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MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

HELEN WEEMS and JANE DOE, Plaintiffs, vs. THE STATE OF MONTANA, et al., Defendants.	Cause No. ADV 2018-73 Hon. Mike Menahan **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In contravention of binding Montana Supreme Court precedent, § 50-20-109(1)(a), MCA (the "APRN Restriction" or "the Restriction") singles out people seeking and providing abortion care by barring Advanced Practice Registered Nurses ("APRNs") from providing care within their scope of practice.[1] The Restriction is unconstitutional under a straightforward application of *Armstrong v. State*, 1999 MT 261, 296 Mont. 361989 P.2d 364 (1999). There, the Montana Supreme Court held that Montanans' fundamental right to privacy and procreative autonomy includes the right to obtain a pre-viability abortion from a competent health care provider of their choice, and, in a case brought by a physician assistant, struck down a law restricting the provision of abortion to physicians. *Id.* Applying that precedent here, this Court preliminarily enjoined enforcement of the Restriction as to the Plaintiff APRNs, after concluding that the State failed to present any evidence that it is necessary to protect the health of Montanans seeking abortion care. D. Ct. Prelim. Inj. Order, 7. The Montana Supreme Court affirmed. *Weems v. State,* 2019 MT 98, ¶ 27, 395 Mont. 350, 440 P.3d 4.

Three years after this Court granted the preliminary injunction, the State has proffered no credible evidence that the APRN Restriction fares any better than the physician-only law struck down in *Armstrong*. Indeed, there is no genuine dispute on three key points. First, Board of Nursing rules govern APRNs' provision of health care, and—but for the Restriction—govern APRNs' provision of abortion. And, if there was any doubt, in July 2019, the Board of Nursing (the "Board") confirmed that its existing rules cover the provision of abortion care by APRNs, and that "medication and aspiration abortion procedures are not significantly different from the procedures, medications and surgeries that nurse practitioners currently perform." Second, this is consistent with the expert consensus of leading national medical organizations, which agree that abortion is exceedingly safe, and that APRNs can safely provide abortion care on par with their physician counterparts. Third, there is no compelling health reason—nor in fact any rational basis—for plucking abortion care out of the generally applicable scheme that governs the scope of practice for APRNs. Indeed, rather than serving patients' health, due to the dearth of providers

[1] Other provisions of Montana law presume physician or physician assistant involvement in an abortion. *See, e.g.*, § 50-20-110, MCA; § 50-20-501 *et seq.*, MCA. Plaintiffs also seek relief against the enforcement of these provisions against APRNs, as they would likewise limit APRNs' authority to provide abortion services.

in the State, the APRN 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. Accordingly, the State has failed to meet its burden of demonstrating "clearly and convincingly" a "compelling interest in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bona fide* health risk." *Armstrong*, ¶¶ 59, 62.

Further, there is no genuine dispute that the APRN Restriction discriminates against patients who seek abortion care from a competent APRN in violation of the equal protection clause, treating them differently from patients seeking abortion care from a physician or physician assistant and from people seeking other reproductive health care from an APRN. Nor is there a genuine dispute that it singles out competent APRNs who seek to provide abortion care, treating them differently from APRNs who provide comparable care and from physicians and physician assistants providing early abortion care. The State has not demonstrated that singling out people seeking abortions, or singling out APRNs seeking to provide abortion care, for differential treatment advances any compelling state interest or has rational basis.

Accordingly, Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment and permanently enjoin § 50-20-109(1)(a), MCA.[2]

PROCEDURAL HISTORY

I. Preliminary Injunction Proceedings Before this Court

On January 31, 2018, Plaintiffs Helen Weems[3] and Jane Doe[4] filed this case challenging the constitutionality of § 50-20-109(1)(a), MCA, on behalf of themselves and their patients. Under that law, APRNs licensed in Montana, like the Plaintiffs, are prohibited from providing abortion care to their patients under threat of criminal prosecution. That same day, Plaintiffs also

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[2] In support of their summary judgment motion, Plaintiffs have filed a statement of undisputed facts demonstrating that there are no genuine issues of material fact. *See* Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ("SUF").

[3] Helen Weems is a Certified Nurse Practitioner ("NP") licensed to provide care in Montana. *Id.* ¶ 39.

