No. 24-745

IN THE

Supreme Court of the United States

STATE OF MONTANA, ET AL.

Petitioners,

v.

PLANNED PARENTHOOD OF MONTANA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the Supreme Court of Montana

SUPPLEMENTAL APPENDIX FOR BRIEF IN OPPOSITION

ANJALI SALVADOR
KYLA EASTLING
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William St., 11th Fl.
New York, NY 10038

DIANA SALGADO
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., N.W.
Suite 300
Washington, DC 20005

(Additional Counsel Listed on Inside Cover)

JAIME A. SANTOS
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
1900 N St., N.W.
Washington, DC 20036
jsantos@goodwinlaw.com
(202) 346-4000

JORDAN BOCK
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210

Counsel for Respondents

May 30, 2025

TANIS M. HOLM
COLTON | HOLM
310 Grand Avenue
Billings, MT 59101

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0272

PLANNED PARENTHOOD OF MONTANA, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Christopher Abbott, Presiding

APPELLANTS' OPENING BRIEF

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael D. Russell
Michael Noonan
Thane Johnson
Assistant Attorneys General
MONTANA DEPT. OF JUSTICE P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

Attorneys for Appellants

Tanis M. Holm
310 Grand Av.
Billings, MT 59101
Phone: 406-259-9986
tholm@yellowstonelaw.com

Anjali Salvador*
123 William St., Floor 11
New York, NY 10038
Anjali.salvador@ppfa.org
Phone: 212-261-4602
**Admitted Pro Hac Vice*

Kyla Eastling*
Planned Parenthood
Federation of America
123 William St., Floor 9
New York, NY 10038
Phone: 212-541-7800
kyla.eastling@ppfa.org
**Admitted Pro Hac Vice*

Attorneys for Appellees

Dale Schowengerdt
LANDMARK LAW
PLLC
7 West 6th Ave.,
Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpl
lc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF ISSUES

1. Did the District Court incorrectly apply a heightened form of strict scrutiny to a law that enhances the protections of minors under Article II, Section 15 of the Montana Constitution?

2. Did the District Court incorrectly deny the State's motion for summary judgment under the correct legal standard?

3. Alternatively, did the District Court incorrectly determine material facts were not in dispute?

STATEMENT OF THE CASE[1]

After a "long and arduous journey to decision," (Doc. 301 at 12), this case finds its way back to this Court after eight years. *Planned Parenthood v. State*, 2015 MT 31, 378 Mont. 151, 342 P.3d 684 ("PPMT I"). It began in May 2013, when Planned Parenthood sued to enjoin the Parental Consent for Abortion Act ("Consent Act") and LR-120 ("Notice Act"). (Doc. 1.) The State consented to a preliminary injunction of the Consent Act in June 2013. (*See* Doc. 13.) After the parties cross-moved for summary judgment, the District Court held that the State was collaterally estopped from defending both Acts because it had not appealed a 1995 district court ruling holding an earlier notice law unconstitutional. *See* (Doc. 65.) This Court reversed and remanded. *PPMT I*, ¶ 26.

---

[1] The State produced relevant unsealed record excerpts in the appendix. The State did not include the sealed portions of the record and instead cites to the sealed document number.

After extensive discovery, the parties completed a second round of summary judgment briefing on March 3, 2017. (Doc. 175.) The case then idled for years. (Doc. 283 at 3–5.) In February 2023—nearly a decade after the lawsuit was filed— the District Court finally ruled on the parties' cross-motions for summary judgment. (Doc. 301.) As relevant here, Judge Abbott held that (1) strict scrutiny applied to both the Notice Act and Consent Act; (2) the Consent Act did not survive strict scrutiny; and (3) there were genuine disputes of material fact as to whether the Notice Act survived strict scrutiny. He then certified the portion of his order granting summary judgment as to the Consent Act for appellate review under Montana Rule of Civil Procedure 54(b). (Doc. 311.)

STATEMENT OF THE FACTS

A. MONTANA'S PARENTAL INVOLVEMENT LAWS

Montana law acknowledges what everyone knows to be true: minors lack the decision-making capacity of adults and thus need more protection. These protections cover decisions large and small. *See, e.g.*, Mont. Code Ann. § 45-5-501 (minors under 16 cannot consent to sexual activity); Mont. Code Ann. § 45-5-623(1)(f) (minors cannot get a tattoo or an ear-piercing without parental consent). But the through-line is clear: the State may permissibly restrict minors' rights by passing laws to protect them.

Perhaps no issue divides Americans—and Montanans—more than abortion. But no one questions that abortion is a "grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and

emotional support." *L. v. Matheson*, 450 U.S. 398, 409–10 (1981); *see also In re Meghan Rae*, Cause No. DA 14–005, ¶ 10 (citing *Matheson*).[2] Thus, "it comes as no surprise that most States have enacted statutes requiring that, in general, a physician must notify or obtain the consent of at least one of her parents or legal guardian before performing an abortion on a minor." *Hodgson v. Minnesota*, 497 U.S. 417, 486 (1990). Like most states, Montana has enacted three laws requiring parental involvement in a minor's decision to obtain an abortion. Each time, Planned Parenthood has sued to enjoin the law.

The Legislature passed the State's first parental notice law in 1995. *See* Parental Notice of Abortion Act, Mont. Code Ann. §§ 50-20-201 to -215 (1995) (repealed 2011). Planned Parenthood challenged the law in 1999, and a district court ruled in an unpublished decision that the law was unconstitutional. *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999).

In 2011, the Legislature placed LR-120 on the ballot, which prohibited physicians from performing an abortion on a minor under 16 without giving notice to one of the minor's parents or legal guardian. 2011 Mont. Laws 307. The referendum passed with 70.55% of the vote. The referendum's wide support is

---

[2] This case is unreported based on confidentiality. The document is in the record at Doc. 133 ex. 2 (UNDER SEAL). The District Court used the case name. (Doc. 301 at 6 n. 3.)

unsurprising when one considers that 35 other states have parental notice and consent laws on the books.[3]

In 2013, the Legislature enacted the Consent Act. The Consent Act requires a physician to obtain signed consent from a parent or guardian before performing an abortion on a minor under 18. *See* Mont. Code Ann. §§ 50-20-501 to -511. The Consent Act also prohibits any person from coercing a minor to have an abortion. Mont. Code Ann. § 50-20-508.

B. THE CONSENT ACT'S JUDICIAL WAIVER PROVISIONS

The Consent Act's judicial bypass procedure protects minors whose parental involvement may be unsafe or unnecessary. A court must grant a minor's petition for judicial bypass if it finds, by a preponderance of the evidence, that the minor is competent to decide whether to have an abortion. Mont. Code Ann. §§ 50-20-232(4), -509(4). Even if she is not competent, the minor will still receive a waiver if she establishes evidence of physical, sexual, or emotional abuse by one or both parents, or if the court finds that parental involvement is not in the minor's best interests. *Id.*; Mont. Code Ann. §§ 50-20-232(5), -509(5). The court must issue its findings within forty-eight hours of the petition's filing. § 50-20-232(3). If the waiver is denied, this Court considers appeals on a highly expedited basis. Mont. R. App. P. 30(3), (5).

Judicial bypass proceedings require the strictest confidentiality of any proceeding in Montana. The

---

[3] https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions (accessed Oct. 2, 2023).

minor may file under a pseudonym, the court file is sealed, the court's findings of fact and conclusions of law are sealed, and any appeal and any resulting Montana Supreme Court decision is sealed. *In re Meghan Rae*, ¶¶ 16–20; *see also id.*, ¶ 31 (Rice, J., dissenting).

Judicial bypass is almost never denied to minors who seek it. *See Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986) (federal district court noted just nine denials out of 3,573 petitions for judicial bypass).[4] Indeed, Planned Parenthood's expert on judicial bypass admitted that in the hundreds of bypass cases in which she's represented minors, only around five were not successful at the district court, and of those, only one or two cases were ultimately unsuccessful on appeal. App. 205. And the burden in Montana is lower than in most states, since Montana does not explicitly require a hearing. (Doc. 132 at ¶¶ 80–82, 84–85.)

C. MINORS HAVE A LOWER CAPACITY FOR FULLY INFORMED DECISION-MAKING THAN ADULTS.

Parental involvement in life-altering decisions by minors is critical because minors often lack the ability to make reasoned, considered decisions in the same way adults do. Magnetic resonance imaging (MRI) studies show why minors' brains function differently. Longitudinal MRI research has allowed scientists to plot milestones as individual brains mature. *See, e.g.*,

---

[4] The United States Supreme Court ultimately upheld Minnesota's judicial bypass provision in a plurality opinion. *Hodgson v. Minn.*, 497 U.S. 417, 461 (1990) (O'Conner, J. concurring).

App. 471–476; App. 527–529. One critical milestone is the maturation of the frontal lobes, which govern executive functions like foresight, consequential thinking, and goal-directed action. *See* App. 471–476; App. 527. But the emotional, reward-based brain develops long before the frontal lobes mature. App. 471–476; App. 528–529. This imbalance causes adolescents to think and act impulsively—especially in emotionally turbulent situations. App. 470, 478–481; App. 527–528 (concluding that minors often inaccurately predict parental response to emotional situations "such as an unexpected pregnancy").

Montana law recognizes this scientific reality. "[T]he constitutional rights of children cannot be equated with those of adults … because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *In re C.H.*, 210 Mont. 184, 203, 683 P.2d 931, 941 (1984) (citation omitted); *see also infra* Part.I.A at 23 (collecting statutes). Federal law recognizes the same thing. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. at 454–55 (collecting examples of minor-restrictive federal laws).

Even Planned Parenthood knows that minors have a comparative disadvantage in brain development. Planned Parenthood's experts here have published scholarly works extensively discussing this scientific truth. (Doc. 132 at ¶¶ 51–73.) Planned Parenthood accounts for this by training its staff to assess the "level of maturity" of minors and providing a specific training "for teens." (Doc. 132 at ¶ 44.)

D. ABORTION IS A DECISION FRAUGHT WITH MAJOR PSYCHOLOGICAL, MEDICAL, AND SAFETY IMPLICATIONS, ESPECIALLY FOR MINORS.

As Justice Stevens acknowledged, "[t]he abortion decision is, of course, more important than" other decisions in which the law restricts minors' choices. *Matheson*, 450 U.S. at 422 (Stevens, J., concurring) (citation omitted). Abortion involves serious psychological, medical, and safety concerns for minors.

1. Minors who have abortions are far more likely to experience psychological trauma.

"[T]he most significant consequences of the [abortion] decision are not medical in character…." *Id.*, 450 U.S. at 423 (Stevens, J., concurring). Over one-third of women who obtain elective abortions experience significant psychological distress afterward. App. 003. Abortion is associated with increased rates of depression, suicide, anxiety, and sleep problems. App. 003; App. 526. And minors are more vulnerable to post-abortion trauma than adults. One 2006 study, for instance, found that minors who had an abortion experienced major depression, anxiety disorders, and suicidal ideations at a rate that far exceeded—and in some cases, doubled—that of women between 18 and 25. App. 014–021; (*see also* Doc. 132 at ¶¶ 3–9.) Table 1 from this study shows just how stark the stakes are for minors who obtain abortions:

Measure	Not Pregnant	Pregnant No Abortion	Pregnant Abortion
Major depression (%)			
15-18 years 18 21 years 21-25 years	31.2 27.5 21.3	35.7 34.5 30.5	78.6 45.1 41.9
Pooled risk ratio (95% CI)[11]	35[a] (.20-.59)	.49* (.27-.91)	l[b]
Anxiety disorder (%)			
15-18 years 18-21 years 21-25 years	37.9 15.2 16.9	35.7 25.0 29.8	64.3 25.5 39.2
Pooled risk ratio (95% CI) 11	.35® (.19-.63)	.54*-b (.27-1.07)	l[b]
Suicidal ideation (%)			
15-18 years 18-21 years 21-25 years	23.0 12.5 8.0	25.0 17.9 13.0	50.0 25.5 27.0
Pooled risk ratio (95% CI) 11	.25* (.13-.50)	.31* (.14-.69)	l[b]

App. 017.

The State's expert witness testified, "Several methodologically sound studies that include adolescents suggest that abortion may be associated with an increased risk for mental health problems. In the only meta-analysis of the literature to date, Coleman (2011) found an overall 81% increased risk of mental health problems in the 22 studies she analyzed. Women with a history of abortion had higher rates of anxiety (34%), depression (37%),

heavier alcohol (110%) and marijuana use (230%), and suicidal behavior (155%)." App. 484–485. The rates of mental health problems were far higher for women who had an abortion than for women who carried their child to term. App. 485. Left untreated, such psychological distress can devolve into anxiety disorders, self-destructive behaviors, and suicide. App. 003.

Minors with a history of mental health problems are at an even higher risk. App. 018–019 (the group of 21 to 25 year-olds most at risk for mental health issues were those minors who had a prior history of mental health issues *and* received an abortion); (Doc. 132 at ¶¶ 3–10.) Planned Parenthood's expert admitted that abortion can trigger severe psychological consequences for patients with a history of mental health problems. (Doc. 132 at ¶¶ 7–8, 10–12, 14–15.) But Planned Parenthood does not investigate minors' mental—or medical—health history. (Doc. 132 at ¶¶ 15, 26, 27.) Worse, they conduct *no* follow-up after the abortion to safeguard the minor's psychological well-being. (Doc. 132 at ¶ 35.)

2. Abortion is an invasive surgical procedure with serious medical risks.

Abortion is also a serious surgical procedure with attendant risks. Those risks include perforation or damage to the uterus, cervix, or another nearby organ; excessive bleeding or hemorrhage, requiring blood transfusion; infection introduced into the uterus from the cervix or vagina; and "incomplete abortion." (Doc. 132 at ¶ 31); App. 036–037; (Doc. 133 at 243–44 (UNDER SEAL).) Post-abortion complications can include fever, severe abdominal pain, vaginal

bleeding, and pelvic inflammatory disease. (Doc. 132 ¶ 32–33.) The risk of pelvic inflammatory disease- — which can cause severe damage to the female reproductive system—is much higher in abortion patients and is not found in patients who progress to full-term pregnancy. (Doc. 132 ¶ 33); App. 172–173. Post-abortion infection can threaten a minor female's fertility and, in some cases, her life; but it may also take 48-96 hours to become recognizable. (Doc. 132 at ¶¶ 31–33); *see also ((*Doc. 131 at 21) citing Phillip G. Stubblefield and David A. Grimes, *Current Concepts: Septic Abortion*, New England J. Med., Aug. 4, 1994, at 310)); App. 185–186.

Amplifying these risks, and the importance of parental involvement, only one-third of abortion patients return for a post-abortion checkup. ((Doc. 131 at 21) citing Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective* in *A Clinician's Guide to Medical and Surgical Abortions* at 20 (Maureen Paul et al., eds. 1999).)) Even so, Planned Parenthood does not require a scheduled follow-up exam after a minor patient receives a surgical abortion. (Doc. 132 at ¶ 35; Doc. 133 at 282 (UNDER SEAL); Doc. 133 at 253 (UNDER SEAL).)

And while a complete medical history requires a thorough understanding of a patients' past bleeding disorders, respiratory diseases, allergies, medications, prior surgeries, and reactions to anesthetics, Planned Parenthood relies on a minor's (often incomplete) self-report. (Doc. 132 at ¶¶ 25–27, 30.) The doctor performing the abortion does not evaluate that medical history because Planned

Parenthood physicians have a production requirement of four patients per hour. Thus, physicians can spend only 15 minutes with patients—and this includes the time necessary to perform the abortion. (Doc. 132 at ¶ 30; Doc. 133 at 235, 244–45.)

3. Abortion provides predators and abusers with a powerful tool to conceal their sexual exploitation of minors.

Statutory rape is the largest cause of adolescent pregnancy. National surveys indicate that "[a]lmost two thirds of adolescent mothers have partners older than 20 years of age." App. 566. A study of over 51,000 high school pregnancies in California found that babies born to girls under the age of 15 were just as likely to have been fathered by a man *over age 25* as by a peer male. App. 566–567. Women ages 15–17 were *twice* as likely to have been impregnated by a man over 20 years old than by a male their own age. App. 566–567.

These concerns are, tragically, very real in Montana. Thirteen percent of Montana high school females were raped in 2011. *See* App. 567, 628. Nearly 52 percent of all Montana rape victims are adolescents. (Doc. 131 at 19) citing Montana Board of Crime Control, 2012-2013 Report, at 43 (2014).)[5]

Sexual relationships between minors and much older men are inherently exploitative. *See* (Doc. 131 at 12) citing Patricia Donovan, *Caught Between Teens*

---

[5] Report available online at https://mbcc.mt.gov/_docs/Data/CIM/CIM-2012-13.pdf (accessed on October 9, 2023).

and the Law: Family Planning Programs and Statutory Rape Reporting, 1 Guttmacher Report on Public Policy 3 (1998))); App. 489. And this exploitation often influences a minor's abortion decision. When a minor conceals her pregnancy from both parents, the adolescent's boyfriend becomes the most involved person in her decision *89 percent of the time* and finances the abortion *76 percent of the time*. *See* App. 165–166. The outsized influence of exploitative older males is especially concerning because physical abuse by a boyfriend or spouse often increases significantly when a minor becomes pregnant. *See* (Doc. 131 at 12) citing Abbey B. Berenson, et al., *Prevalence of Physical and Sexual Assault in Pregnant Adolescents*, Journal of Adolescent Health 1992; 13:466-69).)

Without parental involvement, abortion can be a powerful tool for abusive men to conceal their sexual exploitation of minors. *See, e.g., Roe v. Planned Parenthood Sw. Ohio Region,* 912 N.E.2d 61, 64–65 (Ohio 2009) (detailing an older abuser using abortion to evade detection). After all, when a minor woman carries her pregnancy to term, her family will usually discover the pregnancy. But abortion can conceal the fact that she was ever pregnant and hide the existence of the relationship by which she became pregnant.

E. PLANNED PARENTHOOD CONCEALED THE STATUTORY RAPE OF A 15-YEAR-OLD.

Planned Parenthood of Montana knows well how parental involvement laws expose sexual crimes against minors. One of the two judicial bypass cases in which it has assisted involved a 15-year-old victim of statutory rape. (Doc. 133 at 231, 255 (UNDER

SEAL).) In 2014, Planned Parenthood initially testified that case involved a "mature young woman." (Doc. 133 at 231 (UNDER SEAL).) This so-called "mature young woman" was actually a 15-year-old girl impregnated by a 19-year-old male. (Doc. 133 at 231, 255; Doc. 133 at 355–57 (UNDER SEAL).) In Montana, this relationship constituted statutory rape. Mont. Code Ann. §§ 45-5-501(1)(b)(iv); -503(1), (3).

Planned Parenthood did not ask the father's age before referring the case to judicial bypass, even though it was confronted with a 15-year-old pregnant female who was statistically likely to be—and actually was—a victim of statutory rape. (Doc. 133 at 255 (UNDER SEAL).) Upon learning that the father was 19, the district court judge presiding over the bypass proceeding reported the situation to law enforcement, because he believed—after communicating with Planned Parenthood's attorney—that Planned Parenthood would not report the abuse. (Doc. 133 at 355– 57 (UNDER SEAL).)

Planned Parenthood's representative's testimony confirmed the judge's fears. (Doc. 132 at ¶ 47). She did not consider this to be an "abuse situation." (Doc. 133 at 231 (UNDER SEAL).) Still, more than six weeks after the bypass hearing, Planned Parenthood's office manager gave a half-hearted "report" to DPHHS. (Doc. 133 at 40–45 (UNDER SEAL).) That "report" did not notify the authorities that the minor was pregnant at any time, nor that the father was 19 years old; it misleadingly stated only that the minor was in a relationship with an 18-year-old and being seen for "birth control and other testing." (*Id.*)

The fault lies not only with the people responsible for concealing this sexual exploitation, but also with Planned Parenthood's mandatory reporting policy. Contrary to Montana law, Planned Parenthood does not treat sexual activity between an adult male and a female under the age of 16 years as "abuse" and therefore does not report that activity. *See* (Doc. 133 at 231, 255 (UNDER SEAL)); *but see* § 41-3-207(2) (mandatory reporters like Planned Parenthood have a duty to report such activity); *see also* (Doc. 301 at 36 n.8) (District Court rejected Planned Parenthood's understanding of its reporting duties).

Unfortunately, discovery revealed that this was not an isolated incident. Planned Parenthood's expert on judicial bypass testified that she intentionally ignores mandatory reporting requirements. App. 208–210. Worse, she does not follow up with minors she represents to determine whether they received counseling or other assistance. App. 209–201, 211–212. Other examples abound. *See, e.g.*, *Jane Doe v. Planned Parenthood of Central and Northern Arizona, et al.,* No. CV 2001-014876, Order of Partial Summary Judgment (Superior Ct., Ariz., Cty. of Maricopa, Nov. 26, 2002) (12-year-old girl raped and impregnated by 23 year old foster brother twice because Planned Parenthood affiliate did not report the first abortion to the authorities); *People v. Cross*, 134 (Cal. App. 4th) 500, 504–06 2005 LEXIS 1844 (abuse of a 13-year-old girl continued well after she was raped by her stepfather and received an abortion because neither Planned Parenthood nor San Francisco General Hospital notified the authorities or the girl's mother); App. 567– 569. The Consent Act is one measure aimed

at protecting these girls from such abuse, among other compelling state interests.

STANDARD OF REVIEW

"This Court reviews a district court's rulings on motions for summary judgment de novo." *PPMT I*, ¶ 11.

SUMMARY OF THE ARGUMENT

There is perhaps no issue that causes more division than abortion. But one thing on which nearly all sides of the issue agree is that it is a weighty decision, which should receive full and informed deliberation by those considering it. It should also be undisputed that minors do not possess the same maturity, cognitive development, and decision-making capacity as adults. Anyone who has had a teenager (or who has been a teenager, for that matter) knows that well enough.

And it is undisputed that minors in a healthy relationship with one or both parents would benefit from having a parent's help in deciding whether to have an abortion. But, sadly, it is also undisputed that, absent laws like the Consent Act, most minors will not involve their parents in their decision because of unrealistic fears about what their parents' reactions will be.

Montana adopted the Consent Act to require parental involvement in a minor's abortion decision, with a straightforward judicial bypass option for minors in a situation where parental involvement is not a reasonable option. It is not a novel idea: thirty-six other states have similar laws, and the United

States Supreme Court has repeatedly held that it is a constitutional and even laudable policy judgment for states to make.

The Montana Constitution does not require a different result. The 1972 Constitutional Convention presumptively placed minors on equal footing with adults, but expressly left room for the Legislature to circumscribe a minor's rights to enhance the minor's protection. Article II, Section 15 was also intended to promote families, not isolate children from their parents.

The District Court was wrong to conclude otherwise. The District Court's rationale creates an illogical legal test that elevates the rights of minors above the rights of adults. That same test calls into question longstanding laws that limit or abrogate the ability of certain minors to carry firearms unsupervised, to marry, or to work. The District Court's opinion further erodes the rights and role of parents in guiding children through difficult choices. The District Court's opinion leaves Montana's children more vulnerable, not more protected, and runs contrary to the text and meaning of the Montana Constitution. This Court should reverse the District Court.

The Consent Act constitutionally protects minors. The State entered evidence overwhelmingly supporting the need for the Consent Act to (1) protect minors from sexual victimization by adult men; (2) protect minors' psychological and physical wellbeing by having informed parents who can monitor post-abortion complications and provide helpful medical history; and (3) protect minors from rash or poorly reasoned decisions that often result from an

adolescent's underdeveloped decision-making capacity. The Consent Act, through its judicial bypass provision, leaves open access to abortion for minors who are competent to make that choice, or for whom that choice is in their best interest. The Consent Act is a reasonable measure that protects vulnerable children in a vulnerable situation.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY ADOPTED A STRICT SCRUTINY PLUS STANDARD FOR MINOR-PROTECTIVE LAWS UNDER ARTICLE II, SECTION 15 OF THE MONTANA CONSTITUTION.

Article II, Section 15 of the Montana Constitution recognizes "that the State's interest in protecting children may conflict with their fundamental rights." *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. Thus, a "[minor's] right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated." *Id.* at 203, 683 P.2d at 941. This Court reaffirmed that principle the first time it heard this case. *PPMT I*, ¶ 20 ("It is axiomatic that the younger a minor is, the more protection she may require."). This Court's understanding of Article II, Section 15 reflects the intent manifest from the provision's text and history: to vouchsafe fundamental rights to minors while preserving the State's ability to pass minor-protective laws.

But the District Court departed from all of this. It instead minted a brand-new rule: that Article II, Section 15 *always* requires the law to treat minors as adults, unless the law seeks to "enhance" minors'

rights. To affirm that holding would not only (a) contravene the text and purpose of Article II, Section 15 and (b) disregard this Court's settled understanding of the provision—it would also upend crucial minor-protective laws that touch on fundamental rights. This Court must reverse.

A. THE TEXT AND HISTORY OF ARTICLE II, SECTION 15 ALLOWS THE STATE TO PASS LAWS THAT ENHANCE THE PROTECTION OF MINORS.

The Montana Constitution provides "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article *unless specifically precluded by laws which enhance the protection of such persons*." Mont. Const. art. II, § 15 (emphasis added). The Framers thus "explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, *unless exceptions were made for their own protection*." *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (citation omitted) (emphasis added).

This Court applies ordinary rules of statutory construction to constitutional provisions. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. It interprets constitutional provisions according to the "plain meaning of the language used" and "in light of the historical and surrounding circumstances" of the 1972 Constitutional Convention. *Id.*, ¶ 16. Constitutional construction should not "lead to absurd results, if reasonable construction will avoid it." *Id.*

Article II, Section 15 contains two operative clauses. The first clause guarantees minors all the rights of

adults. Mont. Const. art. II, § 15 ("The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article….") The second clause creates an exception to the first. *Id.* ("…unless specifically precluded by laws which enhance the protection of such persons.").

The second clause unambiguously limits the application of the first. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. The clause contemplates that a law may "preclude" extending a fundamental right to minors, if the law "enhance[s] the protection of such persons." Mont. Const. art. II, § 15; *see also Preclude*, *Black's Law Dictionary*, 11th ed. (2019) (Preclude means to "exclude or to rule out.") "[T]he protection of such persons" refers to the State's ability to enact laws that account for the "particular vulnerability" of minors and protect them from their own immaturity and lack of fully formed decision-making capacity. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941.

The Bill of Rights Committee Report introducing Article II, Section 15 twice noted the provision's clear exception for minor-protective laws. 2 Mont. Const. Conv. Proceedings, Verbatim Tr., at 635–36 (Feb. 23, 1972) ("Convention Transcripts"). It explained that the provision gave minors "all the fundamental rights of the Declaration of Rights" except "in cases in which rights are infringed by laws designed and operating to *enhance the protection for such persons*." *Id.* (emphasis added). The purpose was to give minors "the same protections from governmental and majoritarian abuses as … adults" while ensuring that "[i]n such cases where the *protection of the special status of minors demands it*, exceptions can be made on a clear

showing that such *protection* is being enhanced." *Id.* (emphasis added); *see also Nelson*, ¶ 14 (courts look to the objectives the Framers sought to achieve when interpreting a constitutional provision).

The delegates echoed the Committee's understanding. When Delegate Monroe introduced the proposal for Article II, Section 15, he noted that it "permitted" "exceptions" for "cases in which [minors'] rights are infringed by laws designed and operating to enhance the protections for such persons." 5 Convention Transcripts at 1750 (Del. Monroe). Delegate Dahood urged the convention to "[p]ay close attention to the fact that the last phrase reads, 'except where specifically precluded by laws which enhance the protection for such person.'" *Id.* at 1751 (Del. Dahood). The provision was not a "revolutionary" revision of Montana's Constitution. *Id.* at 1752 (Del. Dahood). It clarified that, as a baseline, minors possess all the same rights as adults, but also allowed for laws to "specifically preclude[]" a minor's right, if necessary for the minor's protection. *Id.* at 1751 (Del. Monroe) (citing existing state laws prohibiting underage driving, and underage drinking). Thus, the history and text of Article II, Section 15 allows the State to enact laws that protect minors.

The District Court misread this history and effectively struck the "minor protection" clause from Article II, Section 15, when it construed the entire provision as, exclusively, a "rights-enhancing measure." (*See* Doc. 301 at 28–29.) But the exception for minor-protective laws—and the District Court's error—is evident from Article II, Section 15's plain text. *See* Mont. Const. art. II, § 15. So important was

this proviso that the Bill of Rights Committee twice flagged it in its report to the whole Convention. And it is a cardinal error of constitutional construction to "omit" what the Framers took great care to "insert." *See* § Mont. Code Ann. 1-2-101; *Nelson*, ¶ 14 ("In construing constitutional provisions, we apply the same rules used in construing statutes.").

There are other problems with reading Article II, Section 15 the District Court's way. First, it results in a Catch-22: in the District Court's view, laws may only *restrict* a minor's fundamental rights if they *enhance* those same rights. But that makes little sense. *See Nelson*, ¶ 16 (such absurd results should be avoided). And it would render the minor protection clause meaningless. Second, the District Court's reading conflates "protection" and "rights." Article II Section 15's exception applies to laws that "enhance the *protection*" of minors—not the "rights" of minors. And "[d]ifferent language is to be given different construction." *Gregg v. Whitefish City Council*, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P.3d 151. The word "rights" appears twice in Article II, Section 15, and if the Framers intended Plaintiffs' interpretation, then it would have appeared a third time. It does not, because the second clause uses "protection" instead. That term acknowledges and continues the traditional role of the State and parents to protect children from their own immaturity. *See Steilman v. Michael*, 2017 MT 310, ¶ 15, 389 Mont. 512, 407 P.3d 313 (minors' "lack of maturity and underdeveloped sense of responsibility" sets them apart from adults); (*see also* Doc. 301 at 39) (the district court acknowledged the State's compelling interest in "protecting minors from their own immaturity"). Ultimately, the District

Court's construction of the provision would afford minors more rights than adults. But the Framers made clear that they did not intend such absurd results. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 941.

