

FILED

FEB 25 2022

ANGIE SPARKS, Clerk of District Court
By ~~MARY M GOYINS~~ Deputy Clerk

1
2
3
4
5
6
7
8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
9 **LEWIS AND CLARK COUNTY**

10 HELEN WEEMS, et al.,

Cause No.: ADV-2018-73

11
12 Plaintiffs,

**ORDER – MOTIONS FOR
SUMMARY JUDGMENT**

13 v.

14 THE STATE OF MONTANA, et al.,

15
16 Defendants.

17 On January 30, 2018, Plaintiffs Helen Weems and Jane Doe filed a
18 complaint seeking declaratory and injunctive relief, naming as Defendants the
19 State of Montana, by and through Austin Knudsen, in his official capacity as
20 Attorney General, and Travis R. Ahner, in his official capacity as the County
21 Attorney for Flathead County (collectively “State”).¹

22 Plaintiffs challenge the constitutionality of Montana Code
23 Annotated § 50-20-109(a)(a) as applied to advanced practice registered nurses.
24 Before the Court are Plaintiffs’ and Defendants’ competing motions for summary
25

¹ This case originally named State of Montana, by and through Timothy C. Fox, in his official capacity as Attorney General, and Ed Corrigan, in his official capacity as the County Attorney for Flathead County as Defendants. The current named Defendants were automatically substituted in 2021 pursuant to Montana Rule of Civil Procedure 25(d).

1 judgment. Alex Rate and Hillary Schneller represent the Plaintiffs. Austin
2 Knudsen, Patrick M. Risken, David M.S. Dewhirst, and Brent Mead of the
3 Montana Attorney General's Office represent Defendants.

4 ISSUES

5 The ultimate issue before the Court is whether Montana Code
6 Annotated § 50-20-109(1)(a) is unconstitutional. According to Plaintiffs, the
7 statute violates Montanans' fundamental right to privacy and procreative
8 autonomy by arbitrarily limiting their choice of health care providers for abortion
9 procedures based on the provider's title—rather than the provider's
10 qualifications. The Court agrees. Because summary judgment is warranted on
11 these grounds, the Court will not address Plaintiffs' equal protection claims.
12 Similarly, because the Court finds the statute violates patients' fundamental right
13 to choose their own health care provider, the fact-dependent issue of the general
14 accessibility of abortion providers in Montana is irrelevant.

15 STATEMENT OF FACTS

16 Montana Code Annotated § 50-20-109(1)(a) provides: "Except as
17 provided in 50-20-401, an abortion may not be performed within the state of
18 Montana: except by a licensed physician or physician assistant."

19 **The Statute's History**

20 Montana Code Annotated § 50-20-109(1)(a) dictates who may
21 perform an abortion in the state of Montana. The issue before the Court is not
22 one of first impression. The legislature amended the same statute in 2005 after
23 the Montana Supreme Court ruled the previous version unconstitutional based on
24 its language categorically limiting providers.²

25

² The legislature further amended the statute in 2021, but the new amendment does not affect the subsection at issue in this case.



1 Prior to the 2005 amendment, the statute authorized only licensed
2 physicians to provide abortions and explicitly banned physician assistants from
3 performing them. In 1998, Susan Cahill, a physician assistant licensed in
4 Montana, challenged the statute's restriction as an unconstitutional infringement
5 of her patients' right to privacy. *Armstrong v. State*, 1999 MT 261, 296 Mont.
6 361, 989 P.2d 364. The *Armstrong* court ultimately agreed with Cahill and
7 declared the restriction regarding physician assistants unconstitutional, reasoning
8 the government could not show a legitimate medical reason to interfere with
9 patients' right to choose their own health care provider. *Id.* Six years after the
10 *Armstrong* ruling, the legislature enacted the version of the statute which is at
11 issue here. The current statute limits abortion providers to licensed physicians
12 and physician assistants.