[4] Jane Doe is a Certified Nurse Midwife ("CNM") licensed to provide care in Montana. *Id.* ¶ 44. She filed a motion for a protective order to proceed via pseudonym, which the Court granted. D. Ct. Pseudonym Order.

moved for a preliminary injunction, arguing that the APRN Restriction violates the fundamental rights of pregnant people under a straightforward application of *Armstrong*, and that it violates Plaintiffs' and their patients' rights to equal protection without adequate justification. Pls.' Mem. Prelim. Inj., 3. Plaintiffs submitted affidavits demonstrating that, but for the Restriction, Board of Nursing rules would govern APRNs' provision of abortion care and that APRNs routinely perform procedures within their scope of practice that are similar in skill to or more complex than early abortion care. *Weems*, ¶¶ 2-3. Plaintiffs also presented evidence to show that provision of early abortions by APRNs with respect to safety, efficacy, and patient acceptability is the same as physicians and physician assistants. *Id.* ¶ 4.

On April 4, 2018, this Court entered an order preliminarily enjoining enforcement of the law as to the Plaintiffs. D. Ct. Prelim. Inj. Order, 7-8. Because the Montana Constitution protects the right of an individual to obtain a lawful medical procedure from a competent health care provider of their choice—and specifically, the Montana Supreme Court evaluated a nearly identical law in *Armstrong*—this Court applied strict scrutiny. *Id.*, 5. In response to the State's assertion that it had a compelling health justification for barring APRNs from providing abortion care, the Court credited a 2013 study, cited by Plaintiffs' expert witness Dr. Goodman, and submitted by the State during the preliminary injunction argument. *Id.*, 5-6. That evidence indicated that abortion complications were "clinically equivalent between newly trained NPs [nurse practitioners], CNMs [certified nurse midwives], PAs [physician assistants], and physicians." *Id.*, 6. The Court did not credit the State's argument that there was compelling justification for the law because physician assistants are required to practice under physician supervision and ARPNs are not. *Id.*, 5. Accordingly, the Court concluded that the State failed to demonstrate a compelling interest in depriving patients of their fundamental right to obtain abortion from competent APRNs. *Id.* The Court also rejected the State's policy argument in support of the Restriction that enjoining enforcement of the law would result in unqualified APRNs performing abortions because the State failed to offer any evidence in support of its position. *Id.*, 6-7. Absent evidence to the contrary, the Court was "satisfied the Board of Nursing is competent to set up appropriate licensing requirements and police Montana's advanced practice registered nurses," including with respect to their provision of abortion care. *Id.*, 7.

II. The Montana Supreme Court

The State appealed, challenging standing and contending that this Court improperly

issued an advisory opinion. *Weems,* ¶ 1. On April 26, 2019, the Montana Supreme Court affirmed the preliminary injunction. In so doing, 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]." *Id.*, ¶ 19. Like this Court, the Montana Supreme Court found that the record demonstrated APRNs in Montana are independent and autonomous providers who provide care within the scope of practice and for which they are trained. *Id.*, ¶¶ 20-23. Further, it confirmed that Plaintiffs' evidence demonstrated that the Restriction barred ARPNs' ability to provide medication abortion care and to complete the training necessary to provide aspiration abortion care. *Id.*, ¶ 26. Further, the Court held that Plaintiffs' affidavits established that the enforcement of the Restriction would cause irreparable injury. *Id.*, ¶ 25. Accordingly, it upheld this Court's preliminary injunction. *Id.*, ¶¶ 25-27.

III. Discovery

The parties conducted discovery between May 2018 and June 15, 2021. Plaintiffs disclosed three expert witnesses: Dr. Goodman, a family medicine physician licensed in California; Dr. Banks, a family medicine physician licensed in Montana, among other states; and Ms. Jenson, a CNM licensed in Oregon. The State disclosed one expert witness, Dr. Mulcaire-Jones, a family medicine physician licensed in Montana, and a rebuttal witness, Dr. Aultman, an obstetrician-gynecologist licensed in Florida. Each expert, along with Plaintiff Weems and Plaintiff Doe, were deposed.