The District Court's novel interpretation of Article II, Section 15 would have far-reaching consequences. Montana law has long accepted that the State may enact minor-protective laws in areas that would touch on adults' fundamental rights. Montana law restricts minors' right to privacy. Mont. Code Ann. § 45-5-502 (competence to consent to sexual intercourse); Mont. Code Ann. § 40-1-213 (right to marry). It restricts their freedom of speech. Mont. Code Ann. § 45-8-206 (right to purchase obscene materials); Mont. Code Ann. § 45-5-623(1)(f) (right to express a message through a tattoo). It limits their fundamental right of physical liberty (Mont. Code Ann. § 7-32-2302 (authorizing municipal juvenile curfews)); to vote (Mont. Code Ann. § 13-1-111); to keep and bear arms (Mont. Code Ann. § 45-8-344); to enter contracts (Mont. Code Ann. § 41-1-304); and to pursue employment (Mont. Code Ann. §§ 41-2-102–118 (child labor standards)). None of these laws "enhance the rights" of minors, yet no one questions their constitutionality. *See Bd. of Regents v. Judge*, 168 Mont. 433, 448, 543 P.2d 1323, 1332 (1975) ("long standing legislative practice" gives weight to the constitutionality of an act). The District Court fashioned a new rule that flouts this settled understanding of minors' rights. And—contrary to the Framers' intent—it would open all these laws to strict scrutiny for the first time.

B. THE DISTRICT COURT APPLIED THE WRONG STANDARD TO THE CONSENT ACT.

The District Court held that any law affecting a minors' rights must either (a) enhance those rights; or (b) survive strict scrutiny. (Doc. 301 at 30–1) (citing *In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (1997)). If the District Court's test *were* the standard for evaluating minors' rights, large swaths of the Montana Code that relate to minors would be unconstitutional. Take statutory rape laws, for instance. Adults have a fundamental right to engage in consensual sex with whomever they please. *See Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997). But Montana recognizes that minors under 16 cannot consent to sex. So any adult who engages in sex with a person under the age of 16 commits a crime. *See* Mont. Code Ann. §§ 45-5-501(1)(b)(iv), 45-5-503(1). These laws obviously do not "enhance" minors' rights' to engage in consensual sex. Under the District Court's "rights-enhancing" analysis, it would thus be subject to strict scrutiny. *See* (Doc. 301 at 26-33.) To give another example, despite Article II, Section 12 protecting the right to bear arms, Mont. Code Ann. § 45-8-344 criminalizes the unsupervised carrying or use of arms in public by minors under the age of 14. That statute does not enhance the rights of minors to keep and bear arms, but it does enhance their protections by requiring adult supervision to carry or use firearms in public. Mont. Code Ann. § 45-8-344. These statutes, and others like them, do not expand the rights of minors, but instead protect minors from dangerous activity. 5 Convention Transcripts at 1751 (Del. Monroe).

Affirming the District Court's view of Article II, Section 15 would invalidate these and many other minor-protective laws. And it would revolutionize the conception of minors' rights in a way the Framers expressly disavowed. *See* 5 Convention Transcripts at 1752 ("We are not upsetting anything. This is not revolutionary by any means.") (Del. Dahood). The correct legal test upholds laws that enhance the protection of minors, even if the laws "conflict with their fundamental rights." *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940.

In re S.L.M. does not require a contrary analysis. 287 Mont. at 37, 951 P.2d at 1374. There, juvenile offenders successfully challenged a state law on equal protection grounds because the law authorized them to be sentenced twice for the same crime—once as a juvenile and once as an adult. *Id.* at 26, 951 P.2d at 1367.[6] That law presented clear issues. *Id.* at 42, 951 P.2d at 1377 (Trieweiler, J., concurring) (concurring on double jeopardy grounds). The Court invalidated the law because imposing a harsher punitive sentence

---

[6] The Court's statement that if the Legislature seeks to invoke an "exception" to Article II, Section 15, it must show "that the exception is designed to enhance the rights of minors" is dicta that same Court did not consistently apply. *In re S.L.M.*, 287 Mont. at 35, 951 P.2d at 1373. The Court distinguished *In re C.S.*, 210 Mont. 144, 687 P.2d 57 (1984), by reasoning that a purely rehabilitative juvenile sentence may constitutionally exceed the time for a comparable retributory adult sentence. *In re S.L.M.*, 287 Mont. at 38–39, 951 P.2d at 1374–75. That's because rehabilitative sentences enhance the protections of minors, even if they pose greater restrictions on physical liberty. *Id.* Later decisions likewise declined to extend *In re S.L.M.*'s conflation of "protection" and "rights," because that would violate the text of the Constitution itself. *PPMT I*, ¶ 20.

on minors compared to adults does not enhance the protection of the minor. *Id.* at 36, 951 P.2d at 1373 ("the specter of retribution" distinguishes *In re S.L.M.* from *In re C.H.*, 210 Mont. at 204, 683 P.3d at 941). The District Court erred by requiring an initial showing that the law enhances the rights of minors to avoid strict scrutiny. *See supra* Part.I.A. This Court should reverse on that ground.

C. THE DISTRICT COURT'S ANALYSIS IGNORED PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

The District Court's analysis contained another fundamental flaw: it disregarded parents' fundamental rights to care for and supervise their children. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Constitutional law protects this longstanding tradition. The Fourteenth Amendment of the United States Constitution protects "the interests of parents in the care, custody, and control of their children[.]" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This Court, likewise, accepts it as "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interested protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59 (citing *Troxel*, 530 U.S. at 65); *see also Snyder v. Spaulding*, 2010 MT 151, ¶

19, 357 Mont. 34, 235 P.3d 578 (parents have a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their] child").

In adopting Article II, Section 15, the Framers did not intend to upend the fundamental constitutional rights of parents to decide on the care, custody, and control of their child. Delegate DaHood explained that the provision would not "affect[] *in any way* the relationship of parent and child or of guardian and ward with respect to someone under the age of majority." 5 Convention Transcripts at 1751 (Del. DaHood) (emphasis added). Rather, the section's author explained, the provision would "*enhance* the proper parent-child relationships in Montana families and help strengthen the family unit." *See id.* at 1750 (Del. Monroe) (emphasis added). Thus, he affirmed the provision was "not upsetting anything" and was "not revolutionary by any means." *Id.* at 1752 (Del. Dahood).

But the District Court's application of Article II, Section 15 was "revolutionary" indeed. It framed the abortion decision as a "*conflict of interest* … between parent and child," and described parents' attempts to protect their children as "*interference*" with a "decision[] intimately affecting the child's own body." (Doc. 301 at 22) (emphasis added).[7] The District Court correctly observed that the decision to abort one's child "cannot be equated with other circumstances

[7] The District Court did not seem to think that Planned Parenthood's involvement— or even the involvement of an adult boyfriend—in a minor's abortion decision also constituted "inference." *See generally* (Doc. 301).

where the law routinely regulates a minor's freedom of action" because abortion is unparalleled in its "profound spiritual, physical, mental, social, and economic" dimensions. (Doc. 301 at 24.) From these premises, however, the District Court reached an unjustifiable conclusion. According to the District Court, the immensity of the abortion decision means that parents should have *less* of a role in guiding their minor children through it. (*Id.* at 22–25.) The District Court held that minors should be left to weigh this "complex[] dilemma" alone. (*Id.* at 24.)

That twist of logic is not what the Framers had in mind when they adopted Article II, Section 15. As explained, they intended the provision to "enhance" parent-child relationships. Montana law repeatedly conditions the fundamental rights of minors on the consent and supervision of parents or guardians. *E.g.*, Mont. Code Ann. § 40-1-213 (right to marry); Mont. Code Ann. § 41-1-402 (ability to consent to medical services); Mont. Code Ann. § 45-8-344 (right to bear arms). And the unique weight of the abortion decision is *even more* reason to involve parents in it. Even abortion proponents like Justice Powell and Justice Stevens had "little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 640–41 (1979) (opinion of Powell, J.); *see also Hodgson*, 497 U.S. at 486 (Stevens, J.) (quoting this portion of *Belotti*).

This Court should clarify that analysis of the Consent Act must account for parents' weighty

fundamental rights, not dismiss those rights as "interference." (Doc. 301 at 22); *see also In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (" constitutional rights of children cannot be equated with those of adults … because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing.") (emphasis added).

D. ARTICLE II, SECTION 15 REQUIRES A LAW TO BALANCE MINORS' RIGHTS WITH THE STATE'S INTEREST IN PROTECTING THEM.

The correct legal standard balances the State's interest in protecting minors and empowering parents with minors' rights. First, the State must show that a law limiting minors' fundamental rights is intended to protect them. Mont. Const. art. II, § 15; 5 Convention Transcripts at 1751 (Del. Monroe). Second, the rights of minors must be balanced against the nature of the State's interest in protecting them. *See Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see also PPMT I*, ¶ 20 ("It is axiomatic that the younger a minor is, the more protection she may require."). Parental rights must also be taken into account. *See In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (noting "the importance of the parental role in child rearing") (emphasis added); *see also A.J.C.*, ¶ 31; *Snyder*, ¶ 19.

Federal precedent balances these competing interests by holding that parental consent laws are constitutionally valid if they allow minors to use a judicial bypass procedure. *See Casey*, 505 U.S. at 899

(collecting parental consent cases). And this Court has adopted the pre-*Dobbs* federal law framework for parental notice and consent statutes. *See In re Meghan Rae*, ¶ 11 (citing *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson*, 497 U.S. 417; *Matheson*, 450 U.S. 398; *Belotti*, 443 U.S. 622).

The District Court's novel test departed from this standard. Ordinarily, this Court remands to the District Court for review under the appropriate standard. *Wiser v. State*, 2006 MT 20, ¶ 25, 331 Mont. 28, 129 P.3d 133.[8] But, where, as here, this Court possesses all facts necessary to resolve the legal issues it may direct the District Court to enter summary judgment for the State. *Swank v. Chrysler Ins. Corp.*, 282 Mont. 376, 385, 938 P.2d 631, 637 (1997).

II. THE CONSENT ACT SATISFIES THE CORRECT CONSTITUTIONAL STANDARD.

The Consent Act easily survives the appropriate rights-balancing standard. The State established undisputed facts that the Consent Act protects minors and promotes parents' rights to care for their children. And the Act's robust judicial bypass provision adequately respects a minor's right to privacy. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941 (citation omitted); *Casey*, 505 U.S. at 899 (citation omitted). This Court should apply this standard and reverse.

---

[8] If this Court finds material facts in dispute, then remand for application of the proper standard would be appropriate. *Tonner v. Cirian*, 2012 MT 314, ¶ 19, 367 Mont. 487, 291 P.3d 1182.

A. THE CONSENT ACT PROTECTS MINORS SEEKING AN ABORTION AND PROMOTES' PARENTS' FUNDAMENTAL RIGHTS.

The Consent Act unquestionably protects minors and promotes parents' rights to the custody, care, and supervision of their children. The District Court correctly found each of these protections qualified as compelling interests. "[T]he protection of children from sexual exploitation and abuse [is] a compelling state interest." (Doc. 301 at 33.) "There is undoubtedly a compelling state interest in safeguarding the physical and psychological wellbeing of a minor." (Doc. 301 at 37.) "[T]he State has a compelling interest here in protecting minors from their own immaturity." (Doc. 301 at 39.) "The promotion of healthy families is undoubtedly a compelling state interest." (Doc. 301 at 43.) The State backed each of these interests with substantial and undisputed evidence in the record.

1. The Consent Act protects minors from sexual violence.

Protecting minors from sexual assault is clearly a compelling government interest. *See In re E.A.T., 1991 MT 281,* ¶ 32, 296 Mont. 535, 989, P.2d 860 (removing a child from the risk of sexual assault overcame—under strict scrutiny— parents' fundamental liberty interest in raising their children). In other contexts, this Court has held that the State may abrogate even *adult* privacy rights to protect minors from sexual abuse. *See State v. Mount*, 2003 MT 275, ¶ 99, 317 Mont. 481, 78 P.3d 829 (upholding sex offender registry requirements "to prevent the victimization of children").

The District Court agreed that Montana faces an epidemic of sexual violence committed against vulnerable children. (Doc. 301 at 34); *see also supra* Statement of Facts (SOF) at Part.D.3. Indeed, *most* juvenile pregnancies in Montana result from statutory rape. *Supra* at 11 n. 5. Abortion without parental consent fuels this epidemic because sexual predators can encourage minors to obtain abortions to conceal their crimes. Amplifying this concern, abortion providers like Planned Parenthood ignore their mandatory reporting duties. *Supra* SOF.Part.E; *see also Roe*, 912 N.E.2d at 64–65.

Parental involvement laws help detect and combat sexual violence against minors because they increase the percentage of minors that involve parents in their decision whether to carry a pregnancy to term. The most authoritative study on the issue shows that only 45% of minors will voluntarily involve their parents absent a parental involvement law. *See* (Doc. 169 at 18–19); *see also* App. 159 (noting that 45% of minors voluntarily involve their parents). But, as the State's expert Professor Collett described, after Texas implemented its parental notice law, 95% of parents know of their daughters' decisions and can help them respond to unplanned pregnancies. App. 573–574. The record shows that the Consent Act enhances parental involvement, which increases the likelihood sexual predators will be detected. *Supra* SOF.Part.D.3; App. 573–574.

The Consent Act also closes a known loophole in abortion reporting requirements. *Supra*, SOF.Part E. Planned Parenthood concedes that notice statutes can be evaded when it complained in its pleadings that a

doctor could be penalized for giving notice "to an individual whom she incorrectly believed to be the parent." (Doc. 253 at 28.) The existence of that loophole allows sexual predators to use abortion to escape detection. The Consent Act must be allowed to come into effect so that the State and parents are better able to detect and combat sexual violence against minors.

2. The Consent Act protects the physical and psychological wellbeing of minors.

States have an undisputed, compelling interest in safeguarding minors' "physical and psychological well-being." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (citation omitted). The "medical, emotional, and psychological consequences of an abortion are serious and can be lasting." *Matheson*, 450 U.S. at 411; *see generally supra* SOF.Part.D.1–2 (explaining the undisputed medical and psychological risks of abortion). And minors are far more vulnerable to abortion's negative consequences than adults. *Supra* SOF.Part.D.1–2.

Unfortunately, abortion providers take little care to protect minor children. They rely on minors to self-attest to their medical history. (Doc. 132 at ¶¶ 22–30 (UNDER SEAL)) (describing Planned Parenthood's patient intake). They fail to report instances of statutory rape. *Supra* SOF.Part.E. And they require no follow-up appointments after surgical abortions to monitor minor patients for serious, potentially lethal complications. (Doc. 132, ¶ 35 (UNDER SEAL).) Given this vacuum of care for minors, parental involvement is not—as the District Court thought—unnecessary "interference"; it is essential.

The Consent Act protects minors by ensuring parents can "provide medical and psychological data, refer the [abortion provider] to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *Matheson*, 450 U.S. at 411; *supra* SOF.Part.D.2. The Consent Act also allows parents to look after their child for post-abortion complications. *Supra* SOF.Part.D.1–2. This is critical because the rates of mental health issues and substance abuse for post-abortion women are far higher than the rates for women who carried their child to term. *Supra* SOF.Part.D.1. And the rates of mental health issues for minors who had an abortion compared to an adult who had an abortion were higher still. *Supra* SOF.Part.D.1. The consequences of untreated serious psychological distress can result in self-destructive behavior, including anxiety disorders and suicide. *Supra* SOF.Part.D.1.

Parents involved in their child's abortion decision can identify emotional and psychological problems and intervene or seek professional help. Given Planned Parenthood's lack of follow-up care, informed parents will be best situated to provide this care for their children.

3. The Consent Act Protects minors by ensuring they engage in fully informed decision-making.

Adolescents often lack "the ability to make fully informed choices that take account of both immediate and long-range consequences." *Matheson*, 450 U.S. at 409; *see also Bellotti*, 443 U.S. at 634 (reasoning the constitutional rights of children cannot be equated

with adults because of their "inability to make critical decisions in an informed, mature manner"); App. 477–484 (State's expert discussing adolescent immaturity in the abortion context).

Science explains why this is so. Because the executive functions of minors' brains develop after the emotional, reward-based portions of the brain, minors often think and act impulsively—especially in emotionally turbulent situations. *See supra* SOF.Part.C (citing longitudinal MRI studies on brain development). Minors also often lack information about their own medical history, which is essential to making an informed decision and monitoring for post-abortion complications. *See supra* Part.II.A.2; SOF.Part.D.1–2; App. 477–478; App. 524–526.

The Consent Act's entire purpose is to make sure that a minor is not left to face this enormously consequential choice alone without the guidance of mature adults who know her best: her parents. The Act's judicial bypass procedure guarantees that any minor who is mature enough to make this decision on her own or whose family situation is unsafe will be able to obtain an abortion without her parents' consent. *See infra* Part II.B.

4. The Consent Act promotes parents' fundamental rights.

Finally, the Consent Act protects parents' long-recognized fundamental rights in the custody, care, and control of their children. *See Troxell*, 530 U.S. at 65; *Snyder* ¶ 19. As explained, Article II, Section 15 of the Montana Constitution aims to "enhance"—not diminish—"the proper parent-child relationships in

Montana families and help strengthen the family unit." *Id.* at 1750 (Del. Monroe). Consistent with this constitutional tradition, the Consent Act ensures that parents can counsel their children through the uniquely consequential abortion decision. *Supra* SOF.Part.D.1–2 (detailing mental and physical health risks to minors). And that furthers the goal at the very heart of Article II, Section 15.

B. THE CONSENT ACT'S JUDICIAL BYPASS PROVISION PROTECTS A MINOR'S ACCESS TO ABORTION.

"A minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired abortion would be in her best interests.'" *In re Meghan Rae*, ¶ 10 (quoting *Belotti*, 443 U.S. at 643–44). "The evaluation of maturity and competence must be made on an individual, case-by-case basis, rather than according to any arbitrary measure such as age." *Id.*, ¶ 11. But naturally, a child's age factors into the competency determination. *Id.*, ¶ 9 (citing *In re Marriage of Rolfe*, 216 Mont. 39, 51–52, 699 P.2d 79, 86–87 (1985)).

The Consent Act's judicial bypass meets every requirement laid out in the caselaw. *See In re Meghan Rae*, ¶¶ 12–13. By design, the process works quickly. *Supra* SOF.Part.B. Even Planned Parenthood's experts concede it affords meaningful access to minors. App. 205. The bypass provision applies to all minors who: (1) are or have at one point been married, (2) have obtained court-ordered emancipation, (3) are in medical danger, (4) have been determined mature

by a local judge, (5) may be at risk of physical abuse, (6) sexual abuse, (7) emotional abuse or, even if none of the seven preceding exemptions can be met, (8) a court is still empowered to determine that parental involvement is not in the minor's best interests. Mont. Code Ann. §§ 50-20-503(3); -507; -509. The Consent Act even reduced the burden of proof to obtain a waiver to the preponderance of the evidence. *PPMT I*, ¶ 22; *see also Alaska v. Planned Parenthood*, 171 P.3d 577, n.42 (Alaska 2007) (invalidating a parental involvement law that applied the higher "clear and convincing evidence" burden of proof). If, in the confidential bypass proceeding, a court cannot find grounds by a preponderance of the evidence in the above eight categories to exempt an adolescent, she can appeal to this Court. In short, the Consent Act guarantees that any minor who *should* obtain an abortion without parental oversight *can* do so.

The District Court dismissed the Consent Act's bypass procedures because they could "also be employed for a parental notification law," and therefore did not satisfy strict scrutiny. (Doc. 301 at 43.) That conclusion apples the wrong standard, but it also misses the point. The bypass procedure cures other issues identified by the District Court. (Doc. 301 at 42.) For example, the bypass provisions removes any concern that parents will have an ultimate veto power over the minor's decision. (*See* Doc. 301 at 39, 44.) Similarly, the District Court's age-based tailoring analysis ignores the fact while the Consent Act applies to all minors, regardless of age, the bypass provision inherently incorporates that 17 year-olds might be different than 14 year-olds in the "case-by-

case" competency determination. (Doc. 301 at 34); *In re Meghan Rae*, ¶ 11.[9]

In sum, the Consent Act properly balances the State's interests in enhancing the protection of minors, safeguarding parents' rights, and promoting familial integrity while respecting minors' right to an abortion.

III. ALTERNATIVELY, THIS COURT SHOULD REMAND FOR TRIAL UNDER STRICT SCRUTINY.

Even if this Court finds strict scrutiny appropriate, it should nevertheless remand for trial to resolve material factual disputes. *Tonner*, ¶ 19.[10] The District Court erroneously relied on disputed facts and unsupported allegations to conclude the Consent Act was not narrowly tailored. The District Court also incorrectly held that the Notice Act is "necessarily" a less restrictive alternative to the Consent Act. (Doc. 301 at 43.) But this ignores that the Consent Act responds to known situations where abusers coerced minors into abortions and successfully evaded notice requirements. *Roe*, 912 N.E.2d at 64–65 (an adult abuser "pretended to be" minor's father when Planned Parenthood "telephonically notified" a parent).

---

[9] The District Court raised this age-based issue only about the State's interest in combatting sexual violence. The District Court failed to address that the State's interest in protecting minors' health and wellbeing applies to all minors, not just those under the age of 16.

[10] The District Court correctly found each of the State's interests compelling. *Supra* Part.II.A.

The District Court fundamentally misread the statutory scheme as being "unidirectional." (Doc. 301 at 39.) First, the entire statutory scheme guarantees "informed consent." Mont. Code Ann. § 50-20-104(5) (informed consent requires knowledge of "the medical risks of carrying the child to term"); -505(3)(a)(vi) ("a minor has sufficient information to give informed consent"). Second, the State entered substantial evidence in the record that parental involvement increases the pertinent information available to providers. *Supra* SOF.Part.D.1–2. And given Planned Parenthood's lack of follow up care, (Doc. 132, ¶ 35), the Consent Act ensures that the minor will have some support to be prepared for post-abortion complications. *Supra* SOF.Part.D.1–2. And the District Court's acknowledgment that this fact might be in dispute for the Notice Act, (Doc. 301 at 37–38), requires at a minimum it is in dispute here.

Similarly, the District Court stated that "[r]equiring consent does nothing to make it more likely that a sexual crime will be detected or punished" while later finding similar facts in dispute for the Notice Act. (Doc. 301 at 35; Doc. 301 at 45) ("the extent to which a parental notification statute enhances the actual likelihood of parents learning about a child's pregnancy or abortion intentions" is a matter for trial).) The State provided evidence that the Consent Act will increase parental involvement and that parental involvement has led to detection of repeated sexual violence. *E.g.*, App. 566–569, 573–574. The District Court's statement that "consent is not the necessary ingredient" to detecting sexual violence ignores the multitude of examples where the lack of parental consent allowed for repeated sexual abuse.

App. 566–569 (detailing cases where abortion providers failed to report instances of statutory rape, which allowed the same criminal conduct to continue); *Roe*, 912 N.E.2d at 64–65 (an abusive coach impregnated a 13 year-old and evaded Ohio's parental notice requirements by posing as the minor's father).

The District Court further ignored the facts in *Roe* by saying the Consent Act "erects additional, burdensome identification requirements that go far beyond what is necessary to prevent a person who is not a parent or guardian from giving consent" and will "likely impose substantial burdens on those parents or guardians." (Doc. 301 at 39, 40.) First, the statement that the identification requirements will "likely impose substantial burdens" on either minors or parents has no basis in the record. Indeed, the District Court cites nothing in the record to reach this conclusion. (Doc. 301 at 40.) Second, § 50-20-506 requires documentation to demonstrate both identity and authority to act on behalf of the minor. That documentation closes the gap in *Roe* to protect minors. 912 N.E.2d at 64–65 (parental notice requirements did not require proof of identity, or proof of relationship). The District Court assumed those documentation requirements impose a burden without evidence, and the nature of that burden on the minor remains in dispute.

Next, the District Court reviewed the age differential between the Notice and Consent Acts in the context of the State's interest in combatting sexual violence only. (Doc. 301 at 34.) That ignores the State's other interests that unquestionably apply to all minors. It also reads out a natural product of the

judicial bypass provision—that a 17 year-old minor will be more able to demonstrate competence to make an informed decision than a 13 year-old or 14 year-old. *In re Meghan Rae*, ¶ 11.

Finally, the District Court erred by omitting the tailoring effects of the judicial bypass provision. (Doc. 301 at 43) (ignoring the bypass provision because it is found in the Notice Act). Bypass allays many of the other concerns raised. *E.g.*, (Doc. 301 at 39; Doc. 301 at 44 (parental veto concerns); Doc. 301 at 44 (potential for intrafamilial conflict).) The District Court's own reasoning underscores its error. (Doc. 301 at 39) ("except in cases of a granted judicial bypass…[the Consent Act] takes the choice away from [minors]."). The District Court cannot on one hand lament the potential for familial conflict, while ignoring the statutory provision addressing that issue. *See In re Meghan Rae*, ¶ 10 (bypass protects a minor's access to abortion in that event).

While, as previously argued, the pertinent facts are not in dispute under the correct legal standard—*i.e.*, that the Consent Act enhances the protection of minors— if the Court concludes otherwise, it should remand for trial to fully develop facts and determine whether the Consent Act is narrowly tailored.

CONCLUSION

For all these reasons, this Court should reverse the District Court with instructions to enter summary judgment for the State, or, in the alternative, remand for trial.

DATED this 10th day of October 2023.

Austin Knudsen
Montana Attorney General

/s/ Brent Mead
Brent Mead
Deputy Solicitor General
Michael Noonan
Michael D. Russell
Thane Johnson
Assistant Attorneys General
MONTANA DEPT. OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Time New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,888 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ *Brent Mead*
Brent Mead

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0272

PLANNED PARENTHOOD OF MONTANA, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Christopher Abbott, Presiding

APPELLEES' RESPONSE BRIEF

APPEARANCES:

Tanis M. Holm
Colton Holm, PLLC 310 Grand Ave.
Billings, MT 59101
Phone: 406-259-9986
tholm@yellowstonelaw.com

Anjali Salvador*
Kyla Eastling*
Planned Parenthood Federation of America
123 William St., 11th Floor
New York, NY 10038
Phone: 212-261-4602
anjali.salvador@ppfa.org
kyla.eastling@ppfa.org

**Admitted Pro Hac Vice*

ATTORNEYS FOR PLAINTIFFS-APPELLEES

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael D. Russell
Michael Noonan
Thane Johnson
Assistant Attorneys General
MONTANA DEPT. OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Dale Schowengerdt
LANDMARK LAW
PLLC
7 West 6th Ave., Suite
518
Helena, MT 59601
Phone: 406-457-5496
dale@landmarklawpllc.c
om

**ATTORNEYS FOR
DEFENDANTS-
APPELLANTS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES

1. Does the Parental Consent for Abortion Act of 2013, which infringes on minors' fundamental right to privacy and deprives minors seeking abortion of equal protection under the law, warrant strict scrutiny review under this Court's precedent and the Montana Constitution?

2. Did the State fail to meet its burden to demonstrate that the Parental Consent for Abortion Act of 2013 is narrowly tailored to further a compelling governmental interest?

STATEMENT OF THE FACTS

I. The Parental Consent for Abortion Act of 2013

In Montana, as in many states, minors are empowered to consent to various health services without parental consent—including the "prevention, diagnosis, and treatment" of pregnancy. Mont. Code Ann. § 41-1-402(2)(c); *see generally id.* §§ 41-1-401 to 41-1-407. They can place their children for adoption without having to notify a parent. *Id.* § 42-2-405. In addition, minor parents can obtain medical treatment, including surgery, for their children without notifying a parent. *Id.* § 41-1-402(3). There are no legal requirements for minors to involve their parents in the care of their children.

Minors, therefore, can consent to many types of health care, including pregnancy-related care—but abortion is singled out. In 2012, the Montana Legislature proposed and voters approved a parental

notification requirement, which requires minors under the age of 16 who choose to have an abortion to notify a parent or seek a waiver from a court. *See id.* §§ 50-20-221 to 50-20-235(2012) (the "Notice Act"). The following year, the Montana Legislature heightened the restrictions on minors' abortion access by enacting the Parental Consent for Abortion Act of 2013. *Id.* §§ 50-20-501 to -511 (the "Consent Act").[1]

The Consent Act is significantly more restrictive than the Notice Act. It applies to all pregnant minors who are under 18, as opposed to the Notice Act's age threshold of 16. *Id.* The required consent form must be "notarized and…includ[e] an acknowledgement by the parent or legal guardian affirming that the parent or legal guardian is the minor's parent or legal guardian." *Id.* § 50-20-505(3)(d). The parent or guardian must provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor." *Id.* § 50-20-506(1). If a minor cannot obtain consent or if consent is withheld, the patient may only access abortion care by obtaining a court order, colloquially known as a judicial bypass. *See id.* § 50-20-509.

Abortion providers who do not satisfy the Consent Act's requirements are subject to civil and criminal penalties. The Consent Act provides a basis for civil liability, and violation of the act may also be evidence

---

[1] Although Respondents have challenged both the Notice Act and the Consent Act as unconstitutional under the Montana Constitution, this appeal only pertains to the District Court's grant of summary judgment to Respondents as to the Consent Act.

of "violation of a professional obligation." *Id.* § 50-20-235(2). The Consent Act also imposes strict criminal liability, including possible imprisonment, on a person who performs an abortion without complying with its requirements, regardless of the person's state of mind. *Id.* §§ 50-20-235(1), -510(1).

II. The Comparative Safety of Abortion and Childbirth

Abortion is an extremely safe medical procedure, carrying far lower health risks than pregnancy and childbirth. Doc. 254, Ex. F-1 ¶¶ 5–19, 23–24; Doc. 254, Ex. D 120:25–121:11. Compared with people who carry unwanted pregnancies to term, there is no evidence that abortion poses increased risk of mental health problems. Doc. 254, Ex. N 223:11–224:10, 228:19–229:1; Doc. 254, Ex. O-1 ¶ 6. There is no evidence that minors who carry to term are more mature or better able to make informed medical decisions than minors who choose abortion. Doc. 254, Ex. G-1 ¶¶ 30–32.[2] Minor patients are able to provide accurate medical and family histories. Doc. 254, Ex. F-2 ¶ 8.

The majority of minors who decide to terminate their pregnancy will voluntarily tell parents or guardians or consent to their being told. Doc. 254, Ex. G-2 ¶ 27; Doc. 254, Ex. E 117:9–12. The younger the minor or the less firm they are in their decision, the more likely they are to involve a parent. Doc. 254, Ex.

---

[2] Rather, in two peer-reviewed published studies, adolescents having or considering an abortion scored higher on certain independent measures of competence such as future time perspective and independency. Doc. 254, Ex. G-1 ¶¶ 31–32.

