals may prescribe medications or perform procedures—abortion, or otherwise. All Plaintiffs seek here is to set aside a law that *singles out* abortion so people can access that care from a competent health professional—an APRN—on the same terms as they do any other care from APRNs.

It is true that "not every restriction on medical care *impermissibly* infringes [the right to privacy]." State Br. 31 (quoting *Weems*, ¶ 19) (emphasis added). But *barring* people from accessing health care—here, abortion care—from a chosen provider undeniably intrudes on their fundamental right to access care from a chosen

provider. The *next* question is whether the restriction is a permissible or impermissible restriction on that right, i.e., whether the law can withstand strict scrutiny.

**B. The Restriction Fails Strict Scrutiny.**

Because the Restriction interferes with an individual's fundamental right to access abortion care from their chosen health care provider, the burden shifts to the State to demonstrate a compelling interest justifying the law and that it is narrowly tailored to advance only that compelling interest. *Armstrong*, ¶ 34; *accord* Mont. Const. art. II. § 10 ("The 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."); *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. More specifically, here, "except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated," the State "has no interest, much less a compelling one," to interfere with an individual's right to access abortion from a chosen provider. *Armstrong*, ¶ 62.

Laws that infringe on the right to privacy, including the right to abortion, have repeatedly failed this exacting test. *See, e.g.*, *Armstrong* ¶¶ 34, 40-42, 65-66; *Gryczan*, 283 Mont. at 449-51, 942 P.2d at 122 (finding statute criminalizing same sex sexual relations between consenting adults violated right to privacy); *see also Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d

301 (affirming district court order preliminarily enjoining several abortion restrictions, where court "applied our precedent subjecting restrictions on abortion services to strict scrutiny because they interfere with the fundamental right to privacy"); *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 120, 68 P.3d 872 ("We have repeatedly recognized the rights found in Montana's Declaration of Rights as being 'fundamental,' meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.").

*Weems I* affirmed the district court's preliminary injunction in this case, indicating that the State likely failed to justify the Restriction under strict scrutiny. *Weems I*, ¶ 23. The record is even clearer now that no medically acknowledged *bona fide* health risk supports the Restriction and that it is not narrowly tailored. The district court was correct to hold that the State did not meet its heavy burden in defending the Restriction.

**i. There is No Compelling Health Justification for the Restriction**

To rise to the level of "compelling," a state interest must be "at a minimum, some interest of the highest order and . . . not otherwise served." *Armstrong*, ¶ 41 n.6 (internal citation and quotation marks omitted). Here, the State must demonstrate by clear and convincing evidence that a "medically acknowledged, *bona fide* health risk" exists to interfere with an individual's fundamental right to abortion. *Id.*, ¶ 62.

The State contends it has an interest in "protecting the health and safety of all" Montanans. State Br. 36. But, as in *Armstrong*, "there is simply no evidence in the record of this case that [the law is] . . . necessary to protect the life, health or safety of women in this State." *Armstrong*, ¶ 66. The record instead demonstrates that there is no evidence that the Restriction is necessary to avert a medically acknowledged, bona fide health risk unique to abortion. Instead, the Restriction conflicts with the State's general approach to regulating APRNs. It also flies in the face of an overwhelming consensus in the health care community that APRNs are competent, safe, and effective abortion providers, on par with physicians and physician assistants.

First, the district court correctly found that individuals access care from APRNs that is identical to, and that carries the same level of risk, as abortion care. App.A.014 (finding "risk to a patient obtaining an abortion is no greater than from other procedures which APRNs currently perform"). Notably, Montana APRNs can and do prescribe medications and perform aspiration procedures for miscarriage management, which the experts in this case agreed are identical to the medications used and procedures performed for abortion care. App.K, ¶¶ 23, 24, 37, 38. The Board of Nursing agreed, stating that medication and aspiration abortion were "not significantly different" than care APRNs already provide. App.A.010 (quoting Board of Nursing). The State failed to demonstrate any reason—let alone a

medically acknowledged bona fide health risk—to support barring APRNs from providing abortion care (and only abortion care).

Second, the district court correctly found that medication and aspiration abortion safety and efficacy is the same between physicians, physician assistants, and APRNs. *See* App.A.014; App.K, ¶ 34. In fact, abortion is one of the safest types of health care in the United States, App.K, ¶ 1; App.M, ¶ 11; complications are exceedingly low among APRNs, physicians, and physician assistants; and there is no clinically significant difference in complications among those providers. App.A.014 (any "risk to a patient obtaining abortion services from an APRN is no greater than obtaining the services from a licensed physician or physician assistant"). Accordingly, the State demonstrated no medically acknowledged bona fide health risk associated with abortion care when provided by APRNs but not physicians and physician assistants. App.A.014. Instead, every alleged risk the State cited had "nothing to do with whether the provider is a licensed physician, physician assistant or advanced practice registered nurse." *Id*. (referring "issues regarding access to local hospitals, clinic staffing, and access to medical equipment").