Additionally, in July 2019, the Board of Nursing unanimously carried a motion to leave the rules and regulations addressing APRN scope of practice as they are, recognizing that they adequately cover whether APRNs can provide early abortion care. SUF ¶ 28.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits" demonstrate that there is "no genuine issue as to any material fact" and thus the movant is entitled to judgment as a matter of law. Mont. R. Civ. Pr. 56(c). The moving party has the burden of establishing that there is no genuine issue of material fact. *Sprunk v. First Bank Sys.*, 252 Mont. 463, 465, 830 P.2d 103, 104 (1992). To defeat a motion for summary judgment, the opposing party must present specific facts, and cannot rely on statements that are speculative or conclusory. *Id.*

ARGUMENT

Nothing in the factual record has materially changed since this Court entered a preliminary injunction and the Supreme Court affirmed that would warrant denying the relief Plaintiffs seek. As this Court and the Montana Supreme Court have recognized, this case is governed by, and is on all fours with, *Armstrong*. The APRN Restriction violates the Montana Constitution for two independent reasons, and summary judgment is warranted on each ground. First, the APRN Restriction violates Plaintiffs' patients' fundamental rights to privacy and procreative autonomy under the Montana Constitution, which provides "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong*, ¶ 34. Because a fundamental right is at stake, under *Armstrong*, the State is required to show that the APRN Restriction protects Montanans from a medically acknowledged *bona fide* health risk. *Id.*, ¶ 59. The State has failed to meet this burden, and thus the law cannot survive strict scrutiny.

Second, the APRN Restriction violates Plaintiffs' patients and Plaintiffs' own rights to equal protection, for which the Montana Constitution likewise "provides for even more individual protection than does the federal equal protection clause." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 104 P.3d 445 (internal citation and quotation marks omitted). The APRN Restriction discriminates based on patients' exercise of their right to personal autonomy (and specifically, the manner in which they exercise the fundamental right to a competent provider of their choice and their decision whether to continue or end a pregnancy), and between licensed health care providers, without adequate justification.

I. The APRN Restriction Violates Plaintiffs' Patients' Rights to Privacy and Procreative Autonomy.

As in *Armstrong*, the APRN Restriction violates Plaintiffs' patients' rights to privacy and procreative autonomy by preventing individuals from accessing pre-viability abortion care from their chosen competent health care provider without a compelling justification. *See Weems*, ¶ 19 ("Our cases make clear that Montana's constitutional right to privacy is implicated when a statute infringes on a person's ability to obtain a lawful medical procedure." (citing *Armstrong*, ¶ 62; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 286 P.3d 1161)). Indeed, as the Montana Supreme Court confirmed when it affirmed the preliminary injunction in this case, this case is identical to *Armstrong* in all relevant respects and the State's attempts to distinguish it are futile.

Applying *Armstrong*, the Montana Supreme Court held that the fundamental rights of privacy and procreative autonomy include the right of an individual to obtain pre-viability abortion care from a competent health care provider of their choice. *Id.*, ¶ 19 (citing *Armstrong,* ¶ 62). Further, the Court confirmed that *Armstrong*'s use of "health care provider" applies broadly to health care professionals who have been determined by their examining and licensing boards to be competent to perform the medical procedures or services sought by the patient. *Id.* ¶ 1; *accord Armstrong*, ¶ 2 n.1. And, the Court held, as *Armstrong* had, that "health care provider" includes any nurse, nurse-practitioner, or other professional with the requisite competencies. *Weems*, ¶ 1; *accord Armstrong*, ¶ 2 n.1. Few matters, the Court stressed, more directly implicate personal autonomy and individual privacy, as well as the right to dignity separately protected under the Montana Constitution, than medical judgments affecting the course of one's life, one's bodily integrity, and health. *Armstrong*, ¶¶ 45, 53, 72.