G-1 ¶ 25; Doc. 254, Ex. D 78:15–22. Nearly all minors who feel they cannot involve a parent or legal guardian involve another trusted adult; in some cases, that adult may be the primary caregiver for the minor.[3] Doc. 254, Ex. J-1 ¶ 18; Doc. 254, Ex. M-1 ¶ 7; Doc. 254, Ex. G-1 ¶ 28; Doc. 254, Ex. N 70:3–8.

Pregnant minors can benefit from parental involvement, regardless of whether they terminate their pregnancy or carry to term, *if* that involvement is supportive. Doc. 254, Ex. D 106:20–107:25, 127:20–129:3. Minors who unwillingly involve a parent in their abortion and are met with disapproval or indifference are more likely to experience negative emotions than minors who do not involve their parents. Doc. 254, Ex. O-1 ¶ 21. The American Academy of Pediatrics, along with other medical groups, has warned that "the potential health risks to adolescents" of refusing confidential care are "compelling," that parental involvement laws also cause "psychological harm," and that they may "adverse[ly] impact" families, with no offsetting benefits. Doc. 254, Ex. D-1 at 61–63; Doc. 254, Ex. G-1 ¶ 39. The American Medical Association and the U.S. Centers for Disease Control and Prevention have stated similar positions. Doc. 254, Ex. D-1; Doc. 254, Ex. D-2.

Unlike in the abortion context, pregnant minors who choose to carry to term are empowered to make their own health care decisions without parental consent. Mont. Code Ann. § 41-1-402(2)(c). This is true

---

[3] Planned Parenthood of Montana's Native American patients often have extended family members who serve as the primary parental figure. Doc. 254, Ex. I-1 at 3.

even though carrying a pregnancy to term requires substantial decision-making, communication, and personal responsibility. Specifically, to manage the risks associated with pregnancy, a minor patient should: obtain early, continuous and high-quality prenatal care, including ongoing screening for complications; give their provider a complete medical history; follow their provider's medical advice; report any symptoms to their provider; and make necessary lifestyle adjustments. Doc. 254, Ex. K 101:17–102:3, 266:5–14; Doc. 254, Ex. F-1 ¶¶ 20–25. The minor must give informed consent for prenatal care, which may include making decisions about whether to undergo medical procedures that carry risks and require balancing their own health interests with the interests of the fetus. Doc. 254, Ex. K 104:17–105:25, 107:4–108:1; Doc. 254, Ex. F-1 ¶¶ 16, 20–25.

After delivery, minor patients need postpartum care, including monitoring for postpartum depression and other complications. Doc. 254, Ex. K 108:6–109:14. Pregnant minors and their children face increased risk, compared to adults, of certain complications, including preterm delivery, low birthweight, small for gestational age, and infant death. *Id.* 190:17–192:16, 265:16–266:4. Very few adolescents who give birth decide to place the child for adoption. Doc. 254, Ex. D 109:25–110:5.

III. The Impact of the Consent Act

The Consent Act's demanding identification requirements exceed the standards for other medical procedures in Montana. The parent or guardian must sign a notarized acknowledgement that they are indeed the parent or legal guardian of the minor,

Mont. Code Ann. § 50-20-506(3)(d). They must provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor," *id.* § 50-20-506(1). Even though most minors involve a parent in the abortion decision, and even if parents are supportive, these requirements will expose minors to significant delay, particularly if parents must travel to government offices to request documentation and those requests take time to process. Doc. 254, Ex. I-1 at 4–5 (Section IV.E); Doc. 254, Ex. I 247:23–249:24.

Although abortion is safe, the risk of abortion rises with increased gestational age. The longer a minor is delayed care, the more they are exposed to increased medical risks, both those associated with abortion and those associated with a more advanced pregnancy. Doc. 254, Ex. D 166:19–21; Doc. 254, F-1 ¶¶ 28, 38. As a minor patient's pregnancy advances, the options for an abortion become fewer, costlier, and farther away. Doc. 254, Ex. I-1 at 1–2; Doc. 254, Ex. I 31:2–9; 250:6–9. Medication abortion, which PPMT provides in Helena, Great Falls, Billings, and Missoula, is strongly preferred by many patients, including minors. Doc. 254, Ex. I 239:18–240:7. However, it is only available through the eleventh week after the first day of the patient's last menstrual period ("LMP"). If a patient is delayed past 11 weeks LMP, the minor loses the medication abortion option. After 11 weeks, the only option for care is in Helena. After 21 weeks, there would be no abortion procedures available to the minor patient in Montana.

Some minors fear, with reason, that it would not be in their best interests to involve a parent in their abortion decision. Doc. 254, Ex. M-1 ¶ 11. Some minors have previously suffered or witnessed abuse from family members, including parents, and fear that news of their pregnancy and/or abortion decision will trigger further abuse. *Id.* ¶¶ 9–12. Others have good reason to believe that informing their parents will lead to abuse, or being thrown out, or will otherwise seriously damage their relationship with their parents. *Id.* ¶¶ 15–16; Doc. 254, Ex. L-1 at 4. Still others fear that their parents will pressure or force them to carry to term against their will. Doc. 254, Ex. L-1 at 4; Doc. 254, Ex. J-1 ¶ 13. Sometimes, minor patients decide not to involve their parents because they are aware of their parents' own problems, ranging from medical crises to debilitating addiction to domestic violence. Doc. 254, Ex. J-1 ¶¶ 15–16; Doc. 254, Ex. M-1 ¶ 16.

In the face of these barriers posed by the Consent Act, minors who are desperate to terminate a pregnancy will resort to traveling out of state to obtain an abortion. Doc. 254, F-2 ¶ 27. For those who lack the resources to travel, some will attempt to self-manage their abortion outside of the medical system. Doc. 254, G-1 ¶ 40. Some minors will be forced to carry their pregnancy to term. These minors will face heightened risks: medical risks associated with pregnancy and childbirth, Doc. 254, Ex. F-1 ¶ 5–19; risk of abuse or conflict if their pregnancy is discovered, Doc. 254, Ex. M 21:21–24; increased difficulty breaking ties with an abusive partner or escaping an abusive family household, Doc. 254, F-2 ¶ 47; and the social,

educational, and economic consequences of teen parenthood. Doc. 254, Ex. K 96:24–97:14.

Under the Consent Act, minors who do not wish to involve a parent must risk these harms or seek judicial permission to proceed without parental involvement. In a judicial bypass procedure, a minor must file a petition for a waiver of the parental consent requirement. Mont. Code Ann. § 50-20-509(2). The court "issue[s] an order authorizing the minor to consent" to the abortion without parental consent if the court finds that the minor is "competent to decide whether to have an abortion," *Id.* § 50-20-509(4); if there is evidence of "physical abuse, sexual abuse, or emotional abuse of the minor by one or both parents, a legal guardian, or a custodian," *Id.* § 50-20-509(5)(a); or if the consent of a parent or legal guardian is "not in the best interests of the minor." *Id.* § 50-20-509(5)(b).

Some minors will be unable to access the bypass because they do not feel able to discuss their abuse, Doc. 254, Ex. M-1 ¶¶ 18–20, Doc. 254, Ex. D 97:25–98:7; because they are under tight parental control, Doc. 254, M-1 ¶¶ 13, 17; because their time or transportation is too limited, Doc. 254, Ex. J-1 ¶¶ 21–23, Doc. 254, Ex I 33:6–20; or simply because the process itself is too daunting, Doc. 254, Ex. M 71:25–73:16. Or a minor patient may be denied a bypass, leaving them with the ordeal of an appeal and then, if that is denied, with the options of obtaining parental consent or carrying to term, with all of the accompanying risks either choice presents.

Even minors who successfully obtain a judicial bypass under the Consent Act will still be subjected to

delay, stress, and harms from the process itself. Gathering information about the judicial bypass process, finding and meeting with an attorney, preparing for a hearing, and then enduring that hearing–all without drawing parental suspicion–would be difficult, stressful, and time consuming for anyone, and it is more so for minors. Doc. 254, M-1 ¶ 17; Doc. 254, Ex. I 244:20–245:17. The process may be extremely distressing, particularly for minors who have been abused and who must then discuss the details of that abuse with strangers in a formal setting. Doc. 254, Ex. M-1 ¶¶ 18–19; Doc. 254, Ex. E 60:9–61:1. Moreover, obtaining a bypass is particularly hard for minors whose parents monitor them and/or limit their transportation. Doc. 254, Ex. J-1 ¶¶ 20–24. School, work, or caretaking commitments can present other hurdles for minors to access a judicial bypass. *Id.* ¶ 23; Doc. 254, Ex. I 33:6–20, 244:20–245:17.

IV. Planned Parenthood of Montana's Practices

The State devotes considerable space to making unfounded and incendiary accusations about Planned Parenthood of Montana's ("PPMT's") standard of care for its minor patients and compliance with mandatory reporting laws. *See* Appellants' Opening Brief ("App. Br.") at 13–15. The facts are as follows: PPMT always encourages minor patients to involve their parents in their decision whether to have an abortion and in their medical care, and most minors choose to do so. Doc. 254, Ex. I 87:7–88:9; Doc. 254, Ex. E 117:9–12. Moreover, all patients, including minors, go through a private informed consent process in which: (1) they

are educated about abortion and its attendant risks; (2) they discuss their questions and concerns with a trained staff member; (3) the staff member confirms that the patient is capable of giving informed consent and does, in fact, voluntarily consent; and (4) the clinician provides another opportunity for the patient to ask questions and discuss the procedure and again confirms informed consent. Doc. 254, Ex. I 173:20–174:22, 182:4–13; Doc. 254, Ex. H 9:22–10:13.

When serving minor patients, PPMT screens for risk factors related to mental health. Doc. 254, Ex. I-2 ¶ 3. Minor patients fill out a medical history, which includes multiple questions about anxiety and depression, domestic abuse, coercion, and the patients' feelings about being pregnant. *Id.* ¶¶ 3–4, 12. PPMT staff have a private discussion with each patient, which includes detailed questions about the patient's state of mind, safety, support system, and consideration of their options. *Id.* ¶ 3. PPMT immediately halts the process and refers the minor patient to counseling if they feel the patient is not ready to proceed. *Id.* ¶ 5. Patients are provided with referrals both for licensed counselors and for peer-to-peer support groups in case they find themselves struggling with negative emotions. *Id.*; Doc. 254, Ex. I 183:10– 184:10.

The record shows that PPMT screens for abuse and consistently complies with Montana's mandatory

reporting laws.[4] *See* Doc. 257, Ex. 13.[5] The State deliberately conflates mandatory reporting laws and the Consent Act to obscure the fact that it lacks evidence to support the proposition that the Consent Act would protect minors from sexual abuse. The judicial bypass case that the State discusses did not "expose" a sexual crime against a minor.[6] App. Br. at 13. Further, contrary to the State's mischaracterization, the judicial bypass process caused this minor harm: it caused her stress and delayed her abortion, thereby exposing her to increased risks.

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's grant of summary judgment *de novo*. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839 (citation omitted). This Court reviews a district court's conclusions of law to determine whether they are correct and its findings of

---

[4] In 2012, the Montana Legislature amended its mandatory reporting rules. Mont. Code Ann. § 41-3-201. Afterwards, in 2013, the Women's and Men's Health Section of the Department of Public Health and Human Services ("DPHHS") held a training on compliance that was reviewed by DPHHS' legal team. Doc. 257, Ex. 13 ¶¶ 3–4. PPMT's Mandatory Reporting Policy was drafted after considering the guidance and materials provided by DPHHS in a webinar. *Id*. When DPHHS subsequently changed its guidance for mandatory reporting, PPMT updated its policy to ensure compliance and has reported all instances of sexual conduct between minors regardless of age thereafter. *Id*.; *contra* App. Br. at 14.

[5] Lodged for filing with Doc. 254, Ex. 13.

[6] The minor's lawyer testified that the police never contacted the minor or her lawyer. Doc. 169, Ex. 4 37:1–11.

fact to determine whether they are clearly erroneous. *Id*. When "there is no genuine issue as to any material fact . . . the movant is entitled to judgment as a matter of law" and the motion for summary judgment must be granted. Mont. R. Civ. P. 56(c). Assertions that there are genuine issues of material fact must be supported by "material and substantial evidence, rather than mere conclusory and speculative statements." *Motarie v. N. Mont. Joint Refuse Disposal Dist.,* 274 Mont. 239, 242, 907 P.2d 154, 156 (1995). *De novo* review allows this Court "to review the record and make [its] own determinations regarding…entitlement to judgment as a matter of law," including on arguments not reached by a district court. *Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, ¶ 29, 330 Mont. 282, 127 P.3d 436.

SUMMARY OF THE ARGUMENT

Under the Montana Constitution, which contains "significantly broader" privacy protections than the federal Constitution, access to abortion is a fundamental right. *Weems v. Montana*, 2023 MT 82, ¶ 35, 412 Mont. 132, 529 P.3d 798; *Armstrong v. State*, 1999 MT 261, ¶ 41, 296 Mont. 361, 989 P.2d 364. For decades, this Court has recognized that "a woman's right to obtain a pre-viability abortion [is] part and parcel of her right of personal/procreative autonomy." *Armstrong*, ¶ 45. Just this year, this Court again stated that every Montanan has "a fundamental right of privacy to seek abortion care from a qualified health care provider of her choosing, absent clear demonstration by the State of a 'medically-acknowledged, [bona fide] health risk.'" *Weems*, ¶ 37

(quoting *Armstrong*, ¶ 59). Yet incredibly, the State discusses neither *Weems* nor *Armstrong* in its brief.

The Minors' Rights Clause in the Constitution ensures that minors have "all the fundamental rights" contained in the Declaration of Rights, including the same right to access abortion that adults have. Mont. Const. Art. II, § 15. This Court's rulings are consistent with that principle. *See, e.g., Matter of J.W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 498 P.3d 211 ("Montana youths are constitutionally guaranteed the same fundamental rights as adults."). The reference in the Minors' Rights Clause to laws that "enhance the protection" of minors cannot properly be read, as the State would prefer, as a loophole that provides "a grant of legislative authority to *diminish* the rights of minors." Doc. 301 at 25, 27.

As the District Court correctly observed, "[o]ne cannot reasonably dispute that the Consent Act–requiring the minor to surrender consent to an abortion to another unless an exception applies–implicates a minor's personal autonomy." Doc. 301 at 25. It also impermissibly discriminates between minors who choose abortion and minors who choose to carry their pregnancies to term; the latter's choices entail increased medical risk and involve significant decision-making capabilities, yet they are not subjected to a parental consent requirement. Therefore, the District Court correctly determined that the Consent Act is subject to strict scrutiny, meaning that to be found constitutional it "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling state interest." *Armstrong*, ¶ 34.

Because the Consent Act infringes upon the fundamental right to access abortion, "the State's burden [is] to show there is a 'medically acknowledged, [bona fide] health risk, clearly and convincingly demonstrated, justifying interference with a woman's access to abortion." *Weems*, ¶ 45. Yet the record in this case makes clear that the Consent Act will endanger minors rather than protecting their health, and it will not protect minors against sexual offenses. Nor can the State's other asserted interests in protecting minors from their own immaturity and parental rights, App. Br. at 31–32, be deemed sufficiently compelling to justify the Consent Act.

The State knows that the Consent Act cannot survive strict scrutiny, so it seeks to avoid it in favor of a novel balancing test. But its arguments are foreclosed by precedent and unsupported by the record. Contrary to Appellant's claims that the District Court "minted a brand new rule," App. Br. at 18, the District Court correctly applied this Court's established precedent to hold that the Consent Act cannot survive strict scrutiny. The District Court also correctly found that no genuine issue of material fact exists as to the Consent Act. This Court should affirm the decision of the District Court.

ARGUMENT

I. The District Court Correctly Analyzed the Consent Act Under the Strict Scrutiny Standard

A. The Consent Act's infringement of minors' right to privacy requires a strict scrutiny analysis.

The right of individual privacy enshrined in Article II, Section 10 of the Montana Constitution is a fundamental right. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112 (1997). It "protects the right of procreative autonomy—i.e., here, the right to seek and obtain a specific lawful medical procedure, a pre-viability abortion." *Armstrong*, ¶ 14; *see also Weems*, ¶ 37. Just this year, this Court unanimously applied *Armstrong* to strike down another abortion restriction, restating that Montanans' fundamental right to privacy includes the right to access abortion care. *Weems*, ¶¶ 36–37.

Minors have the same fundamental right to privacy as adults, including the right to access abortion care that adults possess. *See Wicklund v. State*, Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116, at *6 (1st Jud. Dist. Feb. 11, 1999) (stating that "minors, including pregnant minors, have a fundamental right of individual privacy that includes . . . [the] right to decide whether to terminate [a] pregnancy"). The Minors' Rights Clause states that "the rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Mont. Const. Art. II, § 15. As stated at the Montana Constitutional Convention, the "crux" of the Minors' Rights Clause is "to recognize that persons under the age of majority have the same protections [from] governmental and majoritarian abuses as do adults." 5 Mont. Const. Convention, Verbatim Tr. at 1750 (Mar. 8, 1972) (Del. Monroe), available at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1041&context=montanaconstitution. The

intention of the framers was crystal clear: "We do not want [minors] to lose any rights that any other Montana citizen has, and this is specifically what this particular section is attempting to do." *Id.* As the District Court correctly understood, the framers plainly meant the Minors' Rights Clause to be a "rights-enhancing measure." Doc. 301 at 28.

This Court has consistently held that Montana youths are constitutionally guaranteed the same fundamental rights as adults. *See Matter of J.W.*, ¶ 23 ("Montana youths are constitutionally guaranteed the same fundamental rights as adults."); *Pengra v. State*, 2000 MT 291, ¶ 8, 302 Mont. 276, 14 P.3d 499 (applying Article II, Section 15 to find minors have the same informational privacy rights as adults); *In re T.D.H.*, 2015 MT 244, ¶ 65, 380 Mont. 401, 356 P.3d 457 (affirming that minors enjoy "all the fundamental rights of an adult under Montana Constitution Article II.").

The Consent Act unquestionably infringes upon the right of minors to access abortion. The State frames the Consent Act merely "touch[ing] on fundamental rights," App. Br. at 18, but its interpretation ignores that restrictions short of complete denial of access have been found to infringe upon the right to access abortion. *See Armstrong* (law requiring that all abortions be performed by physicians violates the right to privacy), *Weems* (law requiring that all abortions be performed by physicians or physician assistants violates the right to privacy); *Wicklund, 1999 Mont. Dist. LEXIS 1116,* at *11 (a parental notice requirement "infringes on the privacy rights of minors who wish to terminate their pregnancies").

Indeed, the State's proposed approach to this case presupposes that the Consent Act infringes upon a fundamental right. App. Br. at 30 ("First, the State must show that a law limiting minors' fundamental rights is intended to protect them."). As the District Court correctly observed, "[o]ne cannot reasonably dispute that the Consent Act– requiring the minor to surrender consent to an abortion to another unless an exception applies–implicates a minor's personal autonomy." Doc. 301 at 25.

In the face of this infringement, the State's proposal that this Court reject a strict scrutiny analysis, App. Br. at 30, ignores the plain language of the Montana Constitution and the established precedent of this Court. Article II, Section 10 states outright that "the right of individual privacy…shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10. This Court has made it clear that "[w]hen the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than the federal constitution." *Weems*, ¶ 35; *Armstrong*, ¶ 41. More specifically, it "requires more than that the State simply not impose an undue burden on a person's exercise of his or her right of individual privacy." *Armstrong*, ¶ 41 (citation omitted). Rather, "legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis–i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling state interest." *Id.*, ¶ 34; *see also Weems*, ¶ 34; *Wicklund,* 1999 Mont. Dist. LEXIS 1116, at *6; *Stand Up Mont. v. Missoula County Pub. Schs.*, 2022 MT 153, ¶ 10, 409

Mont. 330, 514 P.3d 1062; *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301; *Mont. Democratic Party v. Jacobson*, 2022 MT 184, ¶¶ 18–19, 410 Mont. 114, 518 P.3d 58.

The District Court correctly considered the Consent Act using a strict scrutiny analysis—and in doing so, it was in line with the approach of many other states. *See also State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (applying strict scrutiny to an abortion restriction); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (same); *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243 (Fla. 2017) (same); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (same); *Women of the State of Minn. by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (same); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (same); *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d 231 (same).

B. Minors' Rights Clause jurisprudence supports the use of strict scrutiny, not the State's novel proposed balancing test.

In contravention of this Court's jurisprudence, the State attempts to invoke the language in the Minors' Rights Clause about laws that "enhance the protection" of minors as authorization to weaken minors' rights without surviving strict scrutiny. *See* App. Br. at 20. According to the State, the appropriate test is as follows: "First, the State must show that a law limiting minors' fundamental rights is intended to protect them;" then, "the rights of minors must be balanced against the nature of the State's interest in protecting them," and at this stage "[p]arental rights

must also be taken into account." App. Br. at 30. But, as the District Court correctly found, the State's proposed test "cannot be squared with either the original understanding of Article II, Section 15 or the Supreme Court cases applying and interpreting it." Doc. 301 at 27.

Far from being "novel," App. Br. at 23, the District Court's conclusion that "the State cannot use Article II, Section 15 as an escape clause to evade application of the appropriate tier of scrutiny" is supported by the jurisprudence of this Court. Doc. 301 at 31. In *In re C.H.*, this Court upheld a provision of the Youth Court Act. 210 Mont. 184, 683 P.2d 931 (1984). After finding that the two classes of youth in question were "similarly situated for equal protection purposes" and that "physical liberty is a fundamental right," its "next step [was] to determine whether there is a compelling state interest sufficient to warrant such an infringement." *Id.* at 198, 201–02, 683 P.2d at 938, 940. It turned to the Minors' Rights Clause and found that because the challenged provision was narrowly tailored to the compelling state interest in protecting minors, it was consistent with *both* the Equal Protection Clause *and* the Minors' Rights Clause. *Id.* at 202–03, 683 P.2d at 940–41. *In re C.H.* does not, as the State contends, stand for the proposition that "the correct legal test upholds laws that enhance the protection of minors, even if the laws conflict with their fundamental rights." App Br. at 25 (internal quotation omitted). Rather, it found that the law properly served a compelling state interest under the appropriate strict scrutiny test.

In re S.L.M., 287 Mont. 23, 951 P.2d 1365 (1997), both reinforces that *In re C.H.* uses a strict scrutiny analysis and affirms that the Minors' Rights Clause cannot be used to escape strict scrutiny. After finding that the two classes of people involved were similarly situated for equal protection purposes and that a fundamental right was implicated, it continued, "[a]s in *Matter of C.H.*, we must therefore apply a strict scrutiny analysis and determine whether there is a compelling state interest sufficient to justify such an infringement *and* whether such an infringement is consistent with the mandates of Article II, Section 15 of the Montana Constitution." *Id.* at 34, 951 P.2d at 1372 (emphasis added). According to the Court, the "enhance the protection" language in the Minors' Rights Clause must be understood as follows: "[U]nder Article II, Section 15, minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II. Furthermore, if the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors." *Id.* at 35, 951 P.2d at 1373. "Enhanc[ing] the protection" is an additional element that must be met—not a loophole to allow the State to avoid strict scrutiny. *Id.* at 34, 951 P.2d at 1372.

The State's incorporation of parental rights into its novel balancing test is also inappropriate. *See Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *19 ("the fundamental privacy right of the minor against the rights of the parents…prevails"). In fact, a version of the State's approach was considered and rejected at the Montana Constitutional Convention, where the

delegates declined to adopt a version of the Minors' Rights Clause that would have granted minors "all the fundamental rights of a Montana person, except where specifically precluded by…the demands of a proper parent-child relationship." 1 Mont. Const. Convention Proceedings, Delegate Proposal No. 65 at 166 (Jan. 29, 1972) (Del. Monroe), available at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1042&context=montanaconstitution_docs.

The State takes an alarmist posture and claims that numerous provisions of the Montana code would be implicated if this Court affirms the decision below, such as child labor laws. App. Br. at 23–24. This mischaracterizes Respondents' argument. Respondents do not argue that the State can never pass legislation that is protective of minors. Respondents simply argue that strict scrutiny must be applied where, as here, a law infringes upon minors' fundamental rights.

C. Under the Equal Protection Clause, distinctions based on the exercise of a fundamental right are also subject to strict scrutiny.

While the District Court emphasized Respondents' privacy claim, their equal protection claim provides an independent basis for using the strict scrutiny standard. The Equal Protection Clause states that "[n]o person shall be denied the equal protection of the laws." Mont. Const. Art. II, § 4. As with the right to privacy, it "provides for even more individual protection" than the parallel federal equal protection right. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 104 P.3d 445 (citation omitted).

In analyzing a legal challenge under the Equal Protection Clause, a court must "identify the classes involved and determine whether they are similarly situated." *In re S.L.M.*, 287 Mont. at 32, 951 P.2d at 1371. If so, "[w]hen the legislation in question infringes upon a fundamental right or discriminates against a suspect class, [courts] employ the most stringent standard, strict scrutiny." *Id.* As with the right to privacy, "[u]nder the strict scrutiny standard, the State has the burden of showing that the law…is narrowly tailored to serve a compelling government interest." *Snetsinger*, ¶ 17. The analysis is no different where minors are concerned. *See In re S.L.M.* (analyzing an equal protection challenge to a law implicating minors using a strict scrutiny analysis); *Wicklund,* 1999 Mont. Dist. LEXIS 1116 (same, where the challenged law was the 1995 Parental Notice of Abortion Act); *supra* at Part I.B (discussing the relationship between the Equal Protection Clause and the Minors' Rights Clause).

The two classes of minors created by the Consent Act—those who seek abortions and those who choose to carry their pregnancies to term—are similarly situated. *See Armstrong,* ¶ 49 ("[T]he State has no more compelling interest or constitutional justification for interfering with the exercise of [the right to choose abortion] if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term."), *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *5 (minors carrying to term and minors terminating are similarly situated), *Jeannette R. v. Ellery,* No. BDV-94-811, 1995 WL 17959708, at *7–8 (Mont. Dist. Ct. May 19, 1995) (same holding for pregnant patients generally).

Additionally, there is no question that a fundamental right is implicated in this case. *See supra* at Part I.A. The equal protection analysis, as well as the right to privacy analysis, demonstrates that the use of strict scrutiny is proper in this case.

II. The Consent Act Fails Strict Scrutiny

Having established that the Consent Act infringes upon minors' fundamental right to access abortion, it then becomes "the State's burden [] to show there is a 'medically acknowledged, [bona fide] health risk, clearly and convincingly demonstrated,' justifying interference with a woman's access to abortion." *Weems*, ¶ 45; *see also Armstrong*, ¶ 62 ("Except in the face of 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."). Even if the State can establish by clear and convincing evidence that a medically acknowledged, *bona fide* health risk exists, the State must show that the Consent Act is "narrowly tailored" to address that risk. *Weems*, ¶ 44; *Armstrong*, ¶ 34. The undisputed facts plainly establish that the State has failed to meet its burden.

Appellants claim that the Consent Act serves the following objectives: protecting minors from sexual victimization, protecting minors' psychological and physical wellbeing, protecting minors from their own immaturity, and promoting parental rights. App. Br. at 31–32.[7] Not all of these objectives are tied to a

[7] When it enacted the Consent Act, the Legislature identified the following interests: "protecting minors against their own

medically acknowledged, *bona fide* health risk, and even if they were, the Consent Act still gives parents veto power over minors' constitutionally protected ability to access abortion care. It is not narrowly tailored to further any state interest, and its inclusion of a judicial bypass provision cannot remedy its constitutional defects.

A. The State has not met its burden to show that a medically acknowledged, bona fide health risk justifying the Consent Act exists.

1. The Consent Act will endanger minors, not protect their health.

The State's argument that the Consent Act "protects the physical and psychological wellbeing of minors," App. Br. at 34, is unsupported by the record and not "grounded in the methods and procedures of science and collective professional judgment, knowledge and experience of the medical community," as is required. *Armstrong*, ¶ 62. Rather, the record confirms that, far from protecting their wellbeing, the Consent Act would put more minors at risk of harm.

As this Court recognized earlier this year, "abortion care is exceedingly safe" and, in fact, "abortion care is one of the safest forms of medical care in this country and the world." *Weems,* ¶¶ 1, 46. The record in this case, too, overwhelmingly shows that abortion

---

immaturity; fostering family unity and preserving the family as a viable social unit; protecting the constitutional rights of parents to rear children who are members of their household; and reducing teenage pregnancy and unnecessary abortion." Mont. Code Ann. § 50-20-502(2)(a)-(d).

presents no bona fide health risk to minors; it is an extremely safe procedure and carries far lower risks than carrying a pregnancy to term. *See supra* at Statement of Facts (SOF) Part II. There is no evidence that minor patients are not treated for actual complications (which are rare), and Respondents discuss the importance of follow-up with every patient, including minors, and give them contact information for the 24/7 on-call clinician. Doc. 254, Ex. I-2 ¶ 14. The State presented no concrete evidence that these protocols are insufficient or create a health risk.

The American Medical Association and the American Academy of Pediatrics, along with other medical organizations, are opposed to forced parental consent laws. Doc. 254, Ex. D-1 at 61; Doc. 254, Ex. D-2 at 2. Forced parental involvement is more likely to *deter* minors from seeking care, thereby exposing them to increased medical risk. Doc. 254, Ex. D-1 at 61; Doc. 254, Ex. G-1 ¶ 39.

Conversely, the record establishes that the Consent Act will delay, and in some cases prevent, minors from seeking abortion, which has negative physical health impacts.[8] Having to delay their abortions to obtain consent will expose minors to increased medical risk,

---

[8] Even minors who *voluntarily* involve their parents will be delayed, and even prevented, from accessing abortion because of the onerous documentation requirements of the Consent Act. Mont. Code Ann. §§ 50-20-505 to 50-20-506. These minors, too, would lose medical options, face increased risks, and possibly be subjected to forced pregnancy and childbirth. Doc. 254, Ex. I 155:14–156:15, 239:18–240:7, 247:23–249:24; Doc. 254, Ex. F-1 ¶ 29.

remove the medication abortion option, force them to travel out of state, force them to self-manage abortion, or prevent them from having an abortion at all, thereby exposing them to the increased medical risks of pregnancy and childbirth as well as the negative effects of unintended teen parenthood. Doc. 254, Ex. M-1 ¶¶ 13–14, 28; Doc. 254, Ex. I 117:14–119:1.