13 **Current controversy**

14 Plaintiffs Weems and Doe are advanced practice registered nurses
15 (APRNs) licensed to practice in Montana. Weems is a certified nurse practitioner
16 (CNP) and is the owner and sole clinician at All Families Healthcare, a sexual
17 and reproductive health clinic in Whitefish, Montana. Doe is a certified nurse
18 midwife (CNM) and women's health nurse practitioner. The Montana Board of
19 Nursing (Board) is a statutorily created entity which, among other duties, is
20 responsible for the licensing and regulation of Montana nurses, including
21 APRNs. Mont. Code Ann. §§ 2-15-1734; 37-1-131; 37-8-202; 37-8-409.

22 Plaintiffs filed their complaint in 2018 on behalf of themselves and
23 their patients. As in *Armstrong*, Plaintiffs argue the limitations of the current
24 statute prevent otherwise medically qualified APRNs from providing abortion
25 services to their patients.



1 On April 4, 2018, this Court granted Plaintiffs' motion for a
2 preliminary injunction to enjoin enforcement of the statute pending the outcome
3 of this litigation. The Montana Supreme Court affirmed the injunction on April
4 26, 2019. *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4. During a
5 meeting on July 10, 2019, the Board addressed a question raised by the
6 preliminary injunction proceedings:

7 [Whether] APRN-FNPs and APRN-CNMs must obtain specific
8 authorization from the Board to provide medication and aspiration
9 abortion services or if it is within the scope of practice of those
10 health care providers to provide those services without specific
11 authorization from the Board.

12 Thompson Aff., Ex. 9-A; *Weems* at ¶ 13.

13 Upon motion, the Board concluded that the specified procedures are not
14 significantly different than those already performed by Montana APRNs and the
15 current rules and statutes adequately cover the issue.

16 **PRINCIPLES OF LAW**

17 **Summary Judgment**

18 Summary judgment is proper when no genuine issues of material
19 fact exist, and the moving party is entitled to judgment as a matter of law. Mont.
20 R. Civ. P. 56(c)(3). The issue before the Court is the constitutionality of a
21 statute. Whether a statute is constitutional is a legal question. *City of Missoula v.*
22 *Mountain Water Co.*, 2018 MT 139, ¶ 31, 419 P.3d 685. Thus, since the
23 controlling issue before this Court is strictly a legal question, summary judgment
24 is appropriate at this juncture as a matter of law. See *Lingscheit v. Cascade*
25 *County*, 249 Mont. 526, 531, 817 P.2d 682 (1991).

/////



1 **Constitutional Issue**

2 “Statutes are presumed to be constitutional, and it is the duty of
3 this Court to avoid an unconstitutional interpretation if possible.” *Hernandez v.*
4 *Bd. Of County Comm’rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (citing
5 *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of*
6 *Land Comm’rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800; *State v. Nye*,
7 283 Mont. 505, 510, 943 P.2d 96, 99 (1997)). The party challenging a statute’s
8 constitutionality bears the heavy burden of proving the statute is unconstitutional
9 “beyond a reasonable doubt.” *Molnar v. Fox*, 2013 MT 132, ¶ 49, 370 Mont. 238,
10 301 P.3d 824.

11 Statutes conflicting with the Montana Constitution are subordinate
12 to the constitution but, if possible, must be interpreted to harmonize with it. See
13 *Pengra v. State*, 2000 MT 291, ¶ 14, 302 Mont. 276, 14 P.3d 499. In addition, a
14 statute’s constitutionality “is prima facie presumed, and every intendment in its
15 favor will be made unless its unconstitutionality appears beyond a reasonable
16 doubt.” *Board of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323 (1975),
17 (citing authority).

18 **ANALYSIS**

19 In their motion for summary judgment, Plaintiffs argue Montana
20 Code Annotated § 50-20-109(1)(a) is unconstitutional because the law infringes
21 on their patients’ fundamental right to privacy, and personal and procreative
22 autonomy under Article II, Section 10 of the Montana Constitution. In contrast,
23 the State argues the statutory limit on who may provide abortions in Montana

24 ////

25 ////



1 either does not implicate fundamental rights, or that the statute properly balances
2 the implicated rights with the State’s interest in the health and safety of Montana
3 patients.