As this Court has held, because the APRN Restriction infringes upon the fundamental right of an individual to obtain pre-viability abortion care from their chosen competent health care provider, it can only be justified by a compelling government interest that is narrowly tailored to effectuate only that compelling interest. *See* D. Ct. Prelim. Inj. Order, 5 (citing *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 v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). Laws that infringe on the right to privacy, including the right to pre-viability abortion, are subject to strict scrutiny, and have repeatedly been held unconstitutional under this test. *See Armstrong*, ¶¶ 34, 43, 65-66, 75; *Planned Parenthood of Missoula v. State*, No. BDV-95-722, Judgment (1st Jud. Dist., Dec. 29, 1999) (entering judgment declaring unconstitutional state-mandated counseling and delay scheme for abortion); *Wicklund v. State*, No. ADV 97-671, Order on Summary Judgment (1st Jud. Dist., Feb. 11, 1999) (holding unconstitutional law mandating parental notification prior to abortion); *Jeannette R. v. Ellery*, No. BDV-94-811, Order on Motions for Summary Judgment (1st Jud. Dist., May 19, 1995) (holding unconstitutional regulation prohibiting Medicaid coverage for abortion).[5]

[5] All unpublished decisions and orders referenced herein are attached in an appendix in support of Plaintiffs' Motion for Summary Judgment.

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). *Armstrong* made plain that the State must demonstrate by clear and convincing evidence that a "medically acknowledged, *bona fide* health risk" exists in order to interfere with an individual's fundamental right to obtain pre-viability abortion from a licensed health care provider determined to be competent by the medical community. *Id.*, ¶ 62.

Here, the State contends it has an interest in the "safety and well-being of its inhabitants." Defs.' Resp. to Interrog. No. 8. 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. To the contrary, the uncontroverted evidence demonstrates that the State bars APRNs from providing abortion in conflict with its approach to regulating APRNs, and in the face of an overwhelming consensus in the medical community that they are competent, safe, and effective abortion providers, on par with physicians and physician assistants.

First, in granting the preliminary injunction, this Court held that absent evidence to the contrary, it was "satisfied the Board of Nursing is competent to set up appropriate licensing requirements and police Montana's advanced practice registered nurses," including with respect to their provision of abortion care. D. Ct. Prelim. Inj. Order, 7. Indeed, the purpose of licensure by the Board of Nursing is to "[t]o safeguard life and health." SUF ¶ 12. And all evidence demonstrates the absence of any "medically acknowledged, bona fide health risk" that justifies removing the provision of abortion from the regulatory scheme that already applies to APRNs—and, but for the criminal statute challenged here, would also apply to APRNs' provision of abortion care.

The Board of Nursing agrees: on July 10, 2019, the Board addressed the issue of abortion and APRNs, and unanimously carried a motion "to leave the rules and statutes as they are because they adequately cover the issue." *Id.* ¶ 28. So too should the State. In opposing Plaintiffs' request for a preliminary injunction, the State argued that under *Armstrong*, Plaintiffs should look to the State's licensing authority for APRN scope of practice. Defs.' Opp. to Pls.' Prelim. Inj., 16. And the State agrees that Montana permits APRNs to provide any health service that is within their scope of practice "to the extent that the appropriate board or governing body authorizes certified nurse practitioners and/or certified nurse midwives to prescribe medications." SUF ¶ 25. More specifically, the State agrees that licensed APRNs to whom the

Board has granted prescriptive authority may prescribe mifepristone and misoprostol—the medications used in a medication abortion—consistent with state and federal laws and within the APRN's role and population focus. *Id.* ¶ 12. Moreover, it is undisputed that, as the Board concluded, APRNs provide care and perform procedures that are not materially different than medication and aspiration abortion, and that early abortion care is consistent with APRN scope of practice as set out by national professional organizations recognized by the Board. *Id.* ¶¶ 28, 30-32. And, the State's expert agreed that CNMs can be trained in abortion care and provide it as part of their practice. *Id.* ¶ 33.

The State's position that it has a compelling health justification for the law because APRNs (unlike physician assistants) are not supervised by physicians is not credible. It ignores the reality that Montana licensed APRNs are independent and autonomous practitioners and are able to provide care consistent with their scope of practice. And it makes far too much of physician supervision of physician assistants, as a supervising physician need not be on-site with a physician assistant. *See* Admin. R. Mont. 24.156.1601; *id.* R. 24.156.1622 (supervision may be on-site or remote).