Furthermore, contrary to the State's claims, App. Br. at 35, there is longstanding consensus from the major psychiatric organizations in the United States and United Kingdom that there is no credible evidence that abortion causes mental health problems. *See Am. Psych. Ass'n, Rep. of the APA Task Force on Mental Health and Abortion (2008)*; Nat'l Collaborating Ctr. for Mental Health, Induced Abortion and Mental Health: A Systematic Review of the Mental Health Impact of Induced Abortion (2011); *see generally* Doc. 254, Ex. O-1 ¶¶ 4–6. One of the State's experts conceded as much. Doc. 254, Ex. N 224:22–24 ("[T]he state of the research is such that there is no evidence to support a causal relationship" between abortion and mental health problems.).

The only research in the record that compares women with *unwanted pregnancies* who terminate their pregnancies with those who do not, has found *comparable or better* mental health outcomes for those who terminate.[9] Doc. 254, Ex. O-1 ¶¶ 17, 18, 25; *see*

[9] The State cites a 2010 study by Priscilla Coleman to support its claim that "the rates of mental health issues and substance abuse for post-abortion women are far higher than the rates for women who carried their child to term," App. Br. at 35; however, that study was rated "very poor" by the Academy of Royal Medical Colleges' National Collaborating Centre for Mental

also Farmer, 762 A.2d at 636 ("[Y]oung women do not suffer greater psychological problems than the young women who carry their pregnancies to term."); Doc. 254, Ex. N 134:3–135:4 (acknowledging the mental health risks from parenting as a minor).

To the contrary, the record shows that the Consent Act will *subject* minors to emotional harm. Minors who unwillingly involve a parent in their abortion and are met with disapproval or indifference are more likely to experience negative emotions than minors who did not involve their parents. Doc. 254, Ex. O-1 ¶ 21; Doc. 254, Ex. N 182:2–186:17. In addition, the record demonstrates that forced disclosure of a pregnancy will expose some minors to abuse, which has its own negative consequences. Doc. 254, Ex. M 21:21–24.

The Consent Act would harm minors' physical and mental health, rather than improving it. And even if the State had presented evidence that requiring parental consent would improve care, it has not produced any proof that a parental notice requirement is insufficient to address their asserted interest in minors' health.[10]

Health. Doc. 132, Ex. 9 ¶ 23. Dr. Coleman's research and methodology has been discredited (and refuted) by the scientific community such that she has had to publicly correct her own work. *Id.* ¶¶ 10–24.

[10] Respondents do not concede that the Notice Act, Mont. Code Ann. §§ 50-20-221 to 50-20-235, which is not at issue in this appeal, is constitutional. Rather, Respondents note that the Notice Act is an example of a parental involvement law less onerous than the Consent Act, inherently establishing that the Consent Act is not narrowly tailored.

2. The State has not shown that the Consent Act will protect minors against sexual offenses.

Despite asserting that the Consent Act would protect minors from sexual assault, the State has failed to demonstrate that it would actually do so. Rather than presenting specific evidence that parental consent enhances the protection of minors from sexual abuse, the State leans on implicit causal inferences and baseless claims[11] about Respondents' patient protocols in its assertion that "[t]he Consent Act must be allowed to come into effect so that the State and parents are better able to combat sexual violence against minors." App. Br. at 34. This approach does not satisfy strict scrutiny.

In making its sexual abuse argument, the State does not attempt to explain how giving a parent veto power over a child's medical decision-making results in protection from sexual victimization. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386 (strict scrutiny requires demonstration that the statute is "necessary to promote" a compelling state interest). Montana already has a criminal law requiring that medical providers report sexual victimization. Mont. Code Ann. §§ 41-3-201, 41-3-207(2). The record is devoid of any evidence that the Consent Act provides enhanced protection over mandatory reporting laws, especially given that 1) some minors are being abused *by their parents*, Doc. 254, Ex. L-1 at 2–3; and 2) for minors who might seek

---

[11] *See supra* at SOF Part IV for the record evidence that Respondents screen for and report abuse in compliance with Montana law.

a judicial bypass, judges are not mandatory reporters, Mont. Code Ann. § 41-3-201 (and the Consent Act's judicial bypass provisions direct judges to protect the confidentiality of the proceedings, *Id.* § 50-20-509(3)).

The weakness in the State's argument is exposed by the fact that the Consent Act singles out minors seeking abortion, as opposed to those who choose to carry their pregnancies, without any valid justification. Pregnant minors are equally–if not more–in danger of being coerced by an abusive partner *not* to have an abortion and are less likely to escape an abusive situation if they are *prevented* from accessing abortion. Doc. 254, Ex. 11 100:7–20; Doc. 254, Ex. F-2 ¶ 47; Doc. 254, Ex. G-2 ¶ 40 (minors at particular risk of being coerced into keeping pregnancy); Doc. 254, Ex. D 146:15–21 (conceding that women are at risk of being coerced both into having abortions and into keeping pregnancies); Doc. 254, Ex. E 130:3–13 (conceding that partners may coerce minors to continue a pregnancy).

The District Court summarized the matter succinctly:

> Even in those cases where a teenage pregnancy is the product of a sexual assault or exploitation, all requiring parental consent accomplishes is to permit the parent to refuse consent to the early termination of that pregnancy that has already occurred. Requiring consent does nothing to make it more likely that a sexual crime will be detected or punished. And even if one accepts for sake of argument that the Consent Act has a deterrent effect on the would-be sexual offender who risks discovery when his victim seeks an abortion,

> consent is not the necessary ingredient to that effect.

Doc. 301 at 35. The Consent Act's unconstitutionally broad sweep is untethered to any medically acknowledged, *bona fide* health risk regarding sexual abuse.

The State also argues that issues of material fact exist as to whether the Consent Act is narrowly tailored to protect minors from sexual abuse. App. Br. at 39–42. In asserting that the Consent Act "responds to known situations where abusers coerced minors into abortions and successfully evaded notice requirements" in a narrowly tailored fashion, *id*. at 39–40, the State relies heavily on an Ohio case from 2009.[12] *Roe v. Planned Parenthood Sw. Ohio Region*, 912 N.E.2d 61 (Ohio 2009). Yet this single case from Ohio does not suffice to "clearly and convincingly" demonstrate that the Consent Act is narrowly tailored to protecting minors from sexual abuse. *Weems,* ¶ 45; *Armstrong,* ¶ 62. Under the facts in *Roe*, the minor in question was already pregnant by the time she interacted with an abortion clinic; a consent requirement would not have prevented the pregnancy. *Roe,* ¶ 6. As the District Court found, the Consent Act "erects additional, burdensome identification requirements that go far beyond what is necessary." Doc. 301 at 39. Contrary to the State's assertion, the

---

[12] The State's reliance on *Roe* in its claim that "the Consent Act responds to known situations where abusers…successfully evaded notice requirements," App. Br. at 39–40, is particularly curious in light of the fact that the *Roe* decision was issued in 2009 and the Notice Act was proposed by the Legislature in 2012.

record substantiates this finding. Doc 254, Ex. I 247:23– 249:24.

B. The State's other asserted interests are not medically acknowledged, bona fide health risks, nor is the Consent Act narrowly tailored to advance them.

The other interests asserted by the State, protecting minors from their own immaturity and promoting parental rights, App. Br. at 35–37, are not tied to medically-acknowledged, *bona fide* health risks such that they "justify[] interference with a woman's access to abortion." *Weems,* ¶ 45.

Appellants argue that, because minors often "think and act impulsively," forced parental involvement will protect them from their own "underdeveloped decision-making capacity." App. Br. at 17, 36. While minors can act impulsively, the State has not presented evidence that minors make impulsive decisions to have abortions. Obtaining an abortion requires concerted planning, coordination, and activity sustained over time, and therefore is very unlikely to be completed on a whim. Doc. 254, Ex. G-1 ¶ 21. Moreover, minors who choose to carry to term are no more mature or able to make voluntary and informed decisions. In fact, minors who choose to carry to term score worse on various measures of decisional maturity and tend to idealize what parenthood will be like and underestimate its difficulties. *Id.* ¶¶ 30–32; Doc. 254, Ex. N 52:22–53:7; 54:3–10. Further, often minors who choose not to involve parents in their abortions are not lacking in adult input; they consult other trusted adults. Doc. 254, Ex. J-1 ¶ 18; Doc. 254, Ex. D 150:11–152:10.

The State's parental rights argument is similarly unpersuasive. Parental rights cannot outweigh minors' own privacy rights here, because the Minors' Rights Clause expressly affirms the rights of minors except when necessary to enhance *minors' own* protection. *See supra* at Part I.B. Moreover, any parental right that exists is a right to parent free from state interference, not a right to *enlist* the state's powers to gain greater parental control or to make it more difficult for minors to exercise their constitutionally protected rights. *See Farmer*, 762 A.2d at 638 (reasoning that while "the State may not interfere with a parent's upbringing of a child," it does not follow that parents have a "right to prevent or even be informed about a child's exercise of her own constitutionally protected rights").

When it comes to impact on the parent-child relationship, the Consent Act will "neither mend nor create lines of communication between parent and child. Instead, it is the parties' pre-existing relationship that determines whether a young woman involves a parent." *Id.* at 637. And, as the court in *Lungren* found, in dysfunctional families, forced disclosure generally would "exacerbate the instability and dysfunctional nature of the family relationship." 940 P.2d at 829*; see also* Doc. 254, Ex. J-1 ¶ 10 ("[T]here are generally very compelling reasons why a young woman cannot or does not want to involve a parent in her decision."). The record shows that minors who choose not to consult their parents are generally correct in anticipating that their parents would not respond helpfully, making the State's parental rights and healthy families argument even less persuasive. Doc. 254, Ex. M-1 ¶¶ 8–11.

C. Other parental involvement laws further demonstrate that the Consent Act is not narrowly tailored.

The Consent Act fails strict scrutiny not only because the State has failed to establish a compelling interest justifying its intrusion into a minor's right to access abortion, but also because the Consent Act is not narrowly tailored. Indeed, the Consent Act is one of the nation's *most restrictive* mechanisms for requiring parental involvement. For example, it requires that the parent or guardian sign a notarized acknowledgment affirming their relationship with the minor and provide "government-issued proof of identity and written documentation that establishes that the parent or legal guardian is the lawful parent or legal guardian of the minor." Mont. Code Ann. §§ 50-20-505(3)(d), 50-20-506(1).

Other jurisdictions, even ones with parental involvement laws, do not go nearly so far in making it difficult for minors to access abortion. *See* Ariz. Rev. Stat. § 36-2152(A) (no documentation of relationship required); Ark. Code Ann. § 20-16-803(c) (same); Colo. Rev. Stat. § 12-37.5-105(1)(a) (same); Del. Code Ann. tit. 24 § 1783 (same); Fla. Stat. Ann. § 390.01114 (same); Ga. Code Ann. § 15-11-682 (same); Idaho Code Ann. § 18-609A(1) (same); Iowa Code Ann. § 135L.3(2) (same); Kan. Stat. Ann. § 65-6705 (same); Md. Code Ann., Health-Gen. § 20-103 (same); Mich. Comp. Laws Ann. § 722.903 (same); Miss. Code Ann. § 41-41-53 (same); Mo. Ann. Stat. § 188.028(1)(1) (same); Neb. Rev. Stat. § 71-6902 (same); Nev. Rev. Stat. § 442.255(1) (same); N.C. Gen. Stat. Ann. § 90-21.7(a)(1) (same); N.D. Cent. Code § 14-02.1-03(1) (same); Ohio

Rev. Code Ann. § 2919.121(B)(1)(a)(i) (same); Okla. Stat. Ann. tit. 63 § 1-740.4b(C) (no documentation requirement; affirmative defense for provider available if person falsely claiming to be parent presents government identification and provider uses due diligence); 18 Pa. Cons. Stat. Ann. § 3206(a) (no documentation of relationship required); R.I. Gen. Laws § 23-4.7-6 (same); S.C. Code Ann. § 44-41-31(A)(1) (same); S.D. Codified Laws § 34-23A-7(2) (same); Tex. Family Code Ann. § 33.002(c) (same); Utah Code Ann. § 76-7-304.5(1)(a) (same); W. Va. Code § 16-2F-3 (same); Wis. Stat. Ann. § 48.375(4)(a)(1) (same); *but see* Ala. Code § 26-21-3(b); Ind. Code § 16-34-2-4(a); Ky. Rev. Stat. Ann. § 311.732(2)(a)(2)(a); La. Rev. Stat. Ann. § 1061.14(A)(1)(a); Okla. Stat. Ann. tit. 63, § 1-740.2(B); Tenn. Code Ann. § 37-10-303(a)(1).

Consistent with the consensus among other jurisdictions that documentary proof of relationship is unnecessary, the District Court correctly found that the Consent Act "erects additional, burdensome identification requirements that go far beyond what is necessary to prevent a parent or guardian from giving consent," which "alone renders the Act not narrowly tailored." Doc. 301 at 39–40. And as the Alaska Supreme Court reasoned in *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007), parental consent laws are not narrowly tailored because parental notification requirements are a less-restrictive means of achieving the same ends—though they might independently have constitutional deficiencies, and Respondents do not concede that the parental notification act challenged in this case is constitutional.

D. The judicial bypass process cannot remedy the Consent Act's deficiencies.

The State attempts to save the Consent Act by declaring that the judicial bypass provision "guarantees that any minor who *should* obtain an abortion without parental oversight *can* do so." App. Br. at 38. It is incorrect. The record contains evidence of a bypass case that was initially denied, subjecting the minor in question to an even more difficult ordeal. *In re Meghan Rae*, DA 14-0045 (Mont. 2014) (filed under seal). Given the confidential nature of judicial bypass proceedings, there is no evidence that it "is almost never denied to minors who seek it." App. Br. at 5. But even assuming this was true, the evidence is clear that the bypass process itself singles out minors who choose to have an abortion and introduces unnecessary stress, delay, and other potential medical complications.

To begin with, it may take time for a minor to learn that judicial bypass is an option. Doc. 254, Ex. C; Doc. 254, Ex. E 164:25–165:4. There is no system in place to ensure that minors who contact a court receive accurate information about, or assistance with, the bypass process. Doc. 254, Ex. C; Doc. 254, Ex. E 164:25–165:4. Delay is inherent in the bypass process: time is needed to find and meet with an attorney, arrange transportation, prepare a case and attend a hearing–all without drawing parental attention. Doc. 254, Ex. I 104:14–25, 245:20–25; Doc. 254, Ex. J-1 ¶¶ 20–24. This delay can cause not just psychological but also physical harm to minors. *See supra* at SOF at Part III.

Moreover, seeking a judicial bypass risks inflicting emotional harm—or even, as one of the State's experts put it, "emotional violence"—onto minors. Doc. 254, Ex. E 60:9–61:1. The process of preparing for and attending a hearing, in an unfamiliar setting, before a stranger who has the power to determine one's future, all while dealing with the time pressure of a developing pregnancy and the fear of parental discovery, is extremely stressful and upsetting. Doc. 254, Ex. J-1 ¶ 30; Doc. 254, Ex. M 72:13–73:16. It especially risks emotional harm for abused minors, who are under even tighter parental control, both physically and psychologically, and who may find the bypass process traumatic or even dangerous. Doc. 254, Ex. L-1 at 2; Doc. 254, Ex. M-1 ¶¶ 18–22. Some minors will be unable to access judicial bypass at all—for example, because they cannot discuss their abuse without risking further harm; because they are under tight parental control; because their time or transportation is too limited; or simply because they find the process too confusing or frightening. Doc. 254, Ex. J 60:11–61:12, 144:22–146:3.

The State relies on the sealed decision of *In re Meghan Rae*, DA 14-0045 (Mont. 2014), for its argument that the judicial bypass exception renders the Consent Act constitutionally sufficient. But that case did not involve the Consent Act, there was no constitutional challenge involved, and even it acknowledged the flaws in the judicial bypass process. Justice McKinnon's concurrence expressed concern that the trial courts do not have the standards or guidance to evaluate bypass cases adequately, and that the appeal process, which does not allow direct

interaction with the relevant youth, is also flawed. *Id.* ¶¶ 23–25 (McKinnon, J., concurring).

Nor did the District Court "omit[] the tailoring effects of the judicial bypass provision" such that a genuine issue of material fact remains. App. Br. at 42. Rather, the District Court considered that the judicial bypass provision in the Consent Act is "substantively identical" to the one in the Notice Act, analyzed it in light of case law finding that "the inclusion of [a] judicial bypass procedure does not reduce the restrictiveness of the [Parental Consent Act] relative to a parental notification statute," and, after consideration of the facts in this case, reached the same conclusion. Doc. 301 at 12, 43 (citing *Planned Parenthood of Alaska*, 171 P. 3d at 584). The State's disagreement with the District Court's conclusion does not mean that it erred, and it does not dispute that the judicial bypass process will both cause delay for minors resulting in harm and directly cause harm itself. *See supra* at Part II.D.

E. The Consent Act would fail the State's proposed balancing test.

While strict scrutiny is the proper analysis, even under the State's proposed balancing test, the Consent Act would fail because its infringement of minors' rights clearly outweighs the State's interest in protecting them. As the District Court recognized, "the keep/terminate decision cannot be equated with other circumstances where the law routinely regulates a minor's freedom of action . . . Minors can abstain from consuming alcohol or getting a tattoo with little effect on their futures, but the same cannot be said of keeping a pregnancy or having an abortion."

Doc. 301 at 24; *see also Lungren*, 940 P.2d at 816 ("the decision whether to continue or terminate [a] pregnancy . . . (unlike many other choices) *is a decision that cannot be postponed until adulthood*").

There are fatal flaws in both the State's characterization of the Consent Act as protective, *see supra* at Part II.A, and in its proposed incorporation of parental rights, *see supra* at Part II.B. Even under the State's proposed balancing test, the Consent Act could not stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment.

DATED this 1st day of December 2023.

/s/ Tanis M. Holm
Tanis M. Holm
Colton Holm, PLLC
310 Grand Ave.
Billings, MT 59101
Phone: 406-259-9986
tholm@yellowstonelaw.com

Anjali Salvador*
Planned Parenthood
Federation of America
123 William St., 11th Floor
New York, NY 10038
Phone: 212-261-4602
anjali.salvador@ppfa.org

Kyla Eastling*
Planned Parenthood
Federation of America
123 William St., 11th Floor
New York, NY 10038
Phone: 212-261-4602
kyla.eastling@ppfa.org

*Admitted Pro Hac Vice

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this answer brief is printed with a proportionately spaced Time New Roman text typeface of 14 points; it is double-spaced except for footnotes and for quoted and indented material; and its word count is 9,818 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Tanis M. Holm
Tanis M. Holm
Attorney for Plaintiffs
Appellees

CERTIFICATE OF SERVICE

I, Tanis M. Holm, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-01-2023:

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Derek Joseph Oestreicher (Attorney)
974 Guthrie Road
Helena MT 59602
Representing: Montana Family Foundation
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO box 31 Helena MT 59601
Representing: National Center for Youth Law
Service Method: eService

Mikaela Joan Koski (Attorney)
P.O. Box 31
Helena MT 59624
Representing: National Center for Youth Law
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: National Center for Youth Law
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th St N
207 Great Falls MT 59401
Representing: Indigenous Women Rising Service Method: eService

Anjali Salvador (Attorney)
123 William St., Floor 11
New York NY 10038
Representing: Planned Parenthood of Montana, Paul Fredrick Henke, M.D.
Service Method: E-mail Delivery

Kyla Eastling (Attorney)
123 William St., Floor 9
New York NY 10038
Representing: Planned Parenthood of Montana
Service Method: E-mail

Delivery Electronically signed by Jill Lundvall on behalf of Tanis M. Holm
Dated: 12-01-2023

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23–0272

PLANNED PARENTHOOD OF MONTANA, et al.

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Christopher Abbott, Presiding

APPELLANTS' REPLY BRIEF

Austin Knudsen
Montana Attorney General
Brent Mead
Deputy Solicitor General
Michael D. Russell
Michael Noonan
Thane Johnson
Assistant Attorneys General
MONTANA DEPT. OF JUSTICE
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Dale Schowengerdt
LANDMARK LAW PLLC

Phone: 406-444-2026
brent.mead2@mt.gov
michael.russell@mt.gov
michael.noonan@mt.gov
thane.johnson@mt.gov

7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Attorneys for Appellants

Tanis M. Holm
COLTON & HOLM
310 Grand Av.
Billings, MT 59101
Phone: 406-259-9986

tholm@yellowstonelaw.com

Kyla Eastling*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William St., Floor 9
New York, NY 10038
Phone: 212-541-7800
kyla.eastling@ppfa.org
*Admitted Pro Hac Vice

Anjali Salvador*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William St., Floor 11
New York, NY 10038
anjali.salvador@ppfa.org
Phone: 212-261-4602
*Admitted Pro Hac Vice

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The Montana Constitution, Montana law, and this Court's precedent recognize the basic truth that children are different from adults and require protection. Mont. Const. art. II, Section 15; *see also Steilman v. Michael*, 2017 MT 310, ¶ 14, 389 Mont. 512, 407 P.3d 313 ("children are constitutionally different from adults…"); *Planned Parenthood v. State*, 2015 MT 31, ¶ 20, 378 Mont. 151, 342 P.3d 684 ("*PPMT I*") ("It is axiomatic that the younger a minor is, the more protection she may require."); Mont. Code Ann. § 40-1-213 (requiring judicial and parental consent for a minor to exercise fundamental right to marry); Mont. Code Ann. § 41-1-405 (denying minors the ability to consent to sterilization); Mont. Code Ann. § 45-5-501 (minors under 16 cannot consent to sex). This basic truth is not a vestigial prejudice of a bygone era. It is scientific fact. Minors' brains lack the fully formed decision-making capability adults have. (Op.Br.6–7.)

This scientific reality underscores the need for the State to protect minors faced with significant choices. *In re C.H.*, 210 Mont. 184, 203, 683 P.2d 931, 941 (1984) ("the constitutional rights of children cannot be equated with those of adults … [because of] their inability to make critical decisions in an informed, mature manner…."); (Op.Br.6.). The State detailed the real and significant psychological, medical, and safety risks associated with abortion. (Op.Br.7–13.) The Consent Act ("Act") protects minors by ensuring parents know their child is undergoing a procedure that carries serious risks. Mont. Code Ann. § 50-20-501 et seq.; (Op.Br.7– 11, 33.) Given abortion

providers' lack of follow-up care (Op.Br.7–11), parents may be the only ones observing their child for post-procedure complications. The State also showed the tragic reality of sexual violence in Montana. (Op.Br.11–13.) The Act—both through parental involvement and the judicial bypass procedure—helps detect sexual violence to protect Montana girls from repeated exploitation. (Op.Br.12–14.)

This Court must reject Appellees' (hereinafter, "PPMT") illogical retort that because abortion involves a more serious decision than marriage, sexual intercourse, or even sterilization, minors should be more isolated from their caregivers. (PPMT.Br.22.) Rather, it is precisely because abortion is so serious that "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti v. Baird*, 443 U.S. 622, 640–41 (1979) (Powell, J.). The Act protects minors' psychological and physical health, protects them from repeated sexual violence, and protects parents' fundamental right to direct their children's upbringing.

ARGUMENT

I. STRICT SCRUTINY DOES NOT APPLY TO THE ACT.

Montana's Constitution and this Court's precedents treat minors differently from adults. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 941; *Steilman*, ¶ 15 (minors' "lack of maturity and underdeveloped sense of responsibility" set them apart from adults). While

minors possess the same right to privacy as adults, the State may limit or preclude its application to protect minors. (*See* Op.Br.18–31.) This case, therefore, is not about the existence or extent of the right to privacy under Article II, Section 10. It is about whether the Act protects minors. The undisputed facts show that it does.

A. THE MONTANA CONSTITUTION ALLOWS FOR LAWS THAT PRECLUDE EXTENDING FUNDAMENTAL RIGHTS TO MINORS WHEN THE LAW PROTECTS MINORS.

Article II, Section 15 guarantees minors the same rights as adults unless "specifically *precluded* by laws which enhance the protection of such persons." Mont. Const. art. II, § 15 (emphasis added); (Op.Br.19–20). PPMT completely ignores the term "precluded." (PPMT.Br.15–22.) But "precluded" gives meaning to the clause. (Op.Br.19–20.) Properly understood, the last clause limits the application of the first. *In re C.H.*, 210 Mont. at 202, 683 P.2d at 940. "[T]he protection of such persons" refers to the State's ability to enact laws accounting for the "particular vulnerability" of minors and protecting them from their own immaturity and inability to make fully formed decisions. *Id.* at 203, 683 P.2d at 941.

And that is precisely what the Framers intended. Delegate Dahood urged the Convention to "[p]ay close attention to the fact that the last phrase [of the section] reads, 'except where specifically precluded by laws which enhance the protection for such person.'" 5 Conv. Tr. at 1751 (Del. Dahood); 2 Mont. Const. Conv. Proceedings at 635–36 (provision guarantees minors' fundamental rights except "in cases in which rights

are infringed by laws designed and operating to enhance the protection for such persons"). PPMT ignores both the plain text of the Constitution and the Framers' intent. Instead, they would have this Court make it *harder* for the State to justify a law restricting minors' rights than a law restricting adults' rights. (*See* PPMT.Br.21 (arguing the State must (1) satisfy strict scrutiny *and* (2) demonstrate the statute *enhances* the rights of minors).) That strict scrutiny-plus test finds no support in the Constitution's text or the Framers' intent.

Well-settled laws protecting minors demonstrate the absurdity of PPMT's construction. For instance, Montana denies minors under sixteen their privacy right under *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997) to consent to sexual activity. Mont. Code Ann. § 45-5-501. That law does not enhance the rights of minors. It abrogates them. Article II, Section 15 does not require the result proffered by PPMT, and the delegates did not intend that result. (Op.Br.19–26.) Instead, it grants minors the same rights as adults *unless* a law specifically precludes application of those rights for the minors' protection. That is the case here.

B. Montana Law Routinely Limits Minors' Fundamental Privacy Rights To Protect Them.

The State highlighted several instances of long-standing laws that protect minors by limiting their fundamental rights. (Op.Br.23.) PPMT evades any serious consideration of the issue. (PPMT.Br.22.) But PPMT's and the District Court's constitutional logic

would invalidate these important civil and criminal statutes that protect minors from exploitation.

Montana's limitations on the right of minors to marry illustrates the point. Like the right to abortion, the right to marry sounds in a fundamental right to personal autonomy. *See Wash. v. Glucksberg*, 521 U.S. 702, 726 (1997) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992)). This Court likewise grounded the right to a pre-viability abortion in the personal autonomy component of the right to privacy—the same constitutional source of the right to marry. *Armstrong v. State*, 1999 MT 261, ¶ 45, 296 Mont. 361, 989 P.2d 364. In other words, the personal autonomy right adopted by *Armstrong* covers "intimate and personal choices" like marriage *and* abortion. *Armstrong*, ¶ 37 (quoting *Casey*, 505 U.S. at 851).

Montana law subjects a minor's right to marry to both parental and judicial consent. Mont. Code Ann. § 40-1-213. The statute categorically bars minors under 16 from marrying and allows 16- and 17-year-olds to marry only if they complete marriage counseling and receive judicial and parental consent. Mont. Code Ann. §§ 40-1-203, -213(1)–(2). The State thus limits minors' fundamental right to marry by categorically barring some minors from exercising that "intimate and personal choice" (*Armstrong*, ¶ 45) and allowing others to exercise that choice only with parental and judicial consent and the guidance of a marriage counselor. §§ 40-1-203, -213. These guardrails ensure that a minor's "personal and intimate choice" is in their best interest. *Armstrong*, ¶ 45. This statutory scheme plainly does not enhance minors' right to

marry—so, under PPMT's misreading of Article II, Section 15, this scheme would be unconstitutional. That is not what the Framers intended.

Like the right to marry, the right to abortion may be lawfully curtailed, and that is what the Act does. It protects minors who don't have the capacity to make life-altering decisions, ensures parents can protect their children from exploitation and abuse, and ensures the "personal and intimate" choice to obtain an abortion is in their best interest. Like the marriage statutory scheme, the Act is constitutional.

C. THE ACT PROTECTS PARENTS' FUNDAMENTAL RIGHT TO DIRECT THEIR CHILD'S CARE AND UPBRINGING.

PPMT's misreading of the constitutional text also would eradicate parents' fundamental liberty interests. It is "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest protected by Article II, section 17 of the Montana Constitution." *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59. The Fourteenth Amendment of the United States Constitution protects the same interest. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). The delegates did not intend to erase this fundamental interest by adopting Article II, Section 15. (*See* Op.Br.27–28.) Indeed, "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Bellotti*, 443 U.S. at 640–41 (Powell, J.).

PPMT incorrectly uses negative legislative history to contradict the meaning of the United States and Montana Constitutions. *See Gryczan*, 283 Mont. at 451, 942 P.2d at 123 (rejecting use of negative legislative history to demonstrate delegates' intent); (PPMT.Br.21–22; *but see* Op.Br.26–29). The delegates clearly intended that Article II, Section 15 would not "affect[] in any way the relationship of parent and child or of guardian and ward with respect to someone under the age of majority." 5 Conv. Tr. at 1751 (Del. Dahood); *see also id.* at 1750 (Del. Monroe) (explaining that the provision would "enhance the proper parent-child relationships in Montana families and help strengthen the family unit."). The delegates uniformly expressed Article II, Section 15's intent to preserve the rights of parents.

Many laws affecting a minor's privacy rights recognize the important role parents play in guiding children in making life-altering choices. Parents must consent to their minor's marriage. § 40-1-213. Children cannot waive their right to privacy and consent to a search of their home without parental consent. *See State v. Schwarz*, 2006 MT 120, ¶ 14, 332 Mont. 243, 136 P.3d 989. Parents must, generally, consent to medical care for their child. Mont. Code Ann. § 41-1-402.

Moreover, the Anglo-American tradition affirms the "primary role of the parents in the upbringing of their children[.]" *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Snyder v. Spaulding*, 2010 MT 151, ¶ 19, 357 Mont. 34, 235 P.3d 578 (parents have a "fundamental constitutional right to make decisions concerning the care, custody, and control of [their]

child"). When it comes to abortion, however, the District Court and PPMT view this sacred relationship to be nothing but a "conflict of interest." (Doc. 301 at 22.) That unsupported view undercuts centuries of foundational natural law tenets and violates the text and intent of the Montana Constitution.