4 Before the Court addresses the statute’s constitutionality, the Court
5 must first consider two foundational issues:

6 1. Whether a health care providers’ scope of practice should be
7 determined by the medical community and enforced by profession-specific
8 boards, or whether the legislature should decide which health care providers are
9 qualified to provide specific services; and

10 2. Whether the Board’s existing scope of practice rules
11 governing APRNs would allow them to provide abortion procedures if not for the
12 statutory restriction.

13 **Scope of Practice**

14 The State argues the practice of medicine is a privilege granted by
15 legislative authority, and that permissible state regulation of abortion includes
16 requirements regarding the qualifications and licensure of the person performing
17 the abortion. The State further contends APRNs are not medically competent to
18 perform abortions, and thus the statute simply provides protection from
19 unqualified medical practitioners. Absent direct legislative intervention, the
20 Montana Board of Nursing is responsible for the licensing and regulation of
21 Montana APRNs. Plaintiffs argue, from a medical perspective, the abortion
22 procedures at issue are not significantly related to the care APRNs currently
23 provide under Board regulation, and thus these procedures are also properly
24 within their scope of practice. In discussing the proper authority for determining
25 medical competence, the *Armstrong* court concluded that “legal standards for



1 medical practice... must be grounded in the methods and procedures of science
2 and in the collective professional judgment, knowledge and experience of the
3 medical community acting through the state's medical examining and licensing
4 authorities.” *Armstrong* at ¶ 62. Absent a specific compelling interest, medical
5 examining and licensing authorities are the proper entities to determine whether a
6 class of health care providers have the appropriate training, education, and
7 qualifications to provide a particular health care service. In this case, the
8 legislature improperly substituted its own judgment on the medical qualifications
9 of APRNs in place of the Board’s general authority on the issue.

10 However, acknowledging Board authority on this issue does not
11 deny the legislature’s role in protecting Montana citizens from unsafe medical
12 practices. The Montana legislature created the Board via statute for the purpose
13 of regulating the nursing profession in the state. Mont. Code Ann. § 2-15-1734.
14 Pursuant to the statutory scheme, the Board has authority to adopt administrative
15 rules pertaining to nursing. Mont. Code Ann. § 37-8-202(2)(e). The Board’s
16 administrative rules include practice standards for APRNs. Admin. R. Mont.
17 24.159.1405. The State has not articulated a clear reason for determining the
18 Board is incompetent to regulate its licensees regarding the practice of abortion
19 in the same way the Board regulates licensees’ qualifications for all other
20 practice areas.

21 The State objects to APRNs providing abortion care in their scope
22 of practice largely because APRNs are responsible for determining their own
23 scope of practice. The State argues the standard of self-assessment is too low and
24 without the protection of the challenged statute any APRN could decide to self-
25 assess as competent to provide abortions regardless of actual ability. However,



1 the standards for APRN self-assessment and specialty certification are not as
2 undefined as the State suggests.

3 The Board licenses graduates of accredited programs who
4 complete a national certification examination that assesses APRNs in their core
5 competencies. APRNs may then expand their scope of practice by receiving
6 additional training and field specific certification, such as the certified nurse
7 midwife designation held by Plaintiff Doe. Mont. Code Ann. § 37-8-409(1).
8 Additionally, the Board requires APRNs with specialty certifications to abide by
9 practice standards established by national professional organizations specific to
10 the role and population focus of the specialty. Admin. R. Mont.
11 24.159.1405(1)(b). The Board's requirements for meeting national, field specific
12 standards ensure APRNs assess their competence with reference to the judgment,
13 knowledge, and experience of the greater medical community, as required by
14 *Armstrong*. *Armstrong* at ¶ 62.

15 Contrary to the State's argument, the statutes and administrative
16 rules governing APRNs clearly articulate the standards APRNs must meet to self-
17 assess as competent in a specific field. See Mont. Code Ann. § 37-8-409(1);
18 Admin. R. Mont. 24.159.1469(1)(c). Pursuant to the regulatory scheme, APRN
19 self-assessment is a standard exercise as they expand their field specific skills.
20 There is no evidence in the record which demonstrates APRNs are likely to
21 incorrectly self-assess their competence. In fact, they have an incentive not to

22 ////

23 ////

24 ////

25 ////



1 incorrectly self-assess because they are subject to discipline by the Board—
2 including potential revocation of their licenses. Mont. Code Ann. §§ 37-1-105;
3 37-1-307; Admin. R. Mont. 24.149.101. The State’s fears regarding APRN self-
4 assessment as a path to unqualified abortion practice are unsubstantiated and
5 unwarranted.