Second, the record evidence demonstrates that the State bars APRNs from providing abortion care in the face of broad consensus from leading medical organizations, public health organizations, and nursing professional organizations—including those recognized by the Board—that early abortion care can be safely provided by APRNs. SUF ¶¶ 19, 30, 32. For example, 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 early abortion care. *Id.* ¶ 32. Likewise, the U.S. Food and Drug Administration recognizes that qualified health care providers acting within their scope of practice may provide medication abortion as allowed under state law. *Id.* ¶ 29.

Third, it is undisputed that medication and aspiration abortion safety, efficacy, and patient acceptability is the same between physicians, physician assistants, nurse practitioners, and certified nurse midwives. *Id.* ¶ 34. Abortion is one of the safest medical services in the United States; complications are exceedingly low among APRNs, physicians, and physician assistants; and there is no clinically significant difference in complications among those providers. *Id.* ¶¶1, 34; *see also* D. Ct. Prelim. Inj. Order, 6 (noting the State's own evidence

demonstrates that abortion complications were clinically equivalent between newly trained NPs, CNMs, PAs, and physicians, which supported the adoption of policies to allow these providers to perform aspiration abortion).

Fourth, it is undisputed that APRNs in Montana already can and do care for patients experiencing miscarriages using techniques that are identical to early abortion care. SUF ¶¶ 23, 36. As one of the State's experts testified: the "techniques and protocols" for "tak[ing] care of women who have fetal demise or miscarriage or a stillbirth" are "identical" to those for abortion care. *Id.* ¶ 37; *cf. id.* (Aultman testifying that treatment for a "missed abortion"—where fetal demise has occurred, but the patient has not begun to pass the pregnancy—is "comparable" to an aspiration abortion or suction curettage). One of the State's experts further testified that managing the complications of miscarriage, fetal demise, and stillbirth—which APRNs already do under Montana law—is "extremely similar to management of abortion complications." *See id.* ¶ 38.

Fifth, Plaintiff Weems' provision of abortion since this Court granted the preliminary injunction demonstrates that, in practice, there is no credible health reason to bar APRNs from providing abortion care in their scope of practice and under the rules set out by the Board of Nursing. 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. *See id.* ¶ 53. Today, Plaintiff Weems continues to independently provide medication abortion and aspiration abortion to patients in her clinic. *Id.* ¶ 54. She has thus been able to offer abortion care that would otherwise not be available to pregnant people within the five-county catchment surrounding Whitefish, Montana. *See id.* ¶ 55.

Accordingly, as the Montana Supreme Court observed in affirming the preliminary injunction, enforcement of the APRN Restriction does not help, but rather harms, pregnant people. *Weems*, ¶ 25. That is because abortion services are tied to provider availability. Patients must often traverse great distances to access an abortion provider; and, in addition to finding the funds and means to travel, they have to arrange for days off from work, make family arrangements, and ensure they have the funds to pay for care. SUF ¶ 6. The scarcity of providers can cause patients to experience delays in accessing care, forcing them to remain pregnant and to incur the comparative risks as pregnancy advances. *Id.* ¶¶ 49-50. The APRN Restriction therefore increases the health risks and harms that pregnant people face in seeking to exercise

their fundamental constitutional right to obtain pre-viability abortion care from a competent health care provider of their choice. And as Plaintiff Weems' provision of abortion care over the last three years demonstrates, she is filling a critical gap as the only provider—physician, physician assistant, or APRN—who is able to provide services in the northwest region of the State. *See id.* ¶¶ 54-55.

Finally, even if the State's interests were compelling, which they are not, the Restriction fails the close means-to-ends fit *Armstrong* requires. *See Armstrong*, ¶ 34. For example, the APRN Restriction targets abortion but does not bar APRNs from providing equally or more dangerous procedures and medications. There is simply no narrowly tailored medical or public health rationale for singling out abortion as the only health service APRNs cannot provide. For all these reasons, the APRN Restriction violates Plaintiffs' patients' fundamental rights without advancing any compelling interest in a narrowly tailored way and is therefore unconstitutional.

II. The APRN Restriction Violates the Equal Protection Rights of Plaintiffs and Their Patients.

The APRN Restriction is unconstitutional for an additional reason: it violates the equal protection rights of Plaintiffs and their patients. Article II, section 4 of the Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corrs.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992. The Montana Constitution "provides for even more individual protection than does the federal equal protection clause." *Snetsinger*, ¶ 58; *see also Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 119–20, 68 P.3d 872, 883 (interpreting the Montana Constitution's protection from cruel and unusual punishment clause as providing greater protections than the federal constitution because it read the state provision together with the Montana Constitution's dignity provision).