The District Court's dismissal of parental rights as a mere "conflict of interest" threatens to place Article II, Section 15 at odds with the Fourteenth Amendment of the United States Constitution. *See Troxel*, 530 U.S. at 65. The Court must correct this. (Op.Br.28–29.)[1]

II. THE ACT SATISFIES THE CORRECT CONSTITUTIONAL TEST.

The State explained the Act serves compelling interests and protects minors seeking an abortion. (Op.Br.6–13, 31–37.) The identity proof requirements further these objectives. As PPMT argued below, without such requirements, individuals can falsely pose as parents. (Op.Br.33–34, 40–41; Doc. 253 at 28).) And the Act narrowly targets a specific flaw in

---

[1] The District Court and PPMT presume—contrary to the record—that pregnant minors reside in abusive or unsupportive households. (Doc. 301 at 43–44; PPMT.Br.7, 33–34; *but see* Doc. 146 ¶¶ 46–47 (PPMT's expert Pinto could not recall, even anecdotally, a single instance where a pregnant minor telling her parents her intention to obtain an abortion led to abuse. And Pinto relied on a single study that (thankfully) less than .5% of pregnant minors reside in a household with familial abuse.).) This false presumption preemptively denies parents their fundamental rights. For those rare cases when abuse exists, the Act's judicial bypass provision protects minors. (Op.Br.37–39.)

the Notice Act—a flaw acknowledged by PPMT. The Act is narrowly tailored to remedy that flaw. (Op.Br.40–41.)

PPMT's argument that other states fail to impose a parental identity requirement makes little sense considering its arguments below. (PPMT.Br.35 (collecting statutes).) And in any event, the Act's identification requirements respond to deficiencies in other states' laws. (Op.Br.41; App.566–569.) PPMT fails to assert any undisputed facts that Montana's proof of identity regime poses an unconstitutional burden. (PPMT.Br.34–36 (instead arguing that parental notification laws are less restrictive than consent laws).) Moreover, most other states impose a similar notary or informed written consent requirement. (PPMT.Br.35 (collecting statutes).)[2] The District Court, therefore, erred by finding Montana's notary requirement impermissible. (Doc. 301 at 40.) At bottom, the Act's requirements present a minimal hurdle given the important issues at stake. (Doc. 146 at ¶ 90.)[3]

A. THE ACT PROTECTS MINORS FROM THEIR IMMATURE DECISION-MAKING ABILITY.

As explained, the Montana Constitution recognizes that minors suffer from immaturity and a lack of fully

---

[2] Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, and Wisconsin all require notarized or written parental consent.

[3] Indeed, PPMT acknowledged these documents could be obtained at a minimal cost and in less than a day.

formed decision-making capacity. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941. So, Article II, Section 15 allows the State to enact laws that protect minors. (Op.Br.35–36.) The State and PPMT seem to agree that abortion is a uniquely important choice. (Op.Br.7–11; PPMT.Br.12–13.) But that justifies *more* protection for minors making the choice, not less. *L. v. Matheson*, 450 U.S. 398, 422 (1981) (Stevens, J., concurring) ("[t]he abortion decision is, of course, more important than" other decisions in which the law restricts minors' choices).

PPMT's insistence that the State cannot protect minors from their own immaturity (PPMT.Br.32–34) is wrong as a matter of law and fact. *In re C.H.*, 210 Mont. at 203, 683 P.2d at 941; (Op.Br.6–7 (citing *undisputed* facts that adolescents lack fully informed decision-making).) The profoundness of the abortion decision supports the Act's parental involvement. (Op.Br.35–36.) Supporting and developing a minor's informed decision-making serves a constitutionally permissible end. *Bellotti*, 443 U.S. at 640–41 (Powell, J.).

B. THE ACT PROTECTS MINORS FROM RECOGNIZED RISKS AND SEXUAL EXPLOITATION.

The Act serves valid interests in protecting minors and promoting parents' fundamental rights to the custody, care, and supervision of their children. (Doc. 301 at 33, 37, 39, 43.) The State backed each of these interests with substantial and undisputed evidence. (Op.Br.7–15; 31–37.) In response, PPMT injects disputed facts about the relative safety of abortion compared to childbirth (PPMT.Br.26–27), ignoring

the *undisputed* facts that abortion carries psychological and medical risks. (Op.Br.7–11,34–35; *see also* PPMT.Br.6 (citing State's expert on risks associated with abortion).) The State constitutionally protects minors from these risks by involving parents to improve informed decision-making and ensure someone observes the minor post-procedure. That benefits both minor patients and abortion providers. (Op.Br.7–11, 33–35 (parental involvement helps provide accurate medical history and ensures post-operation safety because PPMT does not provide that care).)

PPMT also ignores that abusive partners use abortion as a tool to exploit minors. (Op.Br.11–15, 32–34; PPMT.Br.29–32.) PPMT and the District Court ignored the State's interest in preventing *repeated* abuse. (PPMT.Br.31 (quoting Doc. 301 at 35).) That sexual abuse occurred once does not remove the State's interest in enacting measures aimed at detecting and preventing repeated sexual violence. (*E.g.* Op.Br.14–15 (citing cases when abortion providers' failure to report cases of likely abuse led to repeated incidences of sexual violence against minors).) Unfortunately, statistics show most adolescent pregnancies result from statutory rape. (Op.Br.11–15.) Improving parental involvement increases the likelihood that these cases will emerge and repeat offenses will decrease.[4]

---

[4] Judicial bypass waivers also increase the likelihood sexual abuse comes to light. (*See* Op.Br.13–14; *infra* at II.C.) *In re Meghan Rae* shows that judicial officers can and do take their responsibility to the community seriously.

C. JUDICIAL BYPASS ADDRESSES CASES WHERE PARENTAL INVOLVEMENT IS INAPPROPRIATE.

PPMT argues repeatedly that the Act will expose minors to parental abuse. (PPMT.Br.7–9, 28–30, 38.) But the Act's judicial bypass provision guarantees that minors can obtain an abortion without parental consent when necessary. (Op.Br.37– 39); Mont. Code Ann. §§ 50-20-503(3); -507; -509. "A minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired abortion would be in her best interests.'" *In re Meghan Rae*, Cause No. DA 14–005, ¶ 10 (quoting *Belotti,* 443 U.S. at 643–44). The Act's judicial bypass provision meets every jurisprudential requirement. *See id.* at ¶¶ 12–13

PPMT's response muddies the facts. (PPMT.Br.36–38.)[5] First, PPMT acknowledges that it helps minors use judicial bypass in appropriate cases by connecting them to attorneys. (Doc. 146 ¶ 85; *contra* PPMT.Br.37.) Second, PPMT ignores that Montana's bypass provisions remove alleged procedural burdens because minors need not attend the hearings. (Op.Br.5; *contra* PPMT.Br.37–38.) Third, PPMT relies on disputed facts to establish that the waiver process imposes a burden. (PPMT.Br.8–9; 37–38; *infra* at IV.C.) Fourth, this Court already distinguished the

[5] PPMT eventually distills its arguments against the judicial bypass procedure to the point that because the Notice Act exists, the Act's bypass provision does not matter for tailoring. (PPMT.Br.38–39.) That fallacy ignores the loophole the Act is designed to close. (Op.Br.33–34.)

case used by the District Court and PPMT on the appropriate evidentiary burden to be used. *PPMT I*, ¶ 22; *see also Alaska v. Planned Parenthood*, 171 P.3d 577, n.42 (Alaska 2007) (invalidating a parental involvement law that applied the higher "clear and convincing evidence" burden of proof). By ensuring minors can access abortion without parental consent in those rare cases when parental involvement is inappropriate, the Act's judicial bypass provision sufficiently protects minors' abortion rights. The District Court was wrong to find otherwise. This Court should reverse.

III. PPMT'S EQUAL PROTECTION ARGUMENT FAILS.

The District Court declined to consider PPMT's equal protection challenge to the Act while reserving consideration of the same legal claim against the Notice Act. (Doc. 301 at 48–49; PPMT.Br.22–24.) The District Court identified factual disputes about whether minors carrying pregnancies to term are similarly situated to minors seeking abortions. (Doc. 301 at 45.) PPMT now raises those same disputed facts on appeal in support of an equal protection argument the District Court did not analyze. (PPMT.Br.3–5; 22–24.)[6]

PPMT's citations to unpublished cases do not overcome the District Court's determination that factual issues remain. (PPMT.Br.24 (citing *Wicklund*

---

[6] The State disputed each fact in question. (*Compare* PPMT.Br.3–6 to Doc. 146 ¶¶ 2–3, 5–6, 8–11, 14–15, 17–18, 24, 26–33, 35–36, 38–40, 56, 63–64, 67–69) (disputing PPMT's claims related to the relative safety of abortion).)

v. State, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Mont. Feb. 11, 1999); *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (1st Jud. Dist. Mont. May 19, 1995)). First, *Wicklund* concluded—without analysis—the proposed classes were similarly situated. 1999 Mont. Dist. LEXIS 1116, at *5. Second, *Ellery* expressly limited its analysis to taxpayer-funded, medically necessary benefits. 1994 Mont. Dist. LEXIS 795, at * 4 ("Not at issue are nontherapeutic elective abortions."). Neither case analyzed the identified factual disputes here. (Doc. 301 at 45.)

PPMT also incorrectly states that Article II, Section 4 provides an independent basis to subject the law to strict scrutiny. (PPMT.Br.22.) Strict scrutiny applies only if the law infringes on a fundamental right or implicates a suspect class. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. Because the Act protects minors, the right to privacy does not attach under Article II, Section 15. *See supra* I.A and I.B; (Op.Br.18–26.) Without a fundamental right at issue, Article II, Section 4, cannot independently subject the Act to strict scrutiny. *Snetsinger*, ¶ 17. Moreover, PPMT did not argue below that pregnant minors constitute a suspect class (Doc. 253 at 15), and this Court does "not consider arguments that were not presented to the district court but raised for the first time on appeal." *Estate of Mandich v. French*, 2022 MT 88, ¶ 30, 408 Mont. 296, 509 P.3d 6.

IV. AT A MINIMUM, THIS COURT SHOULD REMAND BECAUSE MATERIAL FACTS ARE DISPUTED.

Many material allegations relied on by PPMT on appeal are disputed below. The State submitted undisputed evidence that abortion poses serious psychological, medical, and safety risks for minors. [7] (Op.Br.7–13.) The State, for example, showed the stark psychological harm to minors who obtain abortions. (Op.Br.7–9 (minors who obtain abortions are more likely to suffer from depression, anxiety, and suicide).) The State also identified the physical risks inherent in surgical abortions: perforated internal organs, excessive bleeding, hemorrhage, and post-surgery complications that may cause severe long-term damage. (Op.Br.9–11.) And the State showed the tragic, but real, fact that statutory rape is the leading cause of adolescent pregnancy, and abortion can be a powerful tool for abusive men to conceal and continue sexual exploitation. (Op.Br.11–13.) PPMT responded almost exclusively with disputed facts (PPMT.Br.2–12) on which the District Court reserved resolution pending trial on the Notice Act. (Doc. 301 at 45–46.)

A. THE STATE HAS REQUESTED EXCLUSION OF SOME DISPUTED FACTS.

The State has two relevant pending motions to exclude the opinions of PPMT's non-experts. (Doc. 150; Doc. 152.) First, the State moved to exclude Rebecca Howell. (Doc. 150.) Howell lacks any training or academic qualifications in the areas to which she testified. She espouses views on judicial bypass without any qualifying experience—in fact, she has never seen a judicial bypass hearing. (*Id.* at 4.)

---

[7] Dr. Anderson testified the medical risks associated with abortion increase week by week. (PPMT.Br.6 (citing Doc. 254, Ex. D 166:19–21); Doc. 146 at ¶ 16.)

Howell's complete lack of scientific, technical, or other specialized knowledge disqualifies her as an expert. (Doc. 150.) PPMT, however, continues to rely on her unsupported opinions and statements. (PPMT.Br.6–9 (citing Doc. 254 Ex. I-1 at 1– 2, 4–5; Ex. I 31:2–9, 33:6–20, 239:18–240:7, 244:20–245:17, 247:23–249:24, 250:6–9).)[8] Howell is not a trained child psychologist, nor does she have any training on the competency or cognitive ability of minors. (Doc. 150 at 3.)

The State also moved to exclude Ashley Novakovich because she possesses no relevant experience related to adolescents in crisis, families dealing with teen pregnancy issues, or Montana's judicial system. (Doc. 152.) Her opinions are inherently unreliable, and her research consists of a single article procured by a Google search. (Doc. 152 at 3.) This Court should disregard her unfounded opinions. (*See* PPMT.Br.7 (citing Doc. 254 Ex. L-1 at 4; Doc. 146 ¶¶ 46, 56, 63, 71) (disputing same); *see also generally* Doc. 152).)

B. THE STATE DISPUTES PPMT'S CLAIMS ABOUT ITS OWN BUSINESS PRACTICES.

The State accurately described PPMT's patient intake process, patient consultations, and mandatory reporting practices. (Op.Br.7–11, 13–15; *see also* Doc. 132 ¶¶ 21–35 (detailing PPMT's patient intake, informed consent, pre-operation, and post-operation procedures); Doc. 132 ¶¶ 46–48 (detailing case when PPMT failed to appropriately report child sex abuse); Doc. 132 ¶ 50 (detailing PPMT's mandatory reporter practices); Doc. 132 ¶ 93 (PPMT's witness testified she

[8] The State disputes there opinions as conjecture, anecdotal, or misstatements of the law. (Doc. 146 ¶¶ 20, 82–85, 90, 93, 95.)

has failed to report abuse even though required to do so by Texas statute).) By the time a minor sees one of PPMT's two doctors, she has already signed the consent forms. (Doc. 132 ¶ 30.) And, unbeknownst to the minor, that doctor has a contractual requirement to perform four abortions per hour, which limits any meaningful patient-physician consultation. (Doc. 132 ¶ 30.) PPMT's response relies on Howell's unreliable, disputed testimony. (PPMT.Br.10–11; *supra* at IV.A; Doc. 146 ¶¶ 58– 60.) The State disputes PPMT effectively provides for informed consent, either as a matter of informing patients or training its staff. (Doc. 132 ¶ 29; Doc. 146 ¶ 58.)

It's also important to note what PPMT does not dispute: that it pressures minors by warning them that delaying an abortion may require them to go out-of-state for services. (Doc. 146 ¶ 58.) PPMT relies on the minor's (often incomplete) self-reported medical history. (Doc. 132 ¶¶ 25–27, 30.) And PPMT does not require or perform follow-up evaluations of minors. (Op.Br.10.)

Finally, PPMT's recitation of disputed facts doubles down on the same theory of their mandatory reporting obligations that the District Court rejected. (PPMT.Br.11 n. 4; Doc. 301 at 38 n. 8.) PPMT also asserts the police never contacted the minor in question or her lawyer. (PPMT.Br.11 n. 6.) This assertion conveniently ignores that PPMT represented that the minor's lawyer would facilitate an interview with the police, but that lawyer failed to do so. (Doc. 169 Ex. 4 37:12–21.) These disputed facts mandate remand.

C. OTHER MATERIAL FACT DISPUTES FAVOR REMAND.

Moreover, PPMT continues to misrepresent the effects of judicial bypass on minors. (PPMT.Br.8–9 (citing Doc. 254 M-1 ¶¶ 18–20).) PPMT's expert Suzanne Pinto acknowledged that minors may obtain a judicial waiver without personally testifying to abuse they suffered. (Doc. 146 ¶ 78.) The very point of judicial bypass is to allow minors in abusive situations to obtain an abortion if a judge determines it's in their best interest.

The State likewise disputes the opinions of PPMT's rebuttal expert Rita Lucido. (*Compare* PPMT.Br.7, 9 (citing Doc. 254 Ex. J-1 ¶¶ 13, 15–16, 20–24) *with* Doc. 146 ¶¶ 48, 51–53, 82–83, 85, 98 (disputing same).) PPMT never explains why if "school, work, or caretaker commitments" do not hinder obtaining an abortion, they nevertheless impose a burden on getting a *judicial waiver* to obtain that abortion. (*E.g.* Doc. 146 ¶¶ 84–85 (disputing that these commitments are anything but a common unavoidable part of accessing courts or medical services).)

Additionally, the State disputes the opinions of Pinto regarding parental involvement. (*Compare* PPMT.Br.6–10 (citing Doc. 254 Ex. M-1 ¶¶ 9–12, 13, 15– 17, 18–20; Ex. M 21:21–24, 71:25–73:16) *with* Doc. 146 ¶¶ 38, 46–47, 49–50, 52, 54, 56, 71, 74, 76, 78, 82, 98–99 (disputing same).) PPMT misleadingly states that minors "fear, with reason" parental involvement including potential abuse. (PPMT.Br.7 (citing Doc. 254 Ex. M-1 ¶¶ 9–12).) Yet Pinto testified that in her 30-year career she could only recall four or five such instances of parental abuse. (Doc. 146 ¶ 46.) Rather,

she testified the most likely source of abuse would be the minor girl's *boyfriend*. (Doc. 158 Ex. 17 20:1–19.) This bolsters the State's point that the Act *protects* minors by alerting parents that their child is in an abusive situation. (Op.Br.11–12, 32–34.)

Finally, PPMT's remaining allegations are either disputed or contradicted by the record. (*Compare* PPMT.Br.6–9 (citing Doc. 254 Ex. D 97:25–98:7, 166:19–21; Ex. E 60:9–61:1; Ex. F-1 ¶¶ 5–19, 28, 38; Ex. F-2 ¶¶ 27, 47; Ex. G-1 ¶ 40; Ex. K 96:24–97:14) *with* Doc. 146 ¶¶ 2, 12, 16, 45, 74, 96, 99 (disputing same).) Many of PPMT's disputed allegations do not stand up even to cursory review. (*E.g.* Doc. 254 Ex. G-1 ¶ 40 (claiming minors will engage in self-induced abortions because of parental involvement laws); *but see* Doc. 146 ¶ 99 (PPMT's witness speculated about this allegation and could not recall the sources she relied on to make the statements in her expert report).) Therefore, this Court should remand for trial to resolve these material factual disputes.

CONCLUSION

For all these reasons, this Court should reverse the District Court with instructions to enter summary judgment for the State, or, alternatively, remand for trial.

DATED this 16th day of January, 2024.

Austin Knudsen
MONTANA ATTORNEY
GENERAL

/s/ Brent Mead
Brent Mead
Deputy Solicitor General
Michael D. Russell
Thane Johnson
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT
OF JUSTICE
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601

ATTORNEYS FOR
APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,685 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ *Brent Mead*
Brent Mead

CERTIFICATE OF SERVICE

I, Brent A. Mead, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-16-2024:

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Tanis M. Holm (Attorney)
310 Grand Ave.
Billings MT 59101
Representing: Planned Parenthood of Montana, Paul Fredrick Henke, M.D.
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: State of Montana, Austin Miles Knudsen
Service Method: eService

Derek Joseph Oestreicher (Attorney)
974 Guthrie Road
Helena MT 59602
Representing: Montana Family Foundation
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO box 31
Helena MT 59601
Representing: National Center for Youth Law
Service Method: eService

Mikaela Joan Koski (Attorney)
P.O. Box 31
Helena MT 59624
Representing: National Center for Youth Law
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: National Center for Youth Law
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th St N
207
Great Falls MT 59401

Representing: Indigenous Women Rising
Service Method: eService

Katherine S. Huso (Attorney)
2812 First Avenue North
Suite 225
Billings MT 59103
Representing: American College of Obstetricians and Gynecologists, American Medical Association, Montana Medical Association, Society for Maternal-Fetal Medicine, Society of Family Planning
Service Method: eService

Nina Monfredo (Interested Observer)
818 Connecticut Ave NW, Ste 425
Washington DC 20006
Service Method: E-mail Delivery

Rebecca Gudeman (Interested Observer)
1212 Broadway, Suite 600
Oakland CA 94612
Service Method: E-mail Delivery

Anjali Salvador (Attorney)
123 William St., Floor 11
New York NY 10038
Representing: Planned Parenthood of Montana, Paul Fredrick Henke, M.D.
Service Method: E-mail Delivery

Kyla Eastling (Attorney)
123 William St., Floor 9
New York NY 10038
Representing: Planned Parenthood of Montana
Service Method: E-mail Delivery

Jessica S Goldberg (Attorney)
1714 Franklin Street #100-393
Oakland CA 94612-3409
Representing: Planned Parenthood of Montana, Paul Fredrick Henke, M.D.
Service Method: E-mail Delivery

Electronically signed by Deborah Bungay on behalf of Brent A. Mead
Dated: 01-16-2024

APPENDIX D

Tanis M. Holm
Crist, Krogh & Nord, PLLC
2708 First Avenue North, Suite 300
Billings, Montana 59101
Phone: (406) 255-0400
tholm@cristlaw.com

Alice Clapman
Richard Muniz
Planned Parenthood Federation of America
1110 Vermont Ave, NW, Suite 300
Washington, DC 20005
Phone: (202) 973-4800
alice.clapman@ppfa.org
richard.muniz@ppfa.org

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, vs.	)	Cause No. BDV-2013-407 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

STATE OF MONTANA and TIM FOX, ATTORNEY GENERAL OF MONTANA, in his official capacity, and his agents and successors,	)
Defendants.	)

I. PRELIMINARY STATEMENT

Montana, like most states, allows minors to self-consent to reproductive health care, such as contraception, testing and treatment for sexually transmitted infections, or prenatal and obstetric care. *See* Mont. Code Ann. § 41-1-402(2)(c). These laws reflect an overwhelming, evidence-based medical consensus, supported by major medical organizations such as the American Medical Association ("AMA") and American Academy of Pediatrics ("AAP"): while providers should generally *encourage* minors to involve their parents in all of their health care (as Plaintiffs do), *requiring* parental involvement in certain types of sensitive health care would endanger many minors by deterring them from seeking care.

Yet, contrary to this medical consensus, Defendants have repeatedly attempted to single out pregnant minors who seek an abortion and restrict their access to care. In 1995, Defendants tried to require minors seeking an abortion to notify a parent, and this Court enjoined the requirement. *See Wicklund v. State*,

Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999) (enjoining Mont. Code Ann. §§ 50-20-201 through 50-20-215 (1995)) (attached as Ex. B to Pls.' Memo. in Supp. of Their Mot. for TRO and/or Prelim. Inj. ("Pls.' PI Br.")). This case involves two more recent attempts to impose even stricter requirements than those invalidated in *Wicklund*, based verbatim on the same four state interests asserted and rejected in that case. The Parental Notice of Abortion Act of 2011 forces minors under 16 to notify a parent (or persuade a judge to allow her to avoid doing so) as a condition of receiving medical care. *See* Mont. Code Ann. §§ 50-20-221 through 50-20-235 (2011) ("Notice Act") (attached to Pls' Statement of Undisputed Facts as Ex. A). The currently enjoined Parental Consent for Abortion Act of 2013 would go much further, requiring a minor to carry her pregnancy to term unless a parent or judge affirmatively *permits* her to have an abortion. *See* Mont. Code Ann. §§ 50-20-501 through 50-20-511 (2015) ("Consent Act") (attached Pls' Statement of Undisputed Facts as Ex. B) (collectively, the "Acts").

Based on indisputable facts and well-established law, both Acts violate these young women's core, fundamental rights guaranteed by the Montana Constitution. *Armstrong v. State*, 1999 MT 261, ¶ 2, 296 Mont. 361, 989 P.2d 364; *see also Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *6; *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705, at 6 (D. Mont. 1995). That is because while most minors facing an unintended pregnancy (especially younger minors) voluntarily involve their parents in their decision-making and medical care, some minors feel they cannot do so—because they are in an abusive family

situation, or because they have other reasons for believing that telling a parent about their situation and intentions could cause estrangement, severe conflict, and/or other harm within the family. Rather than protecting these minors, the Acts single out the ones who decide to have an abortion, obstruct their access to medical care, and force them into potentially harmful confrontations. In doing so, the Acts violate these minors' fundamental right to make their own decisions, free from government interference, about whether and when to become parents.

II. STANDARD FOR GRANTING THE MOTION

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); *Peterson v. Eichhorn*, 2008 MT 250, ¶ 12, 344 Mont. 540, 189 P.3d 615. While the moving party bears the burden of establishing the absence of genuine issues of material fact, the opposing party must come forward with "material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact" in order to defeat the motion. *Motarie v. N. Mont. Joint Refuse Disposal Dist.*, 274 Mont. 239, 242, 907 P.2d 154, 156 (1995); *see also Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indem. Co.*, 2006 MT 133, ¶ 27, 332 Mont. 352, 137 P.3d 522 ("[S]peculative statements by an expert are insufficient to raise a material issue of fact to defeat summary judgment." (citing *Ike v. Jefferson Nat'l Life Ins. Co.*, 267 Mont. 396, 402, 884 P.2d 471, 475 (1994)).

This case can appropriately be decided on summary judgment. The Montana Constitution recognizes each individual's right to equal protection of the laws, and her fundamental right to reproductive freedom, including the right to terminate her pregnancy. Equally, Montana expressly guarantees to minors all fundamental rights guaranteed to adults, except when a distinction serves to *enhance* the protection of minors. Because the Acts restrict a fundamental right, the burden falls on Defendants to provide clear and convincing evidence that they, and the distinctions they create, are narrowly tailored to a compelling state interest. Through months of discovery, Defendants and their witnesses have neither disclosed nor uncovered any material facts that will enable them to meet that burden. In contrast, Plaintiffs' witnesses presented extensive evidence of the facts material to this case, all of which was supported by direct, personal experience and/or peer-reviewed studies.[1] Specifically, Plaintiffs have established that minors seeking an abortion do not need special protections, as compared to other pregnant minors, and that at any rate the challenged restrictions, rather than protect minors seeking an abortion, in fact will harm them.

III. MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Along with their motion, Plaintiffs have filed a statement of facts, which demonstrates that there are no genuine issues of material fact. *See* Pls.' Statement of Undisputed Facts ("Facts"). For the Court's

[1] Plaintiffs disclosed seven expert witnesses and four potential fact witnesses, all of whom Defendants have deposed.

convenience, Plaintiffs summarize those facts here, as well as the relevant requirements of the challenged Acts.

A. The Challenged Acts

Prior to 2013, a pregnant woman in Montana—regardless of her age—could obtain an abortion without parental notice or consent. In 2012, the legislature proposed and voters approved the Notice Act, which took effect in 2013 and requires a minor under the age of 16 who chooses to have an abortion to *notify* a parent of her decision or seek a waiver from a youth court. *See* Mont. Code Ann. §§ 50-20-221 to 50-20-235. In 2013, the legislature heightened this restriction by requiring that all young women *under 18 years of age* obtain the *notarized written consent* of a parent, along with official proof of parentage, before they may have an abortion. *See* Mont. Code Ann. §§ 50-20-501 to 50-20-511. If a minor cannot seek the consent of a parent or if her parents deny consent, she may only have an abortion if she obtains a court order. *See id.* § 50-20-509.

The legislative purposes and findings of the 1995 Act enjoined in *Wicklund*, the Notice Act, and the Consent Act are substantively identical.[2] These stated purposes are: "(a) protecting minors against their own immaturity; (b) fostering family unity and preserving the family as a viable social unit; (c) protecting the constitutional rights of parents to rear children who are members of their household; and (d) reducing

---

[2] The sole difference is that Notice Act and the Consent Act both contain a single additional word—"often"—in the statement of findings that was not in the 1995 Act.

teenage pregnancy and unnecessary abortion." Mont. Code Ann. § 50-20-202(f) (1995 Act); *id.* § 50-20-222(f) (Notice Act); *id.* § 50-20-502(f) (Consent Act). The Notice Act and the Consent Act both impose strict criminal liability, including possible imprisonment, on a person who performs an abortion without complying with their requirements, regardless of the person's state of mind. Mont. Code Ann. §§ 50-20-235(1), -510(1). In addition, violation of either Act may provide a basis for civil liability and/or be evidence of "violation of a professional obligation." *Id.* §§ 50-20-235(2), -510(2).[3]

By contrast, all minors in Montana are statutorily empowered to consent to the provision of surgical and other health services—without parental consent or a court order—in a variety of situations, including for the "prevention, diagnosis, and treatment" of pregnancy. *See* Mont. Code Ann. § 41-1-402(2)(c). *See generally id.* § 41-1-401 *et seq*. They can relinquish their children for adoption without having to notify a parent. Mont. Code Ann. § 42-2-405. In addition, minors who become parents can obtain any medical treatment, including surgical procedures, for their child without notifying a parent. Mont. Code Ann. § 41-1-402(3). Nor are there any legal requirements for minors to involve their parents in the care and rearing of their children.

B. Relative Safety of Abortion and Childbirth

---

[3] Under Montana law, both Plaintiffs Dr. Henke and Planned Parenthood of Montana ("PPMT") could be subject to liability. *See* Mont. Code Ann. §§ 45-2-101, -311.

A woman who is pregnant has only two choices: continuing the pregnancy and giving birth or having an abortion. It is beyond dispute that abortion is an extremely safe medical procedure, requiring little follow-up from the patient and carrying no greater risk of medical complications than pregnancy and childbirth. (In fact, it carries far *lower* risks.) Facts ¶¶ 1–16, 40.[4] Similarly, experts on both side of this case agree that there is no evidence that abortion poses an increased risk of mental health problems, as compared with adolescents who carry an unwanted pregnancy to term. *Id.* ¶ 17.

Not only does carrying a pregnancy to term and giving birth carry risks that are at least equal to (and in fact greater than) those carried by abortion, but—as Defendants' own experts concede—carrying to term requires substantial decision-making, communication, and personal responsibility. Specifically, to effectively manage the medical risks associated with carrying a pregnancy to term and giving birth, a minor patient should: obtain early, continuous and high-quality prenatal care, including ongoing screening for complications; give her provider a complete medical history; follow her provider's medical advice; report any symptoms to her provider; and make any necessary lifestyle adjustments, such

[4] Defendants' proposed expert on abortion safety, Dr. George Mulcaire-Jones, refused to concede these indisputable facts. However, Dr. Mulcaire-Jones not only lacks epidemiology and research expertise, but also did not cite a single credible source that supports his views. As set forth below in Section IV.A.2.a, court after court, including the U.S. Supreme Court this year in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016), has confirmed that abortion is extremely safe, and in fact is far safer than carrying a pregnancy to term and childbirth.

as eliminating use of drugs and alcohol. *Id.* ¶¶ 26–27. The minor must give informed consent for prenatal care, which may include making decisions about whether to undergo procedures (such as a surgical completion of miscarriage, induction or a cesarean section) that carry risks and require balancing her own health interests with the interests of the fetus. *Id.* ¶¶ 29–30. After delivery, she needs postpartum care (which includes monitoring for postpartum depression and other frequent complications). *Id.* ¶ 31.