Likewise, the district court found "unpersuasive" the State's emphasis on the physician/physician assistant relationship compared to APRN's independent practice. App.A.013. As it has before, the State makes too much of physician/physician assistant "supervision;" physicians do not need to be in-person

and on-site for physician assistants to practice. *Id*.; § 37-20-403, MCA. Moreover, APRNs "have advanced education and training which qualifies them to practice without physician supervision" as a general matter. App.A.013. If the State believed physician involvement was the linchpin for safe abortion practice (which it is not), strict scrutiny required the State to make that showing "clearly and convincingly." *Armstrong*, ¶¶ 59, 62. In fact, strict scrutiny required the State to do much more: to demonstrate why barring APRNs from providing abortion care averts an *actual* health risk, when permitting APRNs to provide comparable care does not. The State's unsupported assertions did not come close to making that showing.

Third, the district court found that, but for the Restriction, generally applicable laws govern APRN practice in Montana, including their provision of abortion care. App.A.011. And the State failed to demonstrate that these general rules are uniquely insufficient to protect individuals' health and safety when it comes to abortion. *See* App.A.012-13.

The district court found the State's hyper-focus on "self-assessment" "unsubstantiated and unwarranted" in light of generally applicable laws that, but for the Restriction, continue to govern APRN provision of abortion. App.A.008-009. The State, through the Board, licenses APRNs, grants them prescriptive authority, and authorizes them to provide health care within their scope of practice. *Id*. APRNs are graduates of accredited programs, complete a national certification exam, and

must adhere to practice standards established by national professional organizations specific to their role and population focus. *Id*. These "requirements for meeting national, field specific standards ensure APRNs assess their competence with reference to the judgment, knowledge, and experience of the greater medical community, as required by *Armstrong*." *Id*., at 8 (citing *Armstrong*, ¶ 62).

The district court properly rejected the State's futile search for the word "abortion" in Board rules or guidance from national professional organizations. *See* App.A.011 (scope of practice for APRNs relies on APRN "role and population focus rather than a list of included or excluded procedures and medications"). Those rules and guidance documents do not enumerate an exhaustive list of procedures or medications an APRN can provide or prescribe. *See* App.A.007-009; *see also e.g.*, App.C.081-097 Rather, they set standards that guide APRN practice. *See* App.A.007-009; *see also e.g.*, App.C.081-097. They do not specifically authorize the provision of miscarriage care, which all agreed APRNs can provide. App.K, ¶¶ 23, 24, 37, 38. Yet, just like miscarriage care, abortion fits well within NP and CNM scope as defined by the Board and the relevant national professional organizations it recognizes. *See* App.A.008-11; App.K, ¶¶ 23, 24, 37, 38.

The State presented no evidence that APRNs are unable to adhere to these standards with respect to abortion, and only as to abortion. *See* App.A.008-009. In fact, APRNs have every incentive to stick to these rules and provide only within

their scope, as they risk discipline from the Board and potential loss of licensure. App.A.009. The Board of Nursing confirmed this all in 2019, when it verified that absent the Restriction its general rules govern abortion care and there was no reason to treat it differently. *See* App.010.

The district court's findings are consistent with the broad consensus among leading medical, nursing, and public health organizations that APRNs are competent, safe and effective abortion providers. App.K, ¶¶ 19, 30, 32. Among others, the American College of Obstetricians and Gynecologists, the American Public Health Association, the American College of Nurse Midwives, and the National Association of Nurse Practitioners in Women's Health support APRNs' provision of abortion care. *Id*., ¶ 32. The U.S. Food and Drug Administration, which regulates the first medication provided in a medication abortion, recognizes that APRNs may provide medication abortion. *Id*., ¶ 29.

All the district court needed to do to find the Restriction unconstitutional was conclude that it was not necessary to avert any medically acknowledged *bona fide* health risk. And, based on the record above, it did. App.A.015-16. The district court did not need to consider the backdrop of limited access to abortion in Montana. *See generally Armstrong*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. That context, however, highlights that the Restriction not only fails to protect people's health, but also actively undermines it. As this Court observed in affirming the preliminary

injunction, enforcement of the Restriction does not help, but rather harms, pregnant people. *Weems I*, ¶ 25. Abortion care is largely tied to provider availability; patients often must travel great distances to reach one of a handful of providers in the state. App.K, ¶ 6. Additionally, patients must secure the funds for care, money and means for travel; arrange for time away from work or school; and make arrangements to care for children most people seeking abortion care already have. *Id.*, ¶ 6. The scarcity of providers can cause patients to experience delays accessing care, forcing them to remain pregnant and to experience comparatively higher risks as pregnancy advances. *Id.*, ¶¶ 49-51. Reducing the number of providers and barring the expansion of the pool of competent providers would only—once again—make accessing abortion "as difficult, as inconvenient, and as costly as possible" under the guise of "protecting women's health." *Armstrong*, ¶ 65.