In evaluating an equal protection claim, a court first identifies whether there are similarly situated classes that are being treated differently. *Snetsinger*, ¶ 16. If there are, the court must then decide the appropriate level of scrutiny. "Strict scrutiny applies if a suspect class or fundamental right is affected[]" and requires that the State show that the law "is narrowly tailored to serve a compelling government interest." *Id.*, ¶ 17 (citation omitted); *see also Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, 988 P.2d 1236 (strict scrutiny requires the State to establish that the discrimination advances a compelling state

interest, is closely tailored to advance only that interest, and is "the least onerous path that can be taken to achieve the state objective"). Even where classifications do not affect fundamental or important constitutional rights or burden a suspect class, the law "must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19.

The APRN Restriction violates the Montana guarantee of equal protection for two reasons. First, it discriminates based on an individual's exercise of their fundamental right to obtain health care—and more specifically, abortion—from a competent provider of one's choice and based on the type of reproductive health care they seek, and fails strict scrutiny. Second, it discriminates against competent APRNs who seek to provide abortions, treating them differently from APRNs who provide comparable care and from physicians and physician assistants who provide early abortion care, without any rational basis.

A. The APRN Restriction Violates Plaintiffs' Patients Equal Protection Rights.

The APRN Restriction singles out Plaintiffs' patients for discriminatory treatment by classifying patients based on (1) how they exercise their fundamental right to obtain health care from a competent provider of their choice (an APRN as compared to a physician or physician assistant) and (2) how they exercise their fundamental right of procreative autonomy (abortion as compared to other reproductive health care). The right to obtain a pre-viability abortion from a health care provider of one's choosing who "has been determined by the appropriate medical examining and licensing authority to be competent by reason of education, training or experience" to perform the category of procedures is a fundamental right under the Montana Constitution. *Weems*, ¶ 1 (quoting *Armstrong*, ¶ 2, n.1). By prohibiting people from obtaining abortions from competent APRNs, the APRN Restriction discriminates against individuals based on the manner in which they exercise the fundamental right to a competent provider of their choice and the type of reproductive health care they seek.

This classification is particularly suspect because the personal and procreative autonomy rights at issue also find protection in other, overlapping constitutional rights. *See Armstrong*, ¶¶ 71-72 ("Equal protection . . . requires that people have an equal right to form and to follow their own values in profoundly spiritual matters." (citing Dworkin, *Life's Dominion*, 165-67)); *id.*, ¶ 72 ("Respect for the dignity of each individual . . . demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general,

answering to their own consciences and convictions."); *see also Walker*, ¶ 73

The undisputed evidence shows that the APRN Restriction singles out Plaintiffs' patients from seeking health care from a competent provider of their choice. Montanans who seek to exercise this right by obtaining that care from an APRN are similarly situated to those who seek to obtain care from competent physicians and physician assistants. Montanans access a broad range of health services from APRNs. SUF ¶ 22. APRNs provide IUD insertions, miscarriage management, and other health care services. *Id.* ¶ 24. Additionally, APRNs with prescriptive authority and a DEA registration may prescribe schedules II through V controlled substances. *Id.* ¶ 25. Montanans already access care from APRNs that is comparable to early abortion care. *See supra* Argument Part I (discussing Board's comment on abortion care). For example, it is undisputed that APRNs in Montana can and do already care for patients experiencing miscarriages using techniques that are identical to early abortion care.[6] *Supra* Argument Part I.

Even more specifically, Montanans seeking abortion are similarly situated to those seeking other reproductive health care, such as contraceptive or pregnancy care. *See Armstrong*, ¶ 49 (indicating that individuals who "choose[] to terminate [a] pre-viability pregnancy" are similarly situated to those who "cho[o]se to carry the fetus to term"); *see also id.*, ¶ 47 (discussing right to procreative autonomy as encompassing access to contraceptives). The APRN Restriction treats similarly situated people differently based on how they decide to exercise their rights to privacy and procreative autonomy. It allows those who seek to prevent pregnancy or continue their pregnancy to obtain care from a competent provider of their choice (including from APRNs, if the care is within their scope of practice), but disallows those who seek to end a pregnancy from obtaining that care from competent APRNs.