As Defendants' experts also acknowledge and as Montana courts have recognized, teen parenthood carries other adverse consequences as well. *See Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *21 ("Adolescent mothers are particularly vulnerable to severe and adverse social and economic consequences of bearing and raising children" and "[c]hildren of adolescents are more likely to be born prematurely and to be of low birth weight, increasing their risk of health problems."); *Planned Parenthood of Mont. v. State*, Cause No. DDV-2010-787, slip op. at 16–17 (1st Jud. Dist. May 4, 2016) (attached as Ex. F to Pls.' PI Br.) ("The undisputed facts are that socioeconomic burdens, as well as serious health risks, attend to adolescent pregnancy for both the mother and the infant."); *see also* Facts ¶¶ 12–13. These consequences provide an additional reason why adolescents carrying to term are equally if not more in need of parental support, as compared to adolescents who terminate an unwanted pregnancy.

For all these reasons, it is beyond dispute that all pregnant minors benefit from supportive parental

involvement, if available—regardless of whether they terminate their pregnancy or carry to term. Facts ¶¶ 22–25, 28, 31.

C. Impact of the Notice Act and Consent Act on Minors

As Defendants' experts concede, the Acts will delay some minors and deter them from seeking care or drive them to travel out of state; this delay will expose minors to medical risk; some minors will be prevented altogether from having an abortion; and, for some of those minors who resort to the bypass process, that process itself will be difficult and even traumatic. Facts ¶¶ 74, 88, 96. In addition, Plaintiffs have presented undisputed evidence—including evidence from peer-reviewed studies relied on by Defendants' own experts—that the Acts will also subject minors to other harms, such as unnecessary stress and expenses related to delay, reduced medical options, and in some cases, physical or emotional abuse, or forced pregnancy and childbirth. Facts ¶¶ 64–72, 75–87, 89–95, 97–99.

PPMT and its staff always encourage minors to involve their parents in their decision whether to have an abortion and in their medical care, and most minors choose to do so. Facts ¶¶ 33–34. According to undisputed evidence, the younger the minor or the less firm she is in her decision, the more likely she will involve a parent. *Id.* ¶¶ 35, 37. For those minors who feel they cannot involve a parent, nearly all involve another trusted adult; in some cases, that adult, though not a legal guardian, may actually be the primary caregiver. *Id.* ¶¶ 38, 56. In addition, all of PPMT's patients, including minors, go through a

private informed consent process in which: 1) they are educated about the abortion procedure they are scheduled to undergo and its attendant risks; 2) they discuss with a trained staff member their questions and concerns, the alternatives available (i.e., adoption and parenthood); and 3) the staff member confirms that the minor is capable of giving informed consent and the minor does, in fact, voluntarily consent; and 4) the clinician provides another opportunity for the patient to ask questions and discuss the procedure and again confirms that the minor has given informed consent. *Id.* ¶ 59.

As Defendants' experts concede, some young women have reason to fear that it would not be in their interest to involve a parent in their abortion decision. *See id.* ¶¶ 43–55. And as Plaintiffs' undisputed evidence establishes, the reasons for this are varied: some minors have previously suffered or witnessed physical, sexual, and/or emotional abuse from parents or stepparents or others close to the family, and they fear that news of their pregnancy, and/or their intention to terminate that pregnancy, will trigger further abuse; others have good reason to believe that informing their parents will lead to first-time abuse, or being thrown out of the house, or otherwise will seriously damage their relationship with their parents; and still others fear that their parents will pressure or force them to carry to term. *Id.* Sometimes young women decline to involve their parents because they know their parents are already overwhelmed by stressful and traumatic problems of their own—ranging from a parent's medical crisis to a debilitating alcohol or drug addiction to domestic violence aimed

at other family members. *Id.* ¶¶ 53–54.[5] Sometimes they are not even being cared for by their parents. *Id.* ¶ 53

Under the Acts, these minors must take the risk of these harms by involving a parent or seek judicial permission to proceed without parental involvement. This will place some minors at risk of abuse, including minors who may not have disclosed that abuse to a provider because they feared the consequences of doing so. *Id.* ¶¶ 43–49. Even short of abusive reactions, as Defendants' expert Dr. Eileen Ryan conceded, the experience of encountering active disapproval and conflict can damage an individual's mental health. *Id.* ¶ 70. More specifically, Plaintiffs have presented unrebutted evidence that minors who unwillingly involve a parent in their abortion and meet with disapproval or indifference are more likely to experience negative emotions (as compared with minors who do not involve their parents at all). *Id.* ¶¶ 68–69. In addition to these psychological harms, if the Consent Act goes into effect, parents can compel their daughter to carry to term and undergo childbirth—an

---

[5] In an attempt to counteract the numerous examples and peer-reviewed research presented by Plaintiffs that some minors have good reason not to involve their parents, Defendants' expert Dr. Jane Anderson testified about a single patient who was reluctant to tell her mother she was pregnant for fear of disappointing her; with Dr. Anderson's encouragement, this patient told her mother, and her mother was supportive. Anderson Dep. 70:19–71:23. This single anecdote is irrelevant. PPMT already encourages its minor patients to involve a parent, and most overcome any initial reluctance to do so. The issue in this case is whether minors should be forced to involve their parents when, unlike for the minor in Dr. Anderson's experience, there are reasons not to persist.

extreme violation of their bodily and decisional privacy, as well as an outcome that is particularly destructive toward family unity.[6] Even under the Notice Act, some parents will still be able to interfere with their daughter's decision by pressuring her or limiting her ability to get to a provider. *Id.* ¶¶ 50, 52, 98.

On their face, the Acts will also expose minors to significant delay, even when their parents are supportive. Importantly, this delay falls on the majority of minors seeking an abortion who cannot conceivably benefit from the Acts because they would have involved their parents anyway. With respect to the Notice Act, obtaining the minor's permission to contact the parent and then contacting the parent delays the abortion procedure; already, Plaintiffs have seen their patients delayed by this Act, such that, for example, they lost the option of a non-surgical abortion. *Id.* ¶ 94. The Consent Act's requirement that parents provide "notarized written consent" as well as "government-issued proof of identity and written documentation that establishes that the parent . . . is the lawful parent," *see* Mont. Code Ann. §§ 50-20-504(1), -506(1), will be a substantial additional barrier and cause further delay, particularly if parents must travel to government offices (which, in some cases, will be out of state) to request such documentation in person and if such requests take time to process. There is a clear risk that some parents, even if they are willing to go to these lengths, may be unable to do so; for example, if they lack transportation or cannot

---

[6] As set forth *infra* at p. 9 (citing Facts ¶¶ 45, 72, 74–87), the bypass does not alter this because it will not be accessible for many minors.

take sufficient time off from work or other obligations, or if this process would delay the minor to the point where an abortion is no longer accessible. *Id.* ¶ 90.

According to undisputed evidence, minors who seek a judicial bypass under the Acts will be subjected to delay, stress, and various difficulties. The required steps of gathering information about the process, finding and meeting with an attorney, adequately preparing for a hearing, and attending that hearing—all without drawing parental suspicion—would be difficult, stressful, and time consuming for anyone, and are all the more so for minors. *Id.* ¶¶ 82–85. Moreover, even though the Notice Act has been in place since January 1, 2013, clerks are currently giving out inaccurate, discouraging information to callers, and although Plaintiffs have searched online for publicly available guidance or forms for minors, they have not found any. *Id.* ¶ 72. The bypass process is particularly daunting and painful for minors who have been abused, and who must discuss the details of that abuse with a stranger in a formal setting. Indeed, Defendant's own expert, Teresa Collett, acknowledged that, in these circumstances, the bypass could work "emotional violence" against the minor. *Id.* ¶¶ 74–77. The bypass is also particularly hard for minors whose parents monitor them and/or limit their transportation. *Id.* ¶ 82. Other minors face other hurdles, such as school, work or childcare commitments. *Id.* ¶¶ 82–85.

All of these factors delay minors in obtaining a bypass and an abortion. In some cases, a minor will be erroneously denied a bypass and will incur further delay and obstacles pursuing an appeal. (Indeed, this

has already happened; Plaintiffs are aware of only two bypasses that have occurred under the Notice Act, and in one of these two, an initial denial was overturned on appeal. *Id.* ¶ 73.) They will also have to endure significant stress—e.g., from the uncertainty about whether they will be permitted to have an abortion, from the process of concealing their activities from their parents, and from the experience from having to share personal and painful details with an imposing stranger in a formal setting who has total control over their future. *Id.* ¶¶ 74–77, 86, 89. Some minors will be unable to access the bypass at all—for example, because they cannot discuss their abuse; because they are under tight parental control; because their time or transportation is too limited; or simply because the process is too confusing or scary. *Id.* ¶¶ 45, 72, 74–87. Or, they may be denied a bypass, which under the Notice Act means notifying a parent or carrying to term, and under the Consent Act means obtaining parental consent or carrying to term.

By delaying minors who are seeking an abortion, the Acts harm them in numerous ways. Although abortion is a very safe procedure, it is undisputed that the risk of the procedure rises with increased gestational age; thus the Acts expose minors to increased medical risks. Facts ¶ 16. Delay will also increase the risk that a minor's parents will discover her pregnancy, along with her plan to terminate the pregnancy—which in turn can lead to all the harms outlined above. Finally, it is undisputed that, as a minor's pregnancy advances, her options for an abortion become fewer, costlier, and farther away. Medication abortion, which allows women to safely terminate their pregnancy without a surgical procedure (and is strongly

preferred by many patients and medically indicated for some), is only available through seventy days after the first day of the woman's last menstrual period; PPMT provides this method in Helena, Billings and Missoula. *Id.* ¶¶ 91–95 . If a patient is delayed past ten weeks, she loses her only non-surgical abortion option. After fourteen weeks, she can only obtain an abortion in Billings and Missoula. After sixteen weeks, her only option is in Billings. After twenty-one weeks, she has no options in Montana. *Id.* ¶ 91, 95.

For some minors, the Notice Act and Consent Act will prevent them from obtaining a safe, legal abortion altogether—e.g., if a parent withholds consent and a judge denies a bypass application; if a minor is deterred from seeking a judicial bypass by limited resources, confidentiality and safety concerns, confusion, or an inability to discuss family abuse or other intimate details with a judge in a courthouse; if a parent prevents her daughter from seeking a bypass and/or an abortion; or if delays caused by the Acts' requirements result in the procedure becoming too expensive or becoming unavailable because of gestational age. *Id.* ¶¶ 72, 74–79, 82–87, 90–95, 97. Faced with these barriers, some minors who are desperate to terminate their pregnancy will resort to traveling out of state to obtain an abortion, and some will risk their own health and life attempting to self-induce. *Id.* ¶¶ 96, 99. Others will be forced to carry to term. These minors will face: the heightened medical risks associated with childbirth; the risk of intrafamily abuse or conflict once their pregnancy is discovered; if their partner is abusive, increased difficulties breaking ties with him; and the social,

educational, and economic consequences of teen parenthood. *Id.* ¶¶ 12, 46–57.

For these reasons, the AAP, along with other medical groups, has warned that "the potential health risks to adolescents" of refusing them confidential care are "compelling," that parental involvement laws also cause "psychological harm," and that they may "adverse[ly] impact" families, with no offsetting benefits. *Id.* ¶¶ 64–65. The AMA and the U.S. Centers for Disease Control and Prevention have stated similar positions. *Id.* ¶¶ 66–67.

IV. ARGUMENT

A. The Acts Violate the Constitutional Rights of Plaintiffs' Minor Patients

The Acts violate minors' rights to equal protection and privacy. The Montana Constitution guarantees each individual, expressly including minors, rights to privacy and to equal protection of the laws. Under established case law, the decision to terminate a pregnancy is protected by this privacy right. Thus, because the Acts target a class—minors—based on this decision, they are subject to "strict scrutiny" review, and must be invalidated unless Defendants can show, by clear and convincing evidence, that the Acts, and the distinctions they create, are narrowly tailored to a compelling state interest. The parties have now conducted extensive discovery, and the record from that discovery reflects undisputed facts based on which, as a matter of law, the Acts fail strict scrutiny. Specifically, they have not been narrowly tailored to any compelling state interest.

These very issues were addressed at length in this Court's well-reasoned decision in *Wicklund*, striking down the 1995 parental notice law, also on summary judgment. After analyzing and rejecting the State's specific arguments, the Court captured the fundamental irrationality of laws that single out minors seeking an abortion for unique restrictions: "Thus, the minor who is presumed by the Act to be too immature to decide to have an abortion will, if she continues her pregnancy, become the mother of an infant, fully responsible for its life and for decisions about its medical and other care, without statutory requirements for parental involvement." 1999 Mont. Dist. LEXIS 1116, at *22–23. *Wicklund*'s logic has only been strengthened, both legally and factually, in the years since it was decided.

1. The Acts Are Subject to Strict Scrutiny

a. Minors, like adults, have a fundamental right to reproductive freedom, including abortion

Decisions to prevent, conceive, terminate, or continue a pregnancy involve two critical aspects of privacy: the physical privacy of the body and the mental privacy that protects each individual's most personal and consequential decisions about her own future. For this reason, the Montana Supreme Court has recognized the right to terminate a pregnancy as a core protected privacy right. *Armstrong*, ¶ 2. Even before *Armstrong*, this Court made clear in *Wicklund* that laws requiring parental involvement for minors seeking an abortion implicate the right to privacy and therefore are subject to strict scrutiny review. *Id*. ¶ 6–7.

Section 10 of the Declaration of Rights of the Montana Constitution provides: "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." This provision gives Montana citizens "one of the most stringent protections of its citizens' right to privacy in the United States—exceeding even that provided by the federal constitution." *Armstrong*, ¶ 34 (observing that this "reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives" (quotations and citations omitted)). "The delegates [to Montana's Constitutional Convention] intended this right of privacy to be expansive . . . and protect citizens . . . from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Id.* ¶ 33 (citation omitted). And they intended it to be broad enough to protect individuals against "the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular." *Id*. ¶ 38.

In keeping with the delegates' intent, Montana courts have broadly construed the scope of the right guaranteed by article II, section 10, repeatedly extending that right beyond the limits of the federal due process right. In *Gryczan v. State*, the Montana Supreme Court struck down a ban on consensual, same-gender sexual conduct, affirming "we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution." 283 Mont. 433, 448, 942 P.2d

112, 121 (1997).[7] And in *Armstrong*, the Court struck down a law that prohibited qualified physician assistants from providing abortions, ruling that article II, section 10 "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health . . . free from governmental interference" and more narrowly "protects a woman's right . . . to seek and to obtain . . . a pre-viability abortion." *Armstrong*, ¶ 14.

Armstrong reached this conclusion by recognizing that "'if the right to privacy includes anything, it includes the decision of a woman whether or not to beget or bear a child . . . [and it] encompasses a woman's choice of whether or not to end her pregnancy.'" *Id.* ¶ 42 (quoting *Armstrong v. State*, Case No. BDV 97-627, 1997 Mont. Dist. LEXIS 810 (1st Jud. Dist. Nov. 25, 1997) (alterations in original)). This decision is fundamentally individual and personal; each pregnant individual has a "moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation." *Id.* ¶ 49; *see also Planned Parenthood of Mont.*, slip. op. at 10 ("The stringent privacy right afforded to Montanans includes a so-called 'personal autonomy component,'" which protects "procreative autonomy, such as the decision to obtain a pre-viability abortion." (quoting and citing *Armstrong*, ¶¶ 35, 48–49)); *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL

---

[7] Under the law at that time, the Federal Constitution had been held not to afford any such protection. *See Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

17959705, at *8 (Mont. Dist. Ct. May 19, 1995) (holding that "a woman has a fundamental right to control her body and her destiny," including by choosing to terminate a pregnancy) (attached as Ex. G to Pls.' PI Br.).

As *Wicklund* correctly held, this is no less the case when the individual making this decision is a minor. Indeed, the Montana Constitution expressly limits the State's power to single out minors for legal restrictions: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Mont. Const. art. II, § 15 ("Minors' Rights Clause"). The drafters of this right explained that it was intended to ensure that "persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults." Montana Constitutional Convention, Vol. II at 635–36, *quoted in In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1372–73 (1997).

Under this protection, the State may only single out minors for restrictions "on clear showing that" the restriction *enhances* their protection. *Id.*; *see also In re S.L.M.*, 287 Mont. at 35, 951 P.2d at 1373 (where the State seeks to limit the fundamental rights of minors in any way, "it must not only show a compelling state interest but must also show that the exception is designed to *enhance the rights* of minors" (emphasis added)); *see also Planned Parenthood of Mont.*, slip op. at 9 (granting summary judgment where the state's exclusion of contraception coverage for certain Montana teens did not, among other things, enhance

the rights of minors). The protection applies with at least equal force to abortion: "minors, including pregnant minors, have a fundamental right of individual privacy that includes personal-autonomy privacy, and . . . the constitutional right of privacy encompasses a woman's right to decide whether to terminate her pregnancy." *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *6; *see also Planned Parenthood of Mont.*, slip. op. at 14 ("There can be no doubt that minors also possess the right of privacy, especially where reproductive choices are concerned.").

Indeed, even in states without an express Minors' Rights Clause, courts have recognized that their state constitution's right to privacy protects each minor's reproductive decisions because, in each case, that decision:

> has such a substantial effect on a pregnant minor's control over her personal bodily integrity, has such serious long-term consequences in determining her life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and (unlike many other choices) is a decision that cannot be postponed until adulthood.

Am. Acad.of Pediatrics v. Lungren, 940 P.2d 797, 816 (Cal. 1997); *see also Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 622 (N.J. 2000) ("[A] minor's right to control her reproductive decisions is among the most fundamental of the rights she possesses."); *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (Powell, J., concurring) ("The abortion decision differs in important ways from other decisions that may be

made during minority . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.").

Thus, there is no question that the right restricted by the Acts is fundamental. For that reason, as the Montana Supreme Court stated in *Armstrong*, the Acts "must be reviewed under a strict-scrutiny analysis"—i.e., the State must be held to the requirement that it establish by "clear and convincing evidence" that the Acts are narrowly tailored to a compelling state interest "of the highest order" and "not otherwise served." *Armstrong*, ¶¶ 34, 59, 41 n.6; *see also Jeannette R.*, 1995 WL 17959705, at *7; *Gryczan*, 238 Mont. at 449, 942 P.2d at 122 ("[A]ny legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.")

b. Under the Equal Protection Clause, distinctions based on the exercise of a fundamental right are subject to strict scrutiny

Article II, section 4 of the Montana Constitution (the "Equal Protection Clause") provides that "[n]o person shall be denied the equal protection of the laws." In keeping with its commitment to individual rights, the Montana Supreme Court has explained that this right "provides for even more individual protection" than the parallel federal equal protection provision. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 104 P.3d 445 (citation omitted). The Minors' Rights Clause expressly extends this protection to minors. These provisions guarantee that

Montana minors (like adults) will be protected from discriminatory treatment by the State by requiring that all similarly situated groups be treated alike. This protection is at its strongest when State actions discriminate in ways that burden a fundamental right; in such cases, courts will apply "strict scrutiny," blocking State actions unless the State provides clear and convincing evidence that its actions are narrowly tailored to a compelling state interest. *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *5–6; *Jeannette R.*, 1995 WL 17959705, at *7.

The Acts divide pregnant minors into two classes based on whether they seek to terminate their pregnancy or carry it to term, restricting access to medical care for the first category only.[8] As this Court held in *Wicklund*, for purposes of an equal-protection

---

[8] The Acts also create numerous other impermissible classifications: by singling out abortion as the only medical service associated with sexual activity requiring parental involvement (*See* Mont. Code Ann. § 41-1-405(4) ("Self-consent of minors does not apply to sterilization or abortion, except as provided in Title 50, chapter 20, part 5."); *compare* Mont. Code Ann. § 41-1-401 *et seq.*, *with id.* § 50-20-224, *and id.* § 50-20-504.); by singling out abortion as the only health care service to which minors who are separated from their parents and self-supporting or who have finished high school cannot give consent without parental involvement; by singling out female reproductive care; by allowing minors who are denied financial support because they refuse to have an abortion, but not those minors denied such support because they decide to have an abortion, to be considered emancipated for purposes of eligibility for public assistance benefits (*see* Mont. Code Ann. § 50-20-508); and, for this last group of minors, who become eligible for public assistance because they lose parental support as a result of refusing to have an abortion, by singling out abortion as the one form of health care the state will not cover (*see id.*).

analysis, "a class of pregnant minors who want to obtain an abortion and a class of pregnant minors who do not want an abortion . . . are composed of persons who are similarly situated, i.e., minors who are pregnant." *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *5; *Planned Parenthood of Great Nw. v. State*, 375 P.3d 1122, 1143 (Alaska 2016); *cf. Jeannette R.*, 1995 WL 17959705, at *8 (women seeking medically indicated abortion similarly situated to women seeking obstetric care). Because the Acts single out for disparate treatment young women who are seeking to exercise their fundamental right to privacy, the distinction they create is subject to strict scrutiny under the Equal Protection Clause as well.

2. The Acts Fail Strict Scrutiny

As set forth above, the Acts are subject to strict scrutiny with respect to Plaintiffs' Equal Protection, Privacy, and Minor's Rights claims. The Equal Protection Clause requires the State to demonstrate that whatever *distinctions* a challenged law creates narrowly serve a compelling state interest. *Jeannette R.*, 1995 WL 17959705, at *6 ("[O]nce a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality."). The Privacy Clause and Minor's Rights Clause require the State to demonstrate that the burdens created by the law are narrowly tailored to a compelling state interest. *Armstrong*, ¶ 29; *Jeannette R.*, 1995 WL 17959705, at *7; *Gryczan*, 238 Mont. 449, 942 P.2d 122. As set forth below, the undisputed facts establish that the Acts fail both tests.

The Legislature asserted the following interests to support the Acts: "protecting minors against their own immaturity; fostering family unity and preserving the family as a viable social unit; protecting the constitutional rights of parents to rear children who are members of their household; and reducing teenage pregnancy and unnecessary abortion." Mont. Code Ann. § 50-20-202(2)(a)–(d); *id.* § 50-20-502(2)(a)–(d). These are identical to those asserted in the 1995 Act, which this Court carefully considered on summary judgment and rejected. *See Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *20–21. They are no more compelling now than they were then, nor are they any more narrowly served by the Acts. Certainly Defendants have neither presented nor discovered any evidence which would allow them to establish by "clear and convincing evidence" that the Acts are narrowly tailored to any "interest of the highest order . . . not otherwise served." *Armstrong*, ¶¶ 41 n.6, 59 (internal quotation marks omitted).

a. The Acts will endanger minors, not protect them

With respect to the State's claim that it is "protecting minors against their own immaturity," the bare fact that minors are less mature than adults cannot be a sufficient basis on which to claim the Acts support a compelling state interest, and certainly is not sufficient to demonstrate that the Acts are narrowly tailored to do so. As the Alaska Supreme Court recently explained in considering similar (but less onerous) restrictions:

> On the most generalized level, the State has a compelling interest in protecting minors from

> their own immaturity and aiding parents in fulfilling their parental responsibilities. But we note that the interest in protecting minors from their immaturity requires context—immaturity in and of itself is not a harm.

Planned Parenthood of Great Nw., 375 P.3d at 1139. Rather, the Alaska Supreme Court explained that it would "consider the State's interest in protecting minors from their immaturity in the contexts of" the "relevant . . . harms" to minors that the State had claimed it was trying to rectify. *Id.* at 1139 (internal quotation marks and alteration omitted). The Court then found that the State had not made a concrete showing as to why its parental notice law was necessary to protect minors seeking abortion but not minors carrying to term and giving birth.

The Montana Constitution requires a similar analysis. The Minors' Rights Clause requires that the State make a "clear showing" of necessity for the Acts. And the Montana Supreme Court has similarly warned that patient-protective abortion restrictions "cannot be based on political ideology," and "must [instead] be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities." *Armstrong*, ¶ 62; *cf. Gryczan*, 238 Mont. at 453, 942 P.2d at 124 (relying in part on opinion of public health organizations to reject State's public health rationale for criminalizing gay sex).

Here, as in these other cases, the medical community—including the AMA and the AAP—has spoken out strongly against the Acts' requirements,

warning that they are unnecessary and will harm some minors by deterring them from seeking necessary medical care. *See* Facts ¶¶ 64–67. Moreover, as this Court found in *Wicklund* and the undisputed facts still demonstrate, the State's selective restriction of abortion, but not of its alternatives, makes no sense because "[m]edical risks for abortion are considerably lower than for pregnancy and childbirth, and, in general, adolescents show no substantial psychological effects from abortion," and "the consequences of deciding to continue the pregnancy can be considerably greater than of terminating it." 1999 Mont. Dist. LEXIS 1116, at *21; *see* Facts ¶¶ 1–17.

Indeed, the U.S. Supreme Court recently affirmed, in striking down abortion restrictions that purported to promote women's health, what court after court has found: "Nationwide, childbirth is 14 times more likely than abortion to result in death." *Whole Woman's Health*, 136 S. Ct. at 2315; *see also Planned Parenthood of Great Nw.*, 375 P.3d at 1141 (affirming district court finding "that abortion raises *fewer* health concerns for minors than does giving birth, that abortion is 'quintessentially' and 'extraordinarily' safe, and that 'the majority consensus of American psychiatry is that abortion does not cause mental illness'"); *id.* ("[P]arental involvement is not required to manage complications, which are relatively rare and generally resolved by an obvious, immediate medical response."); *Lungren*, 940 P.2d at 828 ("[A]n abortion, when performed by qualified medical personnel, is one of the safest medical procedures, and . . . the risk of medical complications resulting from continuing a pregnancy and giving birth is

considerably greater than that posed by an abortion."); *Farmer*, 762 A.2d at 639 (finding that "young women do not suffer greater psychological problems than the young women who carry their pregnancies to term").

Not only are medical risks greater for adolescents carrying to term, but experts on both sides of this case agree that it is important for minors carrying to term to obtain consistent, regular medical care, and that this care requires their active, sustained participation and decision-making. *See* Facts ¶¶ 26–30; *Farmer*, 762 A.2d at 636 (finding the State's more restrictive approach toward abortion "difficult to justify" given that "[w]e cannot conceive of a better time than before a major operation such as a cesarean section for a doctor to be fully knowledgeable about a patient's health status"); *cf.* Facts ¶¶ 39–40 (abortion requires little follow-up care, and minors are able to provide a relevant medical history). It is likewise undisputed that adolescents carrying to term face additional adverse consequences, such as diminished educational and economic opportunity. *See* Facts ¶¶ 12–13. For some minors who have an abusive partner, who may coerce her into continuing the pregnancy, carrying to term will make it harder for them to break contact with that partner. *See* Facts ¶¶ 20, 57.[9]

---

[9] There is no evidence that minors who have abortions are more likely to have older partners than minors who carry to term. Facts ¶ 62. Nor is there evidence mandatory parental involvement laws, such as the Acts, reduce interpersonal violence. Facts ¶ 61. At any rate, PPMT already screens all of its abortion patients, including minors, for partner and family abuse and ensures that each patient's consent is informed and voluntary. Facts ¶¶ 58–60.

Moreover, the minors who carry to term—and face these difficult decisions, obligations, and risks—are no more mature, or better able to make a voluntary and informed medical decision, than minors who have an abortion. Facts ¶ 18. And both groups make their decision in a stressful, time-pressured situation. Facts ¶ 19. For these reasons, the Alaska Supreme Court concluded that "all pregnant minors, not just those seeking termination, may need their parents' assistance and counsel when making reproductive choices," *Planned Parenthood of Great Nw.*, 375 P.3d at 1140, and, if anything, parental involvement is *more* critical for minors inclined to carry to term: "Few life decisions could benefit more from consultation with supportive parents than a minor's decision to carry to term; the decision to abort, comparatively, involves far fewer enduring consequences," *id.* Indeed, Defendants' expert, Dr. Anderson, testified that she has seen cases in which a parent counseled her daughter to terminate her pregnancy, and that this counsel improved the minor's decision-making by ensuring that she had the benefit of "an adult perspective" and that she understood and considered her option to terminate. Facts ¶ 24.

For these reasons, Defendants' own experts agree that it is important for parents to be involved in the care of their pregnant minor daughters who carry to term, both as they finalize their decision and as they face the consequences of that decision. *See* Facts ¶¶ 22–25, 28, 31. Thus, facts not subject to dispute establish that the Acts unjustifiably single out minors seeking an abortion based on protective considerations that apply, at least equally, to minors carrying their pregnancy to term.

Not only has the State failed to put forward evidence that the Acts are narrowly tailored to *protect* minors, but the undisputed record here—including the overwhelming opposition of major medical organizations to forced parental involvement—confirms this Court's earlier finding in granting summary judgment in *Wicklund* that forcing parental involvement would in fact *undermine* the state's interests in protecting minors because it would put some minors at risk for abuse and/or various other harms. *See* Facts ¶¶ 43–52, 63–83, 98–99; *Lungren*, 940 P.2d at 828 (challenged parental involvement law "would in fact *injure* the asserted interests of the health of minors and the parent-child relationship" (internal quotation marks omitted)); *see also Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *8–9 (citing evidence that many adolescents "who did not tell their parents had experienced domestic violence, feared it would occur, or were fearful of being forced to leave home," and that in cases where parental notification was forced, many reported "serious consequences such as physical violence or being forced from the home"); *Farmer*, 762 A.2d at 637 ("Mandated disclosure to a parent 'may . . . cause serious emotional harm to the minor' and 'often precipitates a family crisis, characterized by severe parental anger and rejection of the minor.'" (quoting report by the AMA's Council on Ethical and Judicial Affairs)); *id*. at 634 ("We know that '[m]any minor women will encounter interference from their parents after the state-imposed notification. In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision.'" (quoting *H.L. v. Matheson*, 450 U.S. 398,

438–39 (1981))). The Acts will also expose minors to the negative emotion effects associated with loss of autonomy and with facing active disapproval or lack of support from a parent who has been notified. *See* Facts ¶¶ 68–71.[10]

In addition to these harms, it is undisputed that the Acts will delay, and in some cases, prevent minors from seeking an abortion. *See* Facts ¶¶ 21, 73, 84–98; *see also Lungren*, 940 P.2d at 802 ("particularly in matters concerning sexual conduct, minors frequently are reluctant, either because of embarrassment or fear, to inform their parents of medical conditions relating to such conduct, and consequently . . . there is a considerable risk that minors will postpone or avoid seeking needed medical care if they are required to obtain parental consent before receiving medical care for such conditions"). This delay will expose minors to increased medical risk, deprive them of a non-surgical abortion, force them to travel out of state, or, for some minors, prevent them from having an abortion at all, which not only violates their constitutional rights but also exposes them to the increased medical risks of pregnancy and childbirth, as well as the other negative effects of unintended teen parenthood. *See* Facts ¶¶ 1–13; *Farmer*, 762 A.2d at 634 ("A parent who objects to the abortion, once notified, can exert strong pressure on the minor . . . to

---

[10] Moreover, some minors do not wish to involve a parent because they live apart from their parents or their parents are not involved in their lives; their parents are already overwhelmed by other stressors and involving them will add further stress; or they are cared for by another adult. Facts ¶¶ 53–56. For these minors, the Acts will cause delay and all the effects that come with it, with no conceivable benefit.

block her from getting an abortion . . . In such circumstances, the notification requirement becomes, in effect, a consent requirement." (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 472 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part))).