This is all the more true now, when, in the aftermath of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), abortion has become a crime in several states. Montana—where abortion remains legal—is surrounded by states where abortion is either illegal or is under the threat of a total abortion ban. *See* Ctr. for Reprod. Rts., After Roe Fell, https://reproductiverights.org/maps/abortion-laws-by-state/.

As Ms. Weems' provision of abortion care over the last four years demonstrates, she fills a critical gap as the only provider—physician, physician

assistant, or APRN—providing services in the northwest region of this State. App. K, ¶¶ 54-55. Barring Ms. Weems and other qualified APRNs from providing care, especially now, would do nothing to protect pregnant people. It would only increase the health risks and harms that they face in seeking to exercise their fundamental rights.

#### ii. The Restriction is Not Narrowly Tailored to Serve Any Compelling Health Interest.

The district court was also correct to conclude that the Restriction fails to meet the close means-to-end fit *Armstrong* requires. App.A.014-16; *Armstrong*, ¶¶ 34, 62. A narrowly tailored law is "the least onerous path that can be taken to achieve the state objective." *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174; *see also* App.A.014-015 ("The least onerous path is one that infringes on the identified fundamental right the least while still accomplishing the State's interest.").

On appeal, the State makes no real effort to defend the Restriction as narrowly tailored. And for good reason: categorically barring individuals from accessing abortion—and only abortion—from APRNs is not the least intrusive way of achieving the State's interest in safeguarding their health. It is, instead, arbitrary and irrational. The Restriction targets abortion but does not bar APRNs from providing equally or more dangerous procedures and medications. *See supra* p. 11. It prohibits people from accessing abortion from an APRN regardless of their proximity to care that might be necessary in the exceptionally unlikely event a patient experiences a

complication the APRN cannot manage. *See supra* pp. 10-12, 28. And it subjects to criminal penalties APRNs who are qualified by education, training, or experience to provide abortion care, but not physician or physician assistants who might provide abortion care without any such qualifications. *See supra* pp. 22.

In sum, summary judgment was warranted in light of the State's complete failure to demonstrate any health rationale for the Restriction, let alone to demonstrate by clear and convincing evidence that the Restriction was necessary to avoid a medically acknowledged, *bona fide* health risk. It was also proper because the State failed to demonstrate that the Restriction was narrowly tailored to advance any compelling health interest. This Court should affirm.

## II. The State Misconstrues the Issues in this Case.

In a desperate attempt to distract the Court from the fact that this action is on all-fours with *Armstrong* and *Weems I*, the State resorts to outlandish arguments about the Board of Nursing, about *Armstrong*, and amendments made to § 50-20-109(1)(a), MCA, in 2005. But as this Court recognized in *Weems I*, the central issue in this case is whether the Restriction unconstitutionally interferes with the right to obtain a lawful abortion from a health care provider of one's choosing. It is the same issue that was before the Court in *Armstrong*. The Court should reject the State's invitation to depart from the well-established facts and law governing this appeal.

In fixating on the Board of Nursing's 2019 action, the State makes contradictory arguments that the Board deferred to the legislature, State Br. 28, while also exceeded the authority delegated to it by the legislature *id.*, 22. The State's criticism of the Board's action is paradoxical, because at the preliminary injunction stage the State demanded the Board of Nursing weigh in on APRNs and abortion—going so far as to say the case was not justiciable because the Board had not yet specifically considered the issue. *See Weems I*, ¶¶ 13-16.

It is also circular. The State asserts that the Board cannot consider whether abortion is within APRN scope of practice because § 50-20-109(1)(a), MCA, makes it a felony for ARPNs to provide abortion care. *See, e.g.*, State Br. 25. But § 50-20-109(1)(a), MCA, is the subject of the constitutional challenge in this case. It is no answer to point to the statute as a reason APRNs cannot provide abortion care. The same logic would have ended the challenge to the law in *Armstrong* before it began. The version of § 50-20-109(1)(a), MCA, at issue in that case barred physician assistants from providing abortion care regardless of what the Board of Medical Examiners had to say.

In any event, Board of Nursing issued no new rule. All it did was confirm what Plaintiffs have argued since the outset of this case—namely:

- The Board maintains no list of procedures APRNs may or may not perform nor medications they may or may not prescribe. App.A.011; *Weems I*, ¶ 23.