6 To determine the Board’s authority whether abortion may fall
7 within the scope of practice for APRNs (with sufficient training), this Court
8 considered to the Board’s own commentary on the issue. When the Board
9 reviewed the issue at its July 10, 2019, meeting, it framed the question as
10 follows:

11 [Whether] APRN-FNPs and APRN-CNMs must obtain specific
12 authorization from the Board to provide medication and aspiration
13 abortion services or if it is within the scope of practice of those
14 health care providers to provide those services without specific
15 authorization from the Board.

Thompson Aff., Ex. 9-A.

16 The framing of the question is informative for two reasons. First, it recognizes
17 the question relates to APRNs with specific additional training, family nurse
18 practitioners (FNPs) and certified nurse practitioners (CNMs). The Board
19 acknowledged the issue is not about broad authority for anyone with a license to
20 perform abortions, but rather whether abortion is properly within the scope of
21 practice for APRNs who have obtained additional training and certification in a
22 related field of advanced practice. Second, the Board framed the question in a
23 manner which provides context for interpreting their ultimate decision on the
24 issue. In the interest of clarity, the entirety of the Board’s meeting notes on the
25 issue are as follows:

1 Ms. Laureli Scribner moved to leave the rules and statutes as they
2 are because they adequately cover this issue. Medication and
3 aspiration abortion procedures are not significantly different than the
4 procedures, medications and surgeries that nurse practitioners
5 currently perform without significant issues. Ms. Sandy Sacry
6 seconded. Ms. Ford clarified that practitioners must have adequate
7 training and experience before performing these procedures. The
8 motion carried unanimously.

9 Thompson Aff., Ex. 9-B.

10 The Board asked whether abortion services require specific authorization or
11 whether abortion is within the scope of practice without specific authorization.

12 The Board concluded that the current structure, which requires APRNs to know
13 their own scope of practice and competencies, adequately addresses the issue.

14 The State argues the Board did not create a rule affirmatively
15 allowing APRNs to provide abortion procedures. According to the State, this
16 failure to act is evidence the Board does not consider such procedures properly
17 within their scope of practice. Conversely, the State also argues the Board does
18 not have authority to create such a rule because it would determine a scope of
19 practice that conflicts with specific legislative action. If the Board believed
20 abortion was specifically outside the practice of APRNs, it did have the authority
21 to make that determination without creating a conflict with the statute.

22 Notwithstanding these arguments, the Board did not decide to make such a
23 determination.

24 The Board's commentary clearly indicates that but for the statutory
25 conflict, the abortion procedures at issue would fall within an APRN's scope of
practice under the Board's existing regulatory scheme provided practitioners

////

1 “have adequate training and experience before performing these procedures.”
2 The Board’s professional opinion that the abortion procedures at issue are “not
3 significantly different than the procedures, medications and surgeries that nurse
4 practitioners currently perform without significant issues,” makes it clear that any
5 restriction on APRNs’ ability to provide abortions is not based on a lack of
6 medical qualifications to perform the procedures. The Board’s decision is
7 consistent with the existing regulatory scheme for determining scope of practice
8 which relies on each individual APRN’s role and population focus rather than a
9 list of included or excluded procedures and medications.

10 Based on the precedent in *Armstrong* and the State’s failure to
11 present a compelling argument as to why the legislature is better able to
12 determine qualifications of potential abortion providers than the state-created
13 medical licensing board, the Court finds the Montana Board of Nursing to be the
14 appropriate source of authority for determining APRNs’ competency to provide
15 abortion procedures. The Board’s existing regulations are sufficient to ensure
16 APRNs acquire the appropriate training and experience before including abortion
17 procedures in their scope of practice. Thus, the Court finds that but for the
18 statutory limitation, APRNs may obtain the necessary training to properly include
19 medication and aspiration abortion procedures in their scope of practice.