Even worse, some minors desperate to obtain an abortion without parental involvement will risk their own health and lives attempting to self-induce. *See* Facts ¶ 99; *Planned Parenthood of Great Nw.*, 375 P.3d at 1142 n.107 ("As evidenced by the multitude of illicit abortions performed in this country before *Roe v. Wade*, restrictive abortion laws do not guarantee compliance."); *Farmer*, 762 A.2d at 635 ("With time running out, it is inevitable that some minors will seek an alternative solution rather than tell an abusive parent or a judge who is a stranger about their decision to procure an abortion."); *Lungren*, 940 P.2d at 817 ("[A] minor who does not wish to continue her pregnancy but who is too frightened to tell her parents about her condition or go to court may be led by the statutory restrictions to attempt to terminate the pregnancy herself or seek a 'back-alley abortion'—courses of conduct that in the past have produced truly tragic results . . ."); *cf. West Ala. Women's Center v. Miller*, Civil Action No. 2:15cv497-MHT at 45 (M.D. Ala. Oct. 27, 2016) (citing fact that some women arrive for care after unsuccessful attempts to self-induce, including by ingesting turpentine).

Importantly, the Acts will delay, and could prevent, even those minors who voluntarily involve their parents—by adding additional procedural hurdles and, with the Consent Act, onerous documentation

requirements. *See* Facts ¶¶ 90, 94. As a result of the Acts, many of these minors also will lose medical options, face increased risks, and possibly be prevented from having an abortion altogether. *See* Facts ¶¶ 94, 97; *see also Farmer*, 762 A.2d at 633–34 (finding that notarization requirement was additional unnecessary burden); *In re Jane Doe*, No. C–110621, 2011 WL 5119067 (Ohio Ct. App. Oct. 6, 2011) (college student unable to get written consent from consenting parent who lives in other state).

The undisputed facts also demonstrate that the Acts' judicial bypass option does not protect minors from these effects; rather, as this Court explained in granting summary judgment in *Wicklund*, the bypass, by its very nature, "increases stress, delay and potential medical complications." 1999 Mont. Dist. LEXIS 1116, at *22. To begin with, there is no system in place to ensure that minors who contact the court (or anyone acting on their behalf) receive accurate information about, and assistance with, the bypass process. *See* Facts ¶ 72. Even if the State fixed these deficiencies, the process of preparing for and attending a hearing, in an unfamiliar setting, before a stranger who has the power to determine one's future, all while dealing with the time pressure of a developing pregnancy and the fear of parental discovery, is extremely stressful and upsetting. *See* Facts ¶¶ 74–77. For some minors—such as minors who have experienced family abuse—the bypass will in fact be traumatic or even impossible. Facts ¶¶ 77–78; *see also Planned Parenthood of Alaska*, 171 P.3d 577, 584 (Alaska 2007) ("[N]ot all minors possess the wherewithal to embark upon a formal legal adjudication during a time of crisis."); *Lungren*, 940

P.2d at 829 ("[A]t least some minors who are too frightened or ashamed to consult their parents also will be too frightened or ashamed to go to court (often fearing that their presence at the courthouse might be discovered and disclosed by a neighbor or acquaintance) . . .").

Apart from the emotional harm of the bypass process, minors will be significantly delayed in their effort to obtain medical care that is their constitutional right. Delay is inherent in the bypass process; it takes time for a minor to find an attorney, arrange transportation, find a way to meet with her attorney, prepare her case, and attend a hearing—all without drawing attention from her parents or from others who might notify her parents. *See* Facts ¶¶ 73, 82–89; *see also Farmer*, 762 A.2d at 635 ("Even assuming a confidential and expeditious waiver hearing, the process will nonetheless cause significant delay."); *see also Lungren*, 940 P.2d at 829 ("[R]esort to this judicial procedure inevitably will delay the minor's access to a medically safe abortion, thereby increasing the medical risks posed by the abortion procedure, and will inflict emotional and psychological stress upon a minor . . ."). These delays will be even worse for minors who are initially denied a bypass and only obtain relief on appeal. *See* Facts ¶ 86 (citing *In re Jane Doe*, No. 11 CO 34, 2011 WL 6164526 (Ohio Ct. App. Dec. 7, 2011) (five-week delay from filing of application to granting of relief on appeal)).[11] For all of these reasons, rather than

[11] The bypass process also jeopardizes the confidentiality of a minor's decision, putting some minors at risk for abuse. *See* Facts ¶¶ 46–47, 79–80; *see also Farmer*, 762 A.2d at 635 ("The judicial proceeding itself presents a danger that the young woman's

protect minors, the Acts will instead expose them to harm.

b. The Acts are not narrowly tailored to any other compelling state interests

For similar reasons, the State cannot justify its selective restrictions based on the asserted goal of "fostering family unity." Not only do Plaintiffs already encourage all their pregnant minor patients to involve their parents in their decision-making and care, but it is undisputed that most pregnant minors in healthy families *voluntarily* do so. Facts ¶¶ 33–37; *see also Lungren*, 940 P.2d at 828–29. However, the undisputed facts show that in unhealthy family situations, sudden, forced disclosures related to pregnancy and abortion can *damage*, rather than "foster," family unity. *See* Facts ¶¶ 50–56, 68–71, 98. As the New Jersey Supreme Court observed, "a law mandating parental notification prior to an abortion can neither mend nor create lines of communication between parent and child. Instead, it is the parties' pre-existing relationship that determines whether a young woman involves a parent in the difficult decision whether to seek an abortion." *Farmer*, 762 A.2d at 637. And, as *Lungren* found, in dysfunctional families, forced disclosure generally would "exacerbate the instability and dysfunctional nature of the family relationship." 940 P.2d at 829. Thus,

---

anonymity will be breached. A realistic concern is that a minor could be recognized by members of the community who know her while she is at the courthouse to attend the hearing."); *N. Fla. Women's Health & Counseling Servs.*, 866 So.2d 612, 632 (Fla. 2003) ("The chance of a breach in the confidentiality requirement is a real possibility, especially in small communities.").

parental involvement statutes, such as the ones at issue here, "place[] burdens on minors in furtherance of a goal that is illusory for some families and unnecessary for many others." *Farmer*, 762 A.2d at 638.

This is even more so for the Consent Act, which on its face takes decision-making entirely out of the minor's hands and authorizes her parents to decide whether she must bear a child and become a parent (subject only to judicial review if the minor can get to court). As the Alaska Supreme Court recognized, consent requirements, and the absolute veto power they confer, are more likely to *undermine* than to serve legitimate state interests, by *reducing* parents' "incentive to engage in a constructive and ongoing conversation with their minor children about the important medical, philosophical, and moral issues surrounding abortion." *Planned Parenthood of Alaska*, 171 P.3d at 585. Requiring consent, in other words, "guarantees no more than a one-way conversation" between a minor and her parents, and "'allows parents to refuse to consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests.'" *Id*. (quoting *State v. Koome*, 530 P.2d 260, 265 (Wash. 1975) (holding that parental consent statute violates state constitutional right to privacy)); *see also Lungren*, 940 P.2d at 816 (holding that parental consent law "intrudes upon" a pregnant minor's "protected privacy interest under the California Constitution"). Thus, even if this Court were to find that there are disputed issues of material fact as to whether the Notice Act is narrowly tailored

to a compelling state interest, it should still grant summary judgment invalidating the Consent Act as a matter of law because it is plainly not narrowly tailored to the State's interest in promoting family unity.

The final two interests that the Acts purport to advance both fail as a matter of law. The claimed interest in protecting the rights of parents cannot justify the Acts for at least three reasons. First, as this Court found in *Wicklund*, the "unsubstantiated rights" of "parents to rear children" cannot outweigh minors' privacy rights, because the Montana Constitution expressly affirms the equal rights of minors, except when necessary for their *own* protection. 1999 Mont. Dist. LEXIS 1116, at *19; *see also In re S.L.M.*, 287 Mont. at 36–37, 951 P.2d at 1373 (State may not restrict minors' rights to further public safety). Second, the parental right to rear one's children is a right to be free from state *interference*, not the positive right to *enlist* the state's coercive powers as an aid to parental control. *See Farmer*, 762 A.2d at 642 (reasoning that while "the State may not *interfere* with a parent's upbringing of a child," it does not follow that parents have a "right to prevent or even be informed about a child's exercise of her own constitutionally protected rights" (internal quotation marks omitted and emphasis added)). And third, whatever interest the State has in promoting parental authority must be exercised neutrally, not so as to favor childbirth over abortion. As the New Jersey Supreme Court explained in striking down a notice requirement, in language quoted with approval by the Alaska Supreme Court:

> [O]ur decision in no way interferes with parents' protected interests, nor does it prevent pregnant minors or their physicians from notifying parents about a young woman's choice to terminate her pregnancy. Simply, the effect of declaring the notification statute unconstitutional is to maintain the State's neutrality in respect of a minor's childbearing decisions and a parent's interest in those decisions. In effect, the State may not affirmatively tip the scale against the right to choose an abortion absent compelling reasons to do so.

Farmer, 762 A.2d at 622, *quoted in Planned Parenthood of Great Nw.*, 375 P.3d at 1144.

Finally, the Acts assert an interest in "reducing teen pregnancy and unnecessary abortion." Mont. Code Ann. § 50-20-222(2)(d); *id.* § 50-20-502(2)(d). While reducing teen pregnancy is a laudable goal, Defendants have presented no evidence that the Acts even *advance* that goal (still less that it is narrowly tailored to do so). And Defendants' asserted interest in avoiding "unnecessary" abortions cannot be squared with *Armstrong*'s clear holding that it is "a woman's moral right and moral responsibility"—not the State's and not any third party's—"to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation." *Armstrong*, ¶ 49.

For these reasons, there are no material facts in dispute that can alter the conclusion that the Acts do not narrowly serve any of the four state interests that they claim to serve. Thus they violate three

independent constitutional guarantees: Equal Protection, Privacy, and Minors' Rights. *See generally Wicklund*, 1999 Mont. Dist. LEXIS 1116; *Armstrong*.

c. Parental involvement laws from other states further demonstrate that the Montana Acts are not narrowly tailored

Even if Defendants could articulate by "clear and convincing evidence" a state "interest of the highest order" served by the Acts, there would be no way for them to demonstrate that the Acts were "narrowly tailored to effectuate only *that* compelling interest," *Armstrong*, ¶¶ 59, 41 n.6, 34 (emphasis added). Both Acts apply regardless of a minor's maturity. *See* Mont. Code Ann. § 50-20-222(1)(a); *id.* § 50-20-502(1)(a). Neither Act permits health care providers to determine whether the minor is capable of consent and/or whether it is in her best interest to seek the consent of a parent. *Cf., e.g.*, Md. Code Ann. Health-Gen., § 20-103(c)(1) ("physician may perform the abortion, without notice to a parent or guardian of a minor if, in the professional judgment of the physician," the minor is mature or notification is not in her best interest); W. Va. Code Ann. § 16-2F-3(c) (providing that parental notification may be "waived by a physician, other than the physician who is to perform the abortion, if such other physician finds that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interest").

Both Acts, moreover, require a minor to involve a parent or obtain a judicial bypass even if she is a victim of rape, incest or other abuse or is at risk of future abuse. *Cf., e.g.*, Md. Code Ann., Health-Gen. §

20-103(c) (authorizing abortion where, in physician's professional judgment, notice "may lead to physical or emotional abuse" or "would not be in the best interest of the minor"); Ariz. Rev. Stat. Ann. § 36-2152(H)(1) (incest and sexual abuse exceptions to bypass requirement); Colo. Rev. Stat. Ann. § 12-37.5-105(1)(b) (abuse and neglect exceptions); Idaho Code Ann. § 18-609A(7)(a) (rape and incest exceptions); 750 Ill. Comp. Stat. Ann. 70/20(4) (sexual abuse, neglect, and physical abuse exceptions); Iowa Code Ann. § 135L.3(4)–(5) (child abuse and sexual abuse exceptions); Minn. Stat. Ann. § 144.343(4)(c) (abuse and neglect exceptions); Neb. Rev. Stat. Ann. § 71-6902.01 (allowing grandparent to consent if parents are abusive); S.C. Code Ann. § 44-41-30(D) (incest exception); Va. Code Ann. § 16.1-241 (abuse and neglect exceptions); Wis. Stat. Ann. § 48.375(4)(b) (exceptions for rape, psychiatric emergency, abuse or incest). This lack of tailoring is especially harmful because, as set forth above, the bypass process is particularly stressful, and can even be traumatic, for minors who are victims of abuse.

Neither Act, moreover, allows anyone other than a parent or guardian to provide the required consent. *Compare, e.g.*, Del. Code Ann. tit. 24, § 1783(1) (allowing notification of grandparent or licensed mental health professional); Wis. Stat. Ann. § 48.375(4) (allowing an "adult family member," defined to include a grandparent, aunt, uncle, or sibling age twenty-five or older, to provide consent); Colo. Rev. Stat. Ann. §§ 12-37.5-103(6), 104 (allowing notification of other relatives, if the minor resides with said person and not with a parent); 750 Ill. Comp. Stat. Ann. 70/10–70/15 (allowing notification of an

"adult family member," defined to include a grandparent or a stepparent who lives in the minor's household); Iowa Code Ann. § 135L.3(m)(2)(a) (allowing physician to notify a grandparent instead of parent); N.C. Gen. Stat. Ann. § 90-21.7(a) (allowing grandparent with whom the minor has been living to consent); S.C. Code Ann. § 44-41-31 (allowing grandparent to provide required consent, or any person standing in loco parentis); Va. Code Ann. § 16.1-241 (allowing consent by any adult standing in loco parentis). This omission is particularly problematic because, as the undisputed evidence shows, pregnant minors who do not involve a parent do consult a broad range of substitute parent-figures, from biological relatives to school counselors to pastors. *See* Facts ¶ 38; *see also Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *21 ("Most pregnant minors do consult a parent about the decision, and those who did not obtain parental involvement did have discussions with friends or relatives.").[12]

Thus, even assuming the Acts advanced some compelling state interest, neither Act is tailored in any way—let alone narrowly—to distinguish between minors for whom forced parental involvement might be protective, those for whom it would be unnecessary,

---

[12] In pointing out ways in which other states have enacted more narrowly tailored parental involvement laws, Plaintiffs do not concede that these narrower laws would satisfy the uniquely strong protections of the Montana Constitution, *see Armstrong*, ¶ 34, or that they would adequately protect minors in abusive or dysfunctional family situations. Plaintiffs' point is that even if the Acts advanced a compelling state interest, these other laws demonstrate that Montana's approach, as a matter of law, is not narrowly tailored.

and those for whom it would be positively dangerous. For that reason, they are both unconstitutional.

d. Even if the Parental Notice Act satisfied the narrow tailoring requirement of strict scrutiny, the Parental Consent Act would fail

In addition to the defects outlined above, the Consent Act self-evidently fails the narrow tailoring requirement because it is based on the exact same asserted interests as the Notice Act yet is significantly more restrictive. Whereas the Notice Act requires notification for minors under sixteen, the Consent Act requires notarized *consent* for *all* minors. Thus, first of all, the Consent Act sweeps more broadly to include even older minors, including minors who are off at college. *Cf., e.g.*, Del. Code Ann. tit. 24, § 1782 (limiting law to minors under 16); S.C. Code Ann. § 44-41-10 (minors under 17); Mont. Code Ann. § 41-1-402(2)(a) (allowing minors who have completed high school to consent to all medical care other than abortion). Second, with no evidence of necessity, the Consent Act imposes burdensome new documentation requirements that will substantially delay minors. *See* Mont. Code Ann. §§ 50-20-504, -506.

Finally and most egregiously, the Consent Act tightens the requirement from one that the parent know of the minor's decision to one that the parent *make* that decision. Defendants' own experts were unable to articulate any additional benefits conferred by requiring consent, as opposed to notice. Facts ¶ 41. On the other side of the scale, the additional *burdens* of requiring consent are readily apparent. Indeed, Defendants' expert Dr. Anderson, while opining that

parents should have "input" into a minor's decision whether to have an abortion, agreed that "ultimately the adolescent's decision about abortion should be made by the adolescent without coercion from anyone," and stated: "I want that teen to come to a decision with input from her parents, obviously, but I don't want things to be forced." Facts ¶ 42. By amending its law from a notice requirement to a consent requirement, the State has done exactly what its own expert has opined it should not: empowered a minor's parents to take the ultimate decision out of her hands. As the Alaska Supreme Court explained in striking down a consent requirement:

> By prohibiting minors from terminating a pregnancy without the consent of their parents, the PCA bestows upon parents . . . a 'veto power' over their minor children's abortion decisions. This 'veto power' does not merely restrict minors' right to choose whether and when to have children, but effectively shifts a portion of that right from minors to parents. In practice, under the PCA, it is no longer the pregnant minor who ultimately chooses to exercise her right to terminate her pregnancy, but that minor's parents. And it is this shifting of the locus of choice—this relocation of a fundamental right from minors to parents—that is constitutionally suspect.

Planned Parenthood of Alaska, 171 P.3d at 583.[13]

---

[13] The Alaska Supreme Court more recently held that mandated notice for all minors too violated its State's

Thus, even if this Court were to find that there are disputed issues of material fact that related to whether the Notice Act is narrowly tailored, it should still invalidate the Consent Act as a matter of law because it simply cannot be found to be narrowly tailored to any legitimate purpose.

B. The Acts Violate Plaintiffs' Due Process Rights

Finally, the Acts violate Plaintiffs' due process rights because they impose absolute criminal and civil liability in situations where the Acts' application is unclear. *See* Mont. Code Ann. § 50-20-235; *id.* § 50-20-510. The Montana Constitution, like the Federal Constitution, requires that criminal laws define the offense with enough clarity to provide fair notice of the conduct that is prohibited and in a way that does not invite arbitrary and discriminatory enforcement. *State v. Britton*, 2001 MT 141, ¶¶ 5–6, 306 Mont. 24, 30 P.3d 337. This is particularly so where the law fails to include a limiting *mens rea* requirement. *State v. Martel*, 273 Mont. 143, 151–52, 902 P.2d 14, 19–20 (1995). Both Acts violate this requirement.

With respect to the Notice Act, a physician might believe in good faith that she had complied with the Act but might in fact be subject to criminal or civil liability where, e.g.: she incorrectly believed a minor to be over fifteen; she wrongly believed the minor to be emancipated; her understanding of the phrase "reasonable effort" in Mont. Code Ann. § 50-20-224 differed from that of a prosecutor, judge or jury; or she

---

constitutional guarantees. *Planned Parenthood of Great Nw.*, 375 P.3d at 1128.

gave notice to an individual whom she incorrectly believed to be the parent. Similarly, with respect to the Consent Act, a physician might be subject to prosecution or civil liability where, e.g., she mistook a minor for an adult or an emancipated minor; or where the person from whom she received consent was *not* the minor's parent and had produced false identification. This uncertainty could have been avoided with language protecting providers who intend to comply with the law, as many states have done. *See, e.g.*, Ala. Code § 26-21-6; Ind. Code Ann. § 16-34-2-7; Iowa Code Ann. § 135L.3(n); Mich. Comp. Laws Ann. § 722.907(1); S.C. Code Ann. § 44-41-36(b) (providing protection from criminal and civil liability for persons acting in good faith on the representations of the minor or consenting adult); Wyo. Stat. Ann. § 35-6-118(f) (imposing criminal liability on physicians only for knowing or intentional violations of parental involvement statutes).

Thus, both Acts impermissibly function as "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (citation and quotation marks omitted). They raise a risk that providers will be chilled from providing care to young adults or to minor patients who, in fact, have notified a parent or obtained consent—thereby further burdening Montanans' privacy rights without sufficient justification to meet the strict scrutiny test. For the same reasons, they also fail to provide judges and juries with sufficient guidance about how to evaluate claims related to compliance, and so invite arbitrary and discriminatory enforcement. This violates Plaintiffs' due process rights. *See State v. G'Stohl*, 355 Mont. 43, ¶ 9, 355 Mont. 43, 233 P.3d 926; *see also,*

e.g., *Colautti*, 439 U.S. at 390–97 (striking down a viability-determination provision that required abortion providers to comply with ambiguous terms and imposed liability without regard to fault); *Planned Parenthood Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (striking down a law that imposed strict liability for failure to comply with various statutory abortion requirements).

The Acts, therefore, violate Plaintiffs' fundamental right to due process under the Montana Constitution, article II, section 17.

V. CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' motion, declare both the Notice Act and the Consent Act unconstitutional, and enter a permanent injunction against their enforcement.

Respectfully submitted this __ day of December, 2016.

Tanis M. Holm
Crist, Krogh & Nord, LLC
2708 First Avenue North,
Suite 300
Billings, Montana 59101
(406) 255-0400

Alice Clapman*
Richard Muniz*
Planned Parenthood
Federation of America
1110 Vermont Ave. NW,

Suite 300
Washington, DC 20005
(212) 973-4800

Attorneys for Plaintiffs

* Admitted to appear *Pro Hac Vice*

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served by Email and Regular Mail, postage prepaid, on the following interested parties this _____ day of December, 2016.

Timothy C. Fox
Dale Schowengerdt
Patrick M. Risken
Montana Attorney General's Office
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

_____
Crist, Krogh, & Nord, PLLC, Secretary

APPENDIX E

TIMOTHY C. FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
PATRICK M. RISKEN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620 1401
Phone: (406) 444-2026
Fax: (406) 444-3549
dales@mt.gov
prisken@mt.gov

COUNSEL FOR THE STATE

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, v. STATE OF MONTANA and TIM FOX, ATTORNEY GENERAL	Cause No. BDV-2013-407 **Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment**

OF MONTANA, in his official capacity, and his agents and successors, Defendants.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

Planned Parenthood would have this Court believe that the Constitution grants minors all the fundamental rights that it grants adults, but that is wrong. The Constitution expressly limits the rights of minors: they have "all the fundamental rights of this Article unless specifically precluded by laws which enhance the[ir] protection." Mont. Const, art. II, §15. Thus, under the Constitution's express language, the Legislature is authorized to enact laws that enhance the protection of minors, and these enactments do not intrude upon a minor's constitutional rights; rather, they are part and parcel of the rights that minors have.

To be clear, this case is not about the constitutionality of abortion. It is not about whether a minor has a right to an abortion. And, contrary to Planned Parenthood's spin, this is not a case involving the infringement of fundamental rights and various levels of constitutional scrutiny. The issue in this case is simply whether the Legislature can require a minor child to obtain parental consent before having an abortion. Stated differently, the issue is whether a law requiring parental involvement before having an abortion is a law that enhances the protection of minors. If it is, then it is constitutional under Mont. Const, art. II, § 15. As set forth below, parental consent enhances the protection of minors by protecting minors from victimization by sexual predators, protecting them from psychological and medical complications, and protecting them from making a rash decision because of their undeveloped decision-making capacity, which the Montana

Supreme Court has already recognized as a matter of law* They also protect the integrity of the family and the rights of parents to protect and foster the best interests of their children. This Court should deny Planned Parenthood's motion for summary judgment.

I. Planned Parenthood misunderstands the standard under Article II, Section 15, which grants the Legislature authority to pass laws protecting minors.

The United States Supreme Court has repeatedly rejected arguments against Parental Involvement Laws like Montana's. To distance itself from these cases, Planned Parenthood stakes its case on the argument that it should win here because the Montana Constitution's right to privacy is sometimes more rigorously applied than the federal right to privacy. *See,* e.g., PPMT Summ. J. Br. at 11-14. But Planned Parenthood ignores that that all of the cases that it cites to support its arguments, such as *Armstrong* and *Gryczan,* involved adults, not minors. And that makes all the difference.

The plain language of Article II, Section 15 provides that "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article *unless specifically precluded by laws which enhance the protection of such persons."* (Emphasis added.) The Montana Supreme Court has repeatedly upheld the State's authority to enact law's that limit minors' rights for their protection. And in the seminal decision interpreting Article II, Section 15, which Planned Parenthood barely mentions, the Court explains why: "[T]he interests of minors and adults are

quantitatively different because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing? *In re C.H.,* 210 Mont. 184, 202-03, 683 P.2d 931 (1984). Thus, Article II, Section 15 explicitly authorizes the Legislature to enact laws that enhance a minor's protection, even though similar laws applied to adults would surely be unconstitutional. *Ibid,* (noting that the "'constitutional rights of children may conflict with their fundamental rights"). In short, the Court has long recognized that "the State's interests in protecting children may conflict with their fundamental rights? *Ibid.*

Despite this precedent, Planned Parenthood attempts to recast this provision as "expressly limit [ing] the State's power to single out minors for legal restrictions." Pls. Summ. J. Br. at 13. It cites no cases to support that argument, which is no surprise, given that the Montana Supreme Court has invalidated a law under Article II, Section 15 only once, in an obvious case that sentenced juvenile offenders twice, both as adults *and* juveniles. *See, In re S.L.M.,* 287 Mont. 23, 26, 951 P.2d 1.365, 1367 (1997).

So while the Montana Constitution's privacy right may sometimes be more protective than the federal right, it is beside the point in this case because the Delegates to the 1972 Constitutional Convention sought to give the Legislature explicit authority to limit minors' rights for their own protection. And the Delegates specifically sought to incorporate federal Supreme Court precedent in how a minor's rights are balanced. *See,* State's Open. Summ. J. Br. at 6-7 (the

Delegates cited the United State® Supreme Court's precedent concerning parental involvement in abortion laws to describe the motivation and breadth of Article IL Section 15). As Justice Stevens has described:

> The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe v. Wade,* 410 U.S. 113 (1973) that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

L. v. Matheson, 450 U.S. 398, 421-24 (1981) (Stevens, J, concurring).

Thus. Planned Parenthood's argument that strict scrutiny is required for their due process and equal protection claims misses the point. The dispositive question here is whether the parental involvement laws enhance the protection of minors. Rights that are subject to rigorous strict scrutiny in the context of adults, are subject to a balancing test when it comes to minors. *In re C.H.,* 210 Mont, at 184, 683 P.2d at 941 ('we hold that a juvenile's right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated").

It could hardly be otherwise, since Montana law often limits the rights of minors in multiple ways that would be intolerable for adults. *See, e.g.* State's Summ. J. Br. at 8 9; *see also* Mont. Code Ann. § 45-8-206 (free speech right to purchase obscenity); Mont. Code Ann. § 7-32-2306 (curfew for minors); Mont. Code Ann. § 13-1-111 (suffrage); Mont. Code Ann. § 45-5-502 (competence to consent to sexual intercourse); Mont. Code Ann. § 40-1-213 (right to many). The existence of these laws, which are ubiquitous and have never even been challenged, enlightens the practical understanding of Article II, Section 15.

In sum. this Court should analyze Planned Parenthood's due process and equal protection claims through Article II. Section 15—not as separate claims subject to standard strict scrutiny. But even if they were viewed under standard strict scrutiny, the State should still win because its interests in protecting minors is compelling and the law' is carefully tailored to advance those interests.

II. Planned Parenthood's attempt to undermine the State's interests lacks persuasive support.

Planned Parenthood addresses only some of the State's interests, ignoring the Legislative history and the Legislature's statements of purpose in support of the law. Pls. Summ. J. Br. at 1.6; *cf.* Mont Code Ann. § 50-20-502. But even those arguments lack persuasive support.

Planned Parenthood relies primarily on and unpublished and unreviewed 18-y ear-old district

court decision in *Wicklund v. State,* 1999 Mont. Dist. LEXIS 1116, to support its arguments that all parental involvement laws in Montana are unconstitutional. As the Montana Supreme Court has noted regarding its own decisions, unpublished opinions "are unpublished for a reason." *State v. Oie*, 2007 MT 328, ¶ 16, 174 P.3d 937, 939. They cannot even be cited as precedent to the Supreme Court, and thus have no weight beyond the particular case decided. *Ibid.*

Beyond that, *Wicklund* analyzed a different law, as the Montana Supreme Court has already explicitly recognized. *Planned Parenthood v. State,* 2015 MT 31, If 22, 378 Mont. 151, 157, 342 P.3d 684, 688. It also relied on outdated facts to support the decision. Planned Parenthood makes the same errors in its summary judgment brief, especially in regard to the decision-making capacity of minors, the psychological and medical impacts of abortion, and the State's authority to require parental involvement for abortion but not pregnancy related medical decisions.

1. Minors have diminished decision making capacity.

Planned Parenthood cites *Wicklund* to argue that "studies show that adolescents are as competent as adults in considering abortion." *Wicklund,* 1999 Mont, Dist. LEXIS, *21. Even if there was data to support that startling conclusion in 1.999, there certainly is not today. Indeed, Planned Parenthood's own expert, Dr. Bonnie Halper-Felsher, has recognized that "adolescents' and adults' decision-making competence differs, with adults outperforming adolescents," Defs. Statement of Undisputed Facts (SOF) 61, She also

notes that adults are more likely to consider the risks and benefits of a decision, seek advice, and consider long-term consequences. SOF 62-64, She further notes that adolescents are much more likely to make spontaneous decisions and much less likely to "seek second opinions when appropriate." SOF 64-65; see *generally* SOF 51-73. The State's experts agree. Expert Report of Dr. Eileen Ryan at 3-11, *Ris ken Deck,* Ex. 29; Expert Report of Dr. Jane Anderson at 1-10, *Risken Deck,* Ex. 30.