- But for the Restriction, the Board's rules govern APRNs who provide abortion care, App.A.010; *Weems I*, ¶ 23.

- Abortion care is comparable to other care APRNs in Montana provide. App.A.010; *Weems I*, ¶ 3.

The State also mischaracterizes *Armstrong* as holding only that individuals have a fundamental right to access abortion care from physician assistants. *E.g.*, State Br. 5. This retreads familiar ground. *Armstrong* itself makes clear its holding is that the Montana Constitution's express privacy protection "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." *Id.*, ¶ 14. *Armstrong* stressed that decisions about whom to trust with "intimate invasions of body and psyche" involved in health care, including abortion care, must be the individual's, and state regulation in that area must be based on averting an actual health risk. *See id.*, ¶ 58; *see also id.*, ¶ 2 n.1 (stating that "health care provider," was a "generic term" meant to include health professionals deemed competent by "education, training, or experience").

*Weems I* reaffirmed *Armstrong*'s holding and confirmed its direct applicability *in this case*. *Weems I*, ¶ 1. In doing so, this Court did not accept the State's effort to distinguish *Armstrong* on the ground that physician assistants practice pursuant to a relationship with physicians, while APRNs practice

independently. *Weems I*, ¶¶ 19-23. The State makes the same argument here, *e.g.*, State Br. 15, and this Court should reject it once again.[5] *See supra* pp. 11-12, 29.

Finally, the State's account of H.B. 737 is wrong—and a red herring. H.B. 737 did amend § 50-20-109(1)(a), MCA, to add physician assistants alongside physicians as those clinicians lawfully permitted to provide abortion care. But that amendment made no difference for people's ability to access abortion from physician assistants. Physician assistants could provide abortion care before 2005 (because of *Armstrong*) and after (consistent with the amended law). Accordingly, the legislature did not "elect" in 2005 to expand the pool of abortion providers. *Contra* State Br. 15. It amended the law as part of a larger piece of legislation intended to address multiple areas relating to physician assistants. And it actually *contracted* the pool of abortion providers by making it a crime for anyone other than a physician or physician assistant to provide that care. Ultimately, this discussion of legislative history does not matter. What the legislature thought it was doing when it amended § 50-20-109(1)(a), MCA, is not at issue here. The Restriction's impact—barring individuals from accessing abortion care from ARPNs—is.

[5] And of course only weeks ago this Court declined the State's invitation to overrule *Armstrong*. *Planned Parenthood of Mont. v. State*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting summary judgment on Plaintiffs' privacy claim, and permanently enjoining enforcement of § 50-20-109(1)(a), MCA.

Respectfully submitted September 16, 2022.

By:

/s/ *Alex Rate*
Alex Rate
Akilah Lane
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-203-3375
ratea@aclumontana.org
lanea@aclumontana.org

/s/ *Hillary Schneller*
Hillary Schneller
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Response Brief of Appellees is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word Office 365 is 8,851 words.

DATED: September 16, 2022

/s/ *Alex Rate*
Alex Rate

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 22–0207

HELEN WEEMS AND JANE DOE,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General; and TRAVIS R. AHNER, in his official capacity as County Attorney for Flathead County,

Defendants and Appellants.

## APPENDICES

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Mike Menahan, Presiding.


Pls.' Statement of Undisputed Facts (D.C. Doc. 95) …… Appendix K

Joey Banks Dep. Tr. Excerpts and Report (D.C. Doc. 92) ……..... Appendix L

Suzan Goodman Dep. Tr. Excerpts and Report (D.C. Doc. 92) …….. Appendix M

Laura Jenson Dep. Tr. Excerpts and Report (D.C. Doc. 92) …..…..… Appendix N

Helen Weems Dep. Tr. Excerpts and Aff. (D.C. Doc. 92) …….. Appendix O

Jane Doe Dep. Tr. Excerpts (D.C. Doc. 92) ……..……. Appendix P

Kathi Aultman Dep. Tr. Excerpts (D.C. Doc. 92) ……..……Appendix Q

George Mulcaire-Jones Dep. Tr. Excerpts (D.C. Doc. 92)…….Appendix R

Defs.' First Disc. Response Excerpts (D.C. Doc. 92) ……..……. Appendix S

A. Thompson Aff. in Support of Pls.' Mot. for S.J. (D.C. Doc. 92) …. Appendix T

## CERTIFICATE OF SERVICE

I certify that the foregoing Response Brief of Appellees was served by eService on counsel for Defendants and Appellants:

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
BRENT MEAD
Assistant Solicitor General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
david.dewhirst@mt.gov
brent.mead2@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
(406) 384-7990
emily@joneslawmt.com

DATED: September 16, 2022

/s/ *Alex Rate*
Alex Rate