20 **The Fundamental Right to Privacy and Procreative Autonomy**

21 The State argues Montana Code Annotated § 50-20-109(a)(a) does
22 not implicate the fundamental right to privacy because it regulates who is
23 qualified to provide an abortion rather than the decision to seek an abortion. The
24 State incorrectly claims that Montana has not specifically addressed the
25 distinction between the right to choose an abortion and the ability of the patient

1 to dictate who performs the abortion. On the contrary, Montana recognizes the
2 “fundamental privacy right to obtain a particular lawful medical procedure from a
3 health care provider [who] has been determined by the medical community to be
4 competent to provide that service and who has been licensed to do so.”

5 *Armstrong* at ¶ 62; *Wiser v. State*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d
6 133; *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 440 P.3d 4. Specifically,
7 the *Armstrong* court held “Article II, Section 10, protects a woman's right of
8 procreative autonomy--here, the right to seek and to obtain a specific lawful
9 medical procedure, a pre-viability abortion, *from a health care provider of her*
10 *choice.*” *Armstrong* at ¶ 75 (emphasis added). The Montana Constitution
11 protects not only a patient’s right to obtain lawful medical procedures, but also
12 the patient’s right to choose the health care provider who performs the procedure
13 if the medical community deems the health care provider qualified.

14 Under Board regulations, APRNs are medically qualified to
15 perform abortions provided they obtain proper certification and training. The
16 statute arbitrarily removes qualified APRNs from the pool of health care
17 providers patients may choose to obtain a lawful medical procedure. Therefore,
18 as in *Armstrong*, Montana Code Annotated § 50-20-109(1)(a) unconstitutionally
19 restricts Montana patients’ fundamental rights to privacy, and personal and
20 procreative autonomy.

21 **Strict Scrutiny**

22 Plaintiffs successfully demonstrated Montana Code Annotated
23 § 50-20-109(1)(a) infringes patients’ fundamental rights. Thus, the burden now
24 rests with the State to establish the law can survive a strict scrutiny analysis. To
25 do so, “the legislation must be justified by a compelling state interest and must be

1 narrowly tailored to effectuate only that compelling interest.” *Gryczan v. State*,
2 283 Mont. 433, 449, 942 P.2d 112 (1997).

3 The State argues it has a compelling interest in “providing safe
4 abortion services to rural and remote areas of the state by health care
5 professionals educated, trained and licensed to perform the services of a
6 physician assistant *while under the supervision of a physician*, an additional layer
7 of patient protection.” Defs. Mem. Supp. Summ. J., 12-13 (emphasis in original).
8 The State frames its interest in the context of the legislative amendment which
9 added physician assistants to the list of eligible providers. Nonetheless, there is
10 no compelling state interest in limiting a patient’s choice of available health care
11 providers to licensed physicians and physician assistants. The State has no
12 compelling interest in abortion providers being “educated, trained and licensed *to*
13 *perform the services of a physician assistant*.” Rather, the state’s interest is that
14 those individuals licensed to perform a medical procedure are properly educated
15 and trained to do so in a safe manner. The State’s emphasis on the “supervision
16 of a physician” distinction is unpersuasive. In this context, “supervision” does
17 not mean the physician must be present while a physician assistant is providing
18 care and performing a medical procedure. Moreover, unlike physician assistants,
19 APRNs have advanced education and training which qualifies them to practice
20 without physician supervision. The medical community clearly considers
21 APRNs competent to practice subject to their own judgment and licensure.

22 Even if the Court finds the State has an interest in the health and
23 welfare of Montana citizens seeking an abortion:

24 //

25 //

1 except in the face of a medically-acknowledged, *bonafide* health
2 risk, clearly and convincingly demonstrated, the legislature has no
3 interest, much less a compelling one, to justify its interference with
4 an individual's fundamental privacy right to obtain a particular
5 lawful medical procedure from a health care provider that has been
6 determined by the medical community to be competent to provide
7 that service and who has been licensed to do so.

8 *Armstrong* at ¶ 62.