Because the APRN Restriction affects a fundamental right, the State bears the burden under strict scrutiny of showing that the law is narrowly tailored to serve a compelling state interest. *Snetsinger*, ¶ 17. At the preliminary relief stage, this Court was "not persuaded the State has a compelling interest to infringe upon a patient's fundamental right to privacy." D. Ct. Order, 5. Since then, the State has failed to meet its burden to demonstrate that it has any interest,

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[6] The State's own expert agreed that complications for a procedure where there has been fetal demise would be "similar" to that of a procedure for an "elective abortion" at the same gestational age—at least early in pregnancy. SUF ¶ 38. He also testified that "managing the complications of miscarriage, fetal demise and stillbirth" is "extremely similar to management of abortion complications." *Id.*

let alone a compelling one, in treating people differently based on how they decide to exercise their rights to privacy and procreative autonomy. *Supra* Argument Part I.

The State asserts an interest in "assuring the safety and well-being of its inhabitants." Defs.' Resp. to Interrog. No. 8. It describes a related compelling interest in barring patients from obtaining abortion care from APRNs but not physician assistants, because unlike physician assistants, APRNs are not required to be supervised by physicians "presumably equipped to handle complications." *Id.* No. 9. The State fails to demonstrate that the APRN Restriction actually furthers either interest, let alone that it is narrowly tailored.

There is no health or safety basis for allowing Montanans to obtain health services—including comparable health services, such as miscarriage management—from APRNs, but prohibiting them from accessing abortion care from APRNs. *Supra* Argument Part I. Nor is there any health or safety reason to prohibit patients from exercising their right to procreative autonomy. As *Armstrong* recognized: "the State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term." *Armstrong*, ¶ 49.

The notion that a legal requirement for physician supervision is sufficient reason to discriminate between patients who obtain abortion care from APRNs on the one hand, and physicians and physician assistants, on the other, has no support—let alone compelling support. APRNs in Montana are not legally required to have physician supervision for any care they provide, including care that can carry more risk than abortion. *See* SUF ¶¶ 13, 24, 26. No credible evidence demonstrates that treating patients who seek abortion, which is exceedingly safe, differently would avert any actual health risk. *See id.* ¶¶ 1, 13. And the Board of Nursing requires licensed APRNs to follow its rules, including providing care only within their scope of practice, being prepared to handle complications (including to transfer care if necessary), and being subject to discipline, *see id.* ¶¶ 13-17; no credible evidence supports treating abortion differently, *see id.* ¶¶ 27-28. Physicians and physician assistants are similarly entrusted to know the limits of their practice and may need to transfer a patient in order to manage complications others are better equipped to handle. *See id.* ¶¶ 17-18.[7] The State provides no evidence to show

[7] Further, as noted *supra*, physician supervision of physician assistants need not be on-site or in person.

that physician involvement is necessary for safe abortion care, and all evidence is to the contrary.

Because the State can demonstrate no compelling interest for its discriminatory treatment, the Court need not consider whether the APRN Restriction is narrowly tailored. Even if it did, the APRN Restriction would fail. As a general matter, *prohibiting* the exercise of a fundamental right cannot be a narrowly tailored means of advancing the State's interests. Additionally, it is uncontroverted that current regulation of APRNs is sufficient to ensure patient health and safety and is therefore a more narrowly tailored means of advancing any purported interest in health or safety. *Infra* Argument Part II.B.

B. The APRN Restriction Violates Plaintiffs' Equal Protection Rights.

The APRN Restriction also discriminates against health providers who seek to provide abortion care. Where a classification does not affect a fundamental right, important constitutional right, or suspect class, rational basis applies. *See In re S.L.M.*, 287 Mont. 23, 32, 951 P.2d 1365, 1371 (1997). Under rational basis review, the Court must make "[a] careful inquiry . . . into . . . the rationality of the connection between legislative means and purpose [and] the existence of alternative means for effectuating the purpose." *In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984) (internal citations omitted).