9 Because the State has the burden to defend the statute, it must clearly and
10 convincingly demonstrate a medically acknowledged, bona fide health risk that
11 justifies the law's interference with a fundamental right. While the State
12 observes there are inherent dangers in performing abortion procedures, these
13 risks are not specific to APRNs. The risk to a patient obtaining an abortion is no
14 greater than from other procedures which APRNs currently perform. Similarly,
15 the risk to a patient obtaining abortion services from an APRN is no greater than
16 obtaining the services from a licensed physician or physician assistant. The
17 issues regarding access to local hospitals, clinic staffing, and access to medical
18 equipment has nothing to do with whether the provider is a licensed physician,
19 physician assistant or advanced practice registered nurse.

20 To the question whether the law is narrowly tailored, this Court
21 finds it is not. The State argues Montana Code Annotated § 50-20-109(1)(a) "is
22 narrowly tailored to address the lack of abortion providers in underserved areas
23 while maintaining a high level of patient safety provided by physicians and PAs."
24 The narrowly tailored standard requires the statute be "the least onerous path that
25 can be taken to achieve the state objective." *Wadsworth v. State*, 911 P.2d 1165,
1174, 275 Mont. 287. The least onerous path is one that infringes on the
identified fundamental right the least while still accomplishing the State's

1 interest. Here, the relevant fundamental right is a patient's right to choose her
2 health care provider, and the right is not dependent on whether a patient lives in
3 an underserved area. The statute is not narrowly tailored because it arbitrarily
4 limits patients' options for health care providers to two specifically named
5 professions and excludes other qualified providers without a legitimate medical
6 justification.

7 Montana Code Annotated §50-20-109(1)(a) does not pass strict
8 scrutiny analysis. The State fails to demonstrate a compelling interest to justify
9 the statute's limitations and the statute is not narrowly tailored.

10 CONCLUSION

11 Plaintiffs have shown that but for the statutory barrier, advanced
12 practice registered nurses may obtain training to become competent to perform
13 pre-viability abortions within their scope of practice. Montana patients have an
14 established constitutional right to privacy that includes the right to choose their
15 health care provider. Montana Code Annotated § 50-20-109(1)(a) infringes upon
16 this right by arbitrarily limiting patients' health care provider options for one
17 specific procedure.

18 The State has failed to demonstrate a compelling interest in
19 limiting abortion providers to licensed physicians and physician assistants. The
20 State has not clearly and convincingly demonstrated a medically acknowledged,
21 bona fide health risk which justifies interfering with a patient's fundamental right
22 to choose her own health care provider. The law is not narrowly tailored because
23 the profession-specific limiting language arbitrarily excludes a group of
24 otherwise qualified health care providers from the pool of providers Montana
25 patients may choose to obtain an otherwise lawful medical procedure. Montana

1 Code Annotated § 50-20-109(1)(a) violates Article II, Section 10 of the Montana
2 Constitution by impermissibly infringing Montana patients' rights to privacy and
3 procreative autonomy.

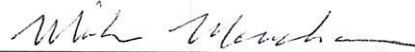
4 Accordingly,

5 **ORDER**

6 **IT IS HEREBY ORDERED** Plaintiffs' motion for summary
7 judgment is **GRANTED**. Defendants' motion for summary judgment is
8 **DENIED**. Montana Code Annotated § 50-20-109(1)(a) is unconstitutional in
9 that it violates Article II, Section 10 of the Montana Constitution.

10 **IT IS HEREBY FURTHER ORDERED** the April 4, 2018
11 Preliminary Injunction is converted to a Permanent Injunction.

12 DATED this 25th day of February 2022.

13
14 

15 **MIKE MENAHAN**
16 District Court Judge

17
18 cc: Alex Rate, ACLU of Montana, via email at: ratea@aclumontana.org
19 Hillary Schneller, Center for Reproductive Rights, via email at:
20 hschneller@reprorights.org
21 David M.S. Dewhirst, Solicitor General, via email at:
22 David.Dewhirst@mt.gov
23 Austin Knudsen, Montana Attorney General, via email at:
24 Austin.Knudsen@mt.gov
25 Brent Mead, Deputy Attorney General, via email at: brent.mead2@mt.gov

MM/sm/OrdMotSummJudgment