The APRN Restriction singles out APRNs who seek to provide abortion care that is within the scope of their practice. The undisputed evidence demonstrates that APRNs are similarly situated to (1) APRNs who provide comparable care, or care that carries more risk; and (2) physicians and physician assistants who provide early abortion care,

Yet, there is no credible evidence that the APRN Restriction's different treatment of licensed providers is rationally related to the State's asserted interest in health or safety. *Cf.* Defs.' Resp. to Interrog. Nos. 8, 9. First, as this Court has already recognized, "[t]he State gives APRNs broad authority to prescribe medications and practice independently within their scope of practice." D. Ct. Prelim. Inj. Order, 3, and the State has failed to show there is any rational basis for plucking abortion out of that scheme. The uncontroverted evidence demonstrates the Board's rules aim to ensure APRNs offer safe, effective, and quality care they are competent to provide—whether for abortion care or otherwise. SUF ¶ 15. Thus, if an APRN "provides abortion services outside the scope of practice or prior to obtaining appropriate training and experience, [that APRN] would be subject to discipline from the regulatory board charged with overseeing APRNs—the Montana Board of Nursing." D. Ct. Prelim. Inj. Order, 3. The Board of

Nursing confirms that its rules governing APRNs also apply to APRNs when they provide abortion care. *Supra* Argument Part I; SUF ¶ 28. Accordingly, the evidence confirms that the APRN Restriction is out of step with the generally applicable rules governing APRNs in Montana. *See* SUF ¶ 13.

Second, the State has demonstrated no rational basis for permitting APRNs to provide care that is comparable in skill and risk to early abortion but prohibiting those same APRNs from providing abortion care simply because it is abortion. *Id.* ¶ 23 (admitting that APRNs may lawfully provide miscarriage care by aspiration and using medications used in medication abortion to the extent of their training and of the recognized authority to each respective license to practice); *see supra* Argument Part I (discussing miscarriage management).

Third, there is no rational basis on which to discriminate between APRNs on the one hand, and physicians and physician assistants on the other, when the same evidence and experience demonstrate that physicians, physician assistants, and APRNs provide early abortion with the same safety and efficacy. *Supra* Argument Part I; *see also* D. Ct. Prelim. Inj. Order, 5-6; SUF ¶ 35. The State has failed to meaningfully contest this. *See* D. Ct. Prelim. Inj. Order, 5-6 (recognizing that article relied upon by the State concluded that complications were "clinically equivalent"). And, any attempt to turn the fact that APRNs are not legally required to be supervised by a physician into a justification for treating APRNs differently than physician assistants fails. APRNs may provide care within their scope of practice independently, and the State has no credible evidence that there is anything about abortion that would uniquely require physician supervision. *See supra* Argument Part I.

Rather than advancing any health or safety interest, the APRN Restriction undermines the health and safety of Montanans by limiting access to health care. For example, in the two months that All Families was open prior to the preliminary injunction, Plaintiff Weems had to ask multiple patients to return to the clinic on a second day because she was unable to provide abortion care. SUF ¶ 52. In the three years since, Plaintiff Weems has been able to provide abortion care to hundreds of patients who otherwise would have had to seek it elsewhere—forcing patients to experience the symptoms and risks of pregnancy longer, along with unnecessary delay and logistical challenges. *See id.* ¶¶ 49-50, 52, 56.

This disparate treatment cannot relate to the State's interest in health or safety, as it actually undermines that asserted interest. To the contrary, it appears the only basis for the

classification is to prevent competent health care providers from providing abortion care.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment and permanently enjoin the APRN Restriction, as applied to APRNs, as well as other laws, such as § 50-20-110, MCA, and § 50-20-501 *et seq.*, MCA., to the extent they limit the provision of abortion by APRNs.

Respectfully submitted this 30th day of August, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email on counsel for Defendants:

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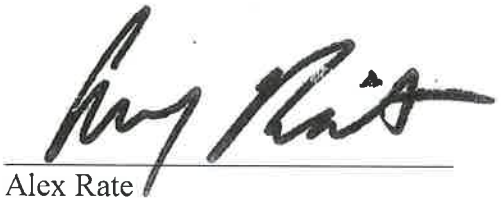

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