The Montana Supreme Court has also flatly rejected that adolescents are as competent in their decision-making as adults, establishing that fact as a matter of law in Montana. *In re C.H.,* at 202. As noted above, the purpose of Article II, Section 15 is to allow the Legislature to protect minors from their own immaturity. See Section I, supra; *In re C.H.,* at 203. The United States Supreme Court has recognized the same principle. *Bellotti v. Baird,* 443 U.S. 622. 63 7 (1979) ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to. or involvement in, important decisions by minors.").

As the State detailed in its opening brief, a minor's diminished decision-making capacity is well-established in Montana as a matter of law, and clearly supports the State's authority to protect minors through Parental Involvement Laws, *See* State's Open, Summ. J, Br. at 21-24.

2. Minors who have had an abortion are at heightened risk of psychological disturbance and medical complications.

Planned Parenthood also cites *Wicklund's* finding that "in general, adolescents show no substantial psychological effects from abortion?' 1999 Mont. Dist. LEXIS 1116, at *21; Pls. Summ. J. Br. at 17* That view, whatever its support at the time, has proven grossly incorrect. As the State noted in its opening brief, the risk of mental health consequences after an abortion are far higher—often double—that of minors who are not pregnant or who are pregnant and carry their child to term. State's Open. Br. at 15-18. *See also,* SOF 3-7. The Supreme Court has recognized that fact* *L.* u* *Matheson,* 450 U.S. 398, 411 (1981); *Gonzales v. Carhart.* 5 50 U.S. 12 4. 15 9 (2007) (finding that "[s] eve re depression and loss of esteem can follow" abortion).

To be clear, the State is not arguing that abortion *causes* psychological problems for minors, but simply noting that the evidence establishes that minors who have had abortions are much more susceptible to these problems. It may very well be that minors were already susceptible to psychological problems and the abortion triggered or contributed to the psychological disturbance. For example, Planned Parenthood's expert notes that women with mental health disorders are more likely to choose abortion than women without mental health disorders, SOF 10. The bottom line, though, is that the incidence of psychological disturbance is far higher, whatever the reason or cause. Planned Parenthood does not pre-screen or ask any questions about mental health history. SOF 15, 26, 27. Nor do they do any mental health evaluation follow-up. SOF 35. Indeed, they flatly admit that abortion "require [es] little follow-up from the patient." Pls. Summ. J. Br. at 5. If that is the case with

Planned Parenthood, then it is reasonable to assume the same holds true with other abortion providers.

There are also serious medical complications that can arise from abortion, which a minor may be unable to discern on their own. State's Open. Summ. J. Br. at 19-21. The proponents of the Parental Consent Law specifically described the dangers and complications that can arise from an abortion, including hemorrhaging, infection, and even death, and they pointed out that parents "have the most knowledge of their child's medical history, including possible drug allergies, prior illnesses, and other health conditions" *2012 Voter Information. Guide* at 6. On this point, legislators heard from Carol Kolar, a Certified Nurse Midwife with 30 years of experience, who testified that young girls are often not familiar with their family history or medical history, including allergies to medicine. She further testified that abortion carries medical risks that parents may not be able to identify if they don't know about the abortion. For example. Kolar stated that the parents of a girl who exhibits a high fever from an infection following an abortion might think the girl is simply ill, rather than experiencing septic infection that requires immediate medical attention. Mont. H. Jud. Comm., *Hearing on. HB 391,* 63rd Reg. Sess. (Feb. 15, 2013), 46:10-47:10 (testimony of Carol Kolar). Similarly, parents could mistake heavy bleeding for a heavy period rather than severe hemorrhaging following the procedure. *Id.; see also* SOF 25, 31-35.

And although there may be medical complications from birth, minors do not (and cannot) conceal the birth of a child from their parents. They do, however,

conceal a decision to have an abortion. Thus, parental involvement is important to recognize post-abortion complications as well as provide medical staff with the minor's medical history.

Moreover, the doctor performing the abortion is in a poor place to recognize any mental disturbance, since the doctor spends very little time with each patient and has nothing to do with following up with the patient. SOF 30. Thus, the Supreme Court has recognized that;[i]t seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.) *Bellotti v. Baird,* 443 U.S. 622, 641 (1979).

3. The State's interests are not undermined simply because it does not require parental involvement in medical decisions concerning pregnancy.

Planned Parenthood also cites *Wicklund* to support its contention that the State cannot require parental involvement in the abortion decision if it does not make a similar requirement for decisions related to carrying the child to term. The argument fails for at least four reasons.

First, a minor's decision whether to have an abortion is not commensurate with other pregnancy decisions. Once a minor becomes pregnant, she will need medical care, and the decisions to be made at that point are generally routine. None of the decisions related to pregnancy care can be equated with the decision to altogether terminate the pregnancy. In

other words, Planned Parenthood is setting up a false comparison, which is precisely what the United States Supreme Court has recognized in rejecting the same argument.

> Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carriers the child to term. But a state's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes. Cf. *Maher v. Boe,* 43 2 U.S. 464, 473-474 (1977). If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

L. v. Matheson., 450 U.S. 398, 412-13 (1981).

Second, the much higher incidents of psychological disturbance that follow abortion than carrying a child to term for minors is sufficient reason to treat abortion different than pregnancy related care. As noted. 78.6 percent of minors experience psychological disturbance following an abortion, while only 35.7 percent of minors who carry the child to term experience psychological disturbance, which is proportionate to incidence among the general population of minors. State's Open. Summ. J. Br. at 17; *Risken Declaration,* Ex. 4, D.M. Fergusson. L.J. Horwood, and E.M. Ridder. *"Abortion in Young Women and Subsequent Mental Health,"* Journal of Child Psychology & Psychiatry 47 (2006).

Third, the State's interest in protecting minors from sexual victimization ajustifies the parental involvement laws, but that same interest does not apply to pregnancy care. The proponents of the parental consent law noted that that parental involvement protects young girls from sexual predators who could coerce the girl into "getting a secret abortion to cover [the predators] tracks. *2012 Voter Information Guide* at 6; *see also* Mont. H. Jud. Comm., *Hearing on HB 391,* 6 3rd Reg. Sess. (Feb. 15, 2013), 41:24-44:00 (testimony of Laura D'Esterre); *see also* State's Open. Br. at 10-14. Planned Parenthood altogether ignores this substantial State interest, and can make no argument that the same interest applies to minors seeking pregnancy care. There is no risk that sexual predators are taking minors in for pregnancy care so that the minors' parents will not discover the abuse.

Fourth, most minors will not voluntarily involve their parents in the decision to have an abortion absent parental involvement laws because of unrealistic fears about what their parents' reactions will be.[1] But there is no evidence that minors similarly conceal pregnancy care. A pregnancy will eventually

---

[1] Planned Parenthood inexplicably claims that most minors *do* voluntarily involve parents in their abortion decision. But Planned Parenthood's expert acknowledged that she had erred in making that representation, and agreed that the study she cited for the proposition noted that only 45% of minors voluntarily told their parents. Pinto Dep. 26:11-31:4, Risken Deel. Ex. 10; see Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors Abortion* Decisions, Family Planning Perspectives, Vol. 24, No, 5 199-200 Table 3, *Risken Deci., Ex. 13.*

manifest itself, and it makes no sense for the minor to hide that she is receiving care.

Most states require parental involvement in a minor's abortion decision. But Planned Parenthood has not identified any state that requires parental involvement in medical decisions for pregnancy care in carrying to term. That is because, as the United States Supreme Court recognized, the decisions are not equivalent. *Matheson,* 450 U.S. at 412'13.[2]

III. Planned Parenthood mischaracterizes Montana's simplified judicial waiver process.

Planned Parenthood attempts to analogize Montana's parental involvement laws to Alaska's, which the Alaska Supreme Court recently struck down as unconstitutional. But the laws are significantly different, and the comparison serves to demonstrate why Montana s laws should easily pass constitutional muster.

Alaska's parental involvement law was described as "one of the most restrictive parental notification laws in the country." *Planned Parenthood of the Great Northwest v. Alaska.* 37 5 P.3d 1122, 1146 (Alaska 2016) (C.J., Fabe, concurring). One reason it was considered so restrictive is that it required a minor to prove that she met the burden for a judicial waiver by "clear and convincing evidence" Alaska's Chief Justice described that burden as having "real, significant

---

[2] For this reason, the classes are not similarly situated. "If the classes are not similarly situated, then ... it is not necessary for us to analyze the challenge further." *Kershaw v. Dept, of Transportation*, 2011 MT 170, ¶ 17. 361 Mont. 215, 257 P, 3d 358.

impact on these cases" because in some cases "the higher standard of proof will place the risk of erroneous factfinding on the child." *Planned Parenthood of the Great Northwest,* 375 P.3d at 1149. "The 'clear and convincing' requirement of the Parental Notification Law would require that a trial court deny a judicial bypass to some minors even if it finds that they are *likely* (though not clearly and convincingly) sufficiently mature, or victims of abuse, or best served by the bypass," *Id.*

Montana's parental involvement laws require the much lower preponderance of the evidence standard. *Planned Parenthood v. State,* 2015 MT 31. ¶ 22, 3 78 Mont. 151,157, 342 P.3d 684, 688. The previous parental notification law at issue in *Wickiund,* however, required clear and convincing evidence, just as Alaska's did. *Id.* As the Montana Supreme Court noted, the change is "significant" and makes the judicial waiver process much more simplified and easy to navigate.

A second significant distinction is that Alaska had a requirement that a minor detail abuse in a notarized statement to receive a judicial waiver which must be signed by a witness who has "personal knowledge of the abuse." AS 18.16.020(a)(4). As the concurrence stated, "the requirements of the law clash with the realities of a pregnant minor who has been abused by a parent yet must seek corroborating evidence from her own family or a government official to prove it." *Id. at* 1149. Planned Parenthood's child psychology expert, Dr. Suzanne Pinto, who also testified in the Alaska case, described How difficult it would be for a minor to both disclose the abuse in a notarized

statement and then have a witness testify to it. Pinto Dep., Ex. 5, ¶¶12-13.

Montana's requirement bears no similarity to Alaska's. In fact, the law simply requires that "if the court finds" that there is evidence of abuse, that the minor is competent to decide to have the abortion, or that it is in her best interests, the court must grant the waiver. Mont. Code Ann. §§ 50-20-232(4); (5)(a-b). Thus, a minor could simply discuss the abuse with her physician, who could then submit a confidential affidavit to the court. There is no requirement that the minor even testify. The court simply has to be convinced, by a preponderance of the evidence, that there is evidence of abuse. Montana s judicial bypass is substantially easier to navigate and provides a more reasonable approach for a minor who has been abused. In fact, Dr. Pinto, Planned Parenthood's child psychology expert, testified that she would support the type of bypass that Montana has. Pinto Dep., 53:443; Alaska Report, Pinto Dep., Ex. 5, ¶ 2.

Planned Parenthood's arguments against Montana's judicial waiver option demonstrates it either misunderstands the law or is simply wrong about how it functions. For example, Planned Parenthood argues that Montana s law applies regardless of the minor's maturity. Pls. Summ. J. Br. at 24. Planned Parenthood is wrong. In fact, one basis for the bypass is if the minor is competent to decide herself whether to have an abortion. Mont. Code Ann. §§ 50-20-232(4), -509(4). Indeed, Planned Parenthood was involved in a judicial bypass proceeding in which the Montana Supreme Court granted the bypass on

the basis of the minor's maturity. *Risken Decl.* Ex. 2, at 8 (FILED UNDER SEAL).

Planned Parenthood also alleges that the law may cause such a delay that abortion is no longer an option. But neither Planned Parenthood nor their experts cite a single example of that actually happening. Montana's judicial waiver process is designed to be extremely expedient, as in the case in which Planned Parenthood was involved demonstrates. SOF 84-87; Mont. Code Ann. § 50-20-509(3) (petition for judicial waiver must take priority over pending matters); § 50-20-232(8) (appeals to the Montana Supreme Court are expedited and confidential). Rather than being delayed by the Parental Involvement Laws, Planned Parenthood's experts have testified that minors delay the abortion decision based on their own immaturity and their desire to pretend that they are not actually pregnant. Pinto, SOF 55, 59.

Planned Parenthood also faults the law for not allowing the abortion doctor to determine whether the abortion is in the minor's best interests. Pls. Summ. J. Br. at 25. But the doctor is not in a place to make the determination since he spends on average a mere fifteen minutes with each patient. SOF 30. All of the informed consent and preparation of the patient is done by Planned Parenthood's "back office" non-physician staff. SOF 22-29. And if the doctor believes that it is in the minor's best interest, he or she can submit an affidavit detailing why.

Finally, Planned Parenthood's complaint that the Parental Involvement laws do not allow anyone other than a parent or guardian to provide consent shows

that it altogether misses the laws' point. Pls. Summ. J. Br. at 25. As described, the laws are designed in part to protect minors from sexual victimization. If someone other than a parent is able to be give consent to the abortion, the law would easily be evaded by, for example, the person perpetrating the abuse.

That is also why the State requires notarized consent, not just mere notice, because abusers can easily circumvent a notice law. Take, for example, the case *Roe v. Planned Parenthood of Southeast Region of Ohio,* 912 N.E.2d 61, 64-65 (Ohio 2009). There, a 13-year-old girl was raped and impregnated by her 21-year old soccer coach. Because Ohio only required notice to a parent, rather than consent, the soccer coach was able to circumvent the law by instructing the victim to give his cell phone rather than the minor's father's when she sought an abortion. *Id.* His scheme worked, and he continued to abuse the minor until a teacher at the school became suspicious and contacted the police. *Id.* The teacher was ultimately charged with seven counts of sexual battery. *Id.*

Requiring a parent's consent best protects the minor from being further victimized by abusers. But Montana has a very straightforward and easily navigable judicial waiver process for minors who need it.

IV. The Parental Involvement Laws do not give parents a veto power because the judicial waiver protects minors who cannot consult their parents.

Planned Parenthood argues that the Parental Involvement Laws give parents a 'Veto" power over

the minor's abortion decision, and that the laws will threaten minor's safety. But the evidence does not support Planned Parenthood's arguments. Parents do not have a veto power over a minor's abortion decision because minors always have the option to seek a judicial waiver. But that does not mean that the decision should not be made with consultation with a parent, where possible. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision, *Planned Parenthood* o, *Danforth,* 428 U.S. 52, 74 (1976), it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota,* 4 9 7 U.S. 417, 444-45 (199 0). The Court has thus held that a judicial waiver process like Montana's protects a minor from being subject to a parent's veto. *Id.*

Moreover, Planned Parenthood's unsupported allegations that minors will be subject to abuse because of the parental involvement laws ignores reality. Although minors may fear that their parents will react poorly, studies show that seldom actually happens. For example, a leading study reports that 55 percent of minors thought that parents would be angry with them, 18 percent thought that parents would make them leave home, 14 percent feared that parents would force them to have the baby, and 6 percent feared that they would be beaten. *Henshaw,* Table 5, *Ris ken Heel,* Ex. 13. But the reality was much different. A statistically insignificant percentage, meaning .5 percent or less, actually suffered physical abuse or were forced to leave home. None reported being forced to have the baby. Even Planned Parenthood's expert testified that minors

"have an exaggerated fear of the reactions of authority figures, especially their parents, to unexpected and unwelcome news." SOF 58.

But Planned Parenthood attempts to leverage those *fears* as a basis to declare the laws unconstitutional. That makes no sense, and Planned Parenthood's arguments are notably lacking any factual support. For example, Planned Parenthood gives no concrete examples of minors being forced to leave home, being forced to have a child, or being abused after telling a parent about their pregnancy, or attempting to self-induce an abortion rather than telling their parents. *See* Pls. Summ. J. Br. at 19. Their experts could not cite any concrete examples either. The lack of any concrete examples is significant, given that a majority of the states have had these laws in place for decades. If examples existed, Planned Parenthood would be able to cite them. Fear mongering is not evidence.

It certainly does not support undermining the integrity of the family or discounting the parental rights at issue in parental involvement laws, even if some parents may respond poorly. For minors in that situation, a judicial waiver is always an option. But as the United States Supreme Court has recognized, that some parents may not respond ideally to the news that their minor daughter is pregnant is not sufficient reason to declare all such laws unconstitutional. "That some parents 'may at times be acting against the best interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Hodgson v. Minnesota.,* 497 U.S. at 494-95. Indeed,

although Planned Parenthood tends to belittle the rights of parents to be involved in their children's abortion decision, the Supreme Court has recognized that the right has both constitutional and commonsense proportions:

> But an additional and more important justification for state deference to parental control over children is that "[the] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters.* 268 U.S. 510, 535 (1925). "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 23 3 (1972). This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

Bellotti v. Baird, 443 U.S. at 637-38.

There is no doubt that some cases may be tougher than others. A minor who is nearly 18 may be more competent than a 15-year-old in deciding whether to have an abortion without parental involvement. But the judicial bypass recognizes that fact, and the courts take into account age and maturity in deciding to grant a bypass. Thus, someone who is almost 18 would have a lighter burden to prove that she is sufficiently well-informed and mature to decide herself.

In sum, Montana's well-crafted judicial waiver sufficiently protects minors who are unable to consult their parents, which fully complies with the constitutional standard that the United States Supreme Court has developed.

V. The laws are not vague and give fair warning on how to comply with them.

Planned Parenthood argues that the parental involvement statutes' imposition of strict liability violates due process because, as Planned Parenthood sees it, the laws act as a "trap for those who act in good faith." Pls. Summ. J. Br. at 28. They complain that requiring "reasonable effort" in complying with the law is vague, that the doctor may be liable for incorrectly believing that a minor is an adult or incorrectly giving notice to a non-parent.

Laws are not supposed to be written like mathematical rules. *State v. Dixon,* 2000 MT 82, ¶ 21, 299 Mont. 165, 998 P.2d 544. "[I]f the challenged statute is reasonably clear in its application to the conduct of the person bringing the challenge, it cannot be stricken on its face for vagueness." *State v. Nye,* 283 Mont. 505, 943 P.2d 96 (1997). Thus, to comply with due process they must simply give fair warning as to how to comply with them. *Dixon,* ¶ 20. The Legislature need not define every term it employs when constructing a statute. *Dixon,* ¶ 21. Montana's parental involvement laws, which mirror similar laws in other states that have never been found to violate due process, give plenty of guidance in how to comply.

As an initial matter, Planned Parenthood has an insurmountable burden to prove vagueness because

the laws have yet to be applied so their challenge is to the statutes' facial constitutionality. "In order to prevail on their facial challenges, Plaintiffs must show that 'no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications." *Montana Cannabis Industry v. State,* 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 (2008)); *see also United States v. Salerno,* 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.")

If that were not enough, that burden is on top of the laws' presumptive constitutionality, "All statutes carry with them a presumption of constitutionality and it is the duty of the courts to construe statutes narrowly to avoid an unconstitutional interpretation if possible." *State v. Lilburn,* 265 Mont. 258, 266, 875 P.2d 1036 (1994). Planned Parenthood has the burden of proving the statute is unconstitutional in all its applications beyond reasonable doubt. *State v. Martel,* 273 Mont. 143, 148, 902 P.2d 14, 17 (1995).

Here, Planned Parenthood's series of hypotheticals does not overcome its burden to prove that the law is unconstitutional even in those hypotheticals, much less in all its applications. For example, if there is a question about whether the patient is a minor. Planned Parenthood's physician should simply use "reasonable effort" to determine her age. Or, better, yet, that information could be provided by the patient

at her first visit to the clinic. Moreover, the doctor is not going to be in a position of giving notice or obtaining consent from a non-parent or non-guardian because the law requires that he or she obtain proof of parentage or guardianship. *See, e.g.,* Mont. Code Ann. § 50-20-506(1) (requiring that the parent or legal guardian provide the physician with proof of identity and documentation establishing that he or she is the parent or guardian of the minor).

Planned Parenthood cites *Calautti v. Franklin,* 439 U.S, 379, 395 (1979), to argue that the abortion restriction in that case is similar to Montana's Parental Involvement Laws. But the Pennsylvania statute there imposed strict liability on a doctor for performing an abortion after viability. The Court found that the law was unconstitutionally vague because of the "uncertainty of the viability determination itself." *Ibid,* In other words, no one could define precisely when a fetus became viable, thus it was unconstitutional to penalize the doctor for performing an abortion after that point. There is no analogy in this case.

Further, it is not uncommon for laws to require professionals and others to obtain basic information such as patient age. For example, it is illegal to sell alcohol to a person "under 21 years of age (Mont. Code Ann. § 16-6-305) or "apparently under the influence" (Mont. Code Ann. § 16-6-304), or to invite a minor into a "public place where an alcoholic beverage is sold" (Mont. Code Ann. § 16-6-305). Those laws impose strict liability, just like the parental involvement laws, and require that those selling alcohol make basic, reasonable determinations about patron's age.

The parental involvement laws' requirement that physicians use "reasonable effort" to comply with the laws' basic demands is not vague and thus does not violate due process.

CONCLUSION

For the foregoing reasons and those in the State's brief in support of its motion for summary judgment, the State respectfully requests that the Court deny Planned Parenthood's motion for summary judgment and grant the State's.

DATED this 17th day of February, 2017.

TIMOTHY C. FOX
Montana Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
DALE SCHOWENGERDT
Solicitor General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document to counsel for the Plaintiffs via regular mail, postage pre-paid.

Ms. Tanis M. Holm
Mr. Eric E. Holm

Ms. Alice Clapman

Sather & Holm, PLLC
2301 Montana Ave., Ste. 202
PO Box 1115
Billings, MT 59103
tanis@satherandholm.com
eric@satherandholm.com

Dated: February 17, 2017

Planned Parenthood Federation of America
1110 Vermont Ave NW, Ste. 300
Washington, DC 20005
alice.clampan@ppfa.org
Richard.muniz@ppfa.org

_____
Aleisha Solem
Paralegal

APPENDIX F

Tanis M. Holm
Eric E. Holm
SATHER & HOLM, PLLC
2301 Montana Avenue, Ste. 202
Billings, Montana 59103
Telephone: (406) 294-1700
Facsimile: (406) 794-0673
tanis@satherandholm.com
eric@satherandholm.com

Alice Clapman
Richard Muniz
Planned Parenthood Federation of America
1110 Vermont Ave, NW, Suite 300
Washington, DC 20005
Telephone: (202) 973-4800
alice.clapman@ppfa.org
richard.muniz@ppfa.org

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs,	)	Cause No. DDV-2013-407 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

vs.	)
	)
STATE OF MONTANA and TIM FOX, ATTORNEY GENERAL OF MONTANA, in his official capacity, and his agents and successors,	)
	)
Defendants.	)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In their memorandum in support of their motion for summary judgment, Plaintiffs demonstrated that Montana's continuing efforts to single out abortion from all other reproductive healthcare and require minors to involve a parent before obtaining this care violates rights guaranteed to their minor patients by the Montana Constitution. In particular, the challenged Acts violate the Equal Protection, Privacy, and Minors' Rights Clauses because, based on undisputed evidence, they create distinctions among pregnant minors and impose burdens on one class of these minors that are not narrowly tailored to any compelling state interest.

Defendants respond by minimizing the constitutional rights at issue, reducing these rights to the federal standard or to a novel "balancing test," and arguing that the State can protect minors from their own immaturity "as a matter of law," with minimal judicial oversight. Notably, Defendants devote more space to federal case law applying a lower standard of review than to Montana case law, and do not even *reference* the Privacy and Equal Protection Clauses. Defendants also misrepresent critical record facts, and assert "facts" with no citation to the record, in an effort to show that the Acts meet their invented balancing test. For the reasons set forth below, nothing in Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment ("Defs.' Opp. Br.") calls into question the evidence and arguments Plaintiffs have presented, and this Court should grant Plaintiffs' Motion for Summary Judgment in full.

I. Defendants Misrepresent Key Facts and "Dispute" Other Facts Without Evidence

As in their brief in support of their motion for summary judgment, Defendants continue to misrepresent key facts. For example, they continue to deny, in the face of their own experts' concessions and other evidence, that even without parental involvement laws, in most cases, parents know of their daughter's pregnancy and plan to terminate her pregnancy. *But see* Pls.' Resp. to Defs.' Mot. for Summ. J. 8-9 ("Pls.' Opp. Br."); Pls.' Sealed Resp. to Defs.' Statement of Undisputed Facts ¶ 20 ("Pls.' Resp. to Defs.' Facts").[1] That most minors voluntarily involve their parents is so widely accepted that the American Academy of Pediatrics cited this fact in their policy statement against mandated parental involvement. *See* Ex. D-l, Pls.' Statement of Undisputed Facts ("Pls.' Facts"), Ctr. for Adolescent Health & the Law, Pol'y Compendium on Confidential Health Servs. for Adolescents 62 (Madlyn C. Morreale et al. eds., 2d. ed. 2005). This fact alone critically undermines

[1] As Plaintiffs' earlier filings explained, Defendants: 1) seize on and misrepresent one inconclusive study, Henshaw & Kost (1992), which provides *no data one way or the other* as to whether a majority of minors voluntarily involve their parent; 2) ignore other studies that (as one of their experts conceded) more clearly reflect that a majority of minors (indeed as many as 77%) *tell* their parents. At any rate, even the Henshaw study shows that, absent a parental involvement law, a majority of parents (61%) *know* about their daughter's pregnancy and abortion (which is what the notice law requires). It also clearly reflects that a majority of younger minors *tell* their parents. *See* Pls.' Opp. Br. 14 n.3 (discussing Ex. 6, Deci, of Patrick M. Risken re Pls.' Mot. for Summ. J.— Expert Witnesses ("Risken Deci."), Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions,* 24 Fam. Plan. Persps. 196 (1992)).

Defendants' arguments; the pool of minors who could theoretically benefit from the Acts is far smaller, and far less likely to actually benefit, than Defendants acknowledge.

Defendants also pretend that all harms caused by mandatory involvement are avoidable because "a judicial waiver is always an option" and is not burdensome, even for abused minors. *See, e.g,* Defs.' Opp. Br. 16,21. In so doing, they ignore record evidence that minors face a variety of obvious difficulties applying for a bypass without their parents' finding out—including confusion about the process, limited transportation, limited time free from school and other obligations, a limited time window in which to conceal a pregnancy, and tight parental control (especially if parents are abusive). Pls.' Facts ¶¶ 82-84. They ignore that, even when minors are able to navigate the bypass successfully, the process delays them, exposing them to medical and other risks. *Id.* K 85-89. They also ignore the distress and, in some cases trauma, that some minors will suffer when forced to testify in support of their bypass application. *Id* ¶ 77—79.

With respect to abused minors, Defendants go even further, denying that minors will even have to testify in order to obtain a judicial waiver.[2] Defendants

---

[2] Defendants also deny that abuse occurs on any significant scale. But unrebutted evidence indicates that it does. *See* Ex. M-l, Pls.' Facts, Expert Rep. of Dr. Suzanne Pinto ¶ 2 ("Pinto Rep."); Pinto Dep. 21:21-24; Risken Deci., Ex. 10, Pinto Dep. 24:12-18; Ex. 25, Pls.' Reply to Defs.' Resp. to Pls.' Statement of Undisputed Facts ("Pls.' Reply to Defs.' Resp. to Pls.' Facts"), Pinto Dep. 33:6-34:11. Nor does the Henshaw study Defendants reference at Defs.' Opp. Br. 19-20 show otherwise. Henshaw

assure this Court that "a minor could simply discuss the abuse with her physician, who could then submit a confidential affidavit to the court." Defs.' Opp. Br. 16[3] There are no facts to support this assurance; Defendants offer no examples from other states of bypasses that operate in this manner, and all the record evidence indicates that the Acts *would* force abused minors to testify in court Indeed, in the only two bypasses that are known to have taken place in Montana, the court held a hearing both times.[4]

---

examines parental reactions in states with no parental involvement law, among parents who were *told by* their daughter (or, in far fewer cases, who found out from the clinic or from some other source, often with their daughter's permission). It is not surprising that this group would have a low incidence of violent response, since most pregnant minors who fear abuse will actively hide their pregnancy from their parents (with help from their medical provider and others). Henshaw's findings say nothing about the incidence of family abuse among minors who seek to hide a pregnancy. *See* Ex. 19, Pls.' Rep. to Defs.' Resp. to Pls.' Facts, Anderson Dep. 134:3-19 (conceding that Henshaw data could simply "reflect that the minors who told their parents voluntarily had a closer relationship with their parents and knew that their parents would respond better").

[3] At the same time that Defendants suggest that a bypass judge could, in every case, just take a physician's affidavit as truth, they justify Montana's burdensome law as necessary because a more a narrowly tailored law that allows a physician to proceed without parental involvement can be too "easily evaded." Defs.' Opp. Br. 18; *see, e.g,* Md. Code Ann., Health-Gen. § 20-103(c)(l) (authorizing abortion where, in physician's professional judgment, notice "may lead to physical or emotional abuse" or "would not be in the best interest of the minor").

[4] The Acts are silent on this issue: while they do not require courts to hold a hearing, they also do not direct courts to grant bypasses without a hearing.

More importantly, given that the *minor* bears the burden of proof in these proceedings and that, with every delay, her medical risks are increasing and her chances of keeping her decision confidential are diminishing, it defies common sense that any minor, however averse to testifying, would decide to take her chances by submitting her case solely on paper. In fact, Plaintiffs' expert Rita Lucido, who represents minors in Texas bypasses, testified that it would be "malpractice" for an attorney to counsel her client to take that chance. Ex. 24, Pls.' Rep. to Defs.' Resp. to Pls.' Facts, Lucido Dep. 139:13-140:21. She further testified that judges *do* question abused minors in detail about their abuse. *Id.* at 140:9-10. Thus, all the available evidence indicates that the Acts will force some, or more likely all, abused minors to testify in court.[5] As Defendants' own expert conceded, for an abused minor to have to discuss her abuse with a judge in a non-therapeutic factfinding setting is a form of "emotional violence." Pls.' Statement of Undisputed Facts ¶ 77 ("Pls.' Facts"); *see also* Ex. L, Pls.' Facts, Novakovich Dep. 74:2-5 (testifying that, in her experience accompanying clients to court to testify about abuse, they often suffer "an extreme amount of re-traumatization and shame about having to share in front of a judge information that's very personal"). The record also reflects that some abused minors will simply be unable to take this step, and therefore will be forced to notify their parents and risk escalating

[5] After inventing a fantasy bypass process that does not require the minor's involvement, Defendants claim that Plaintiffs' expert Dr. Pinto "testified that she would support the type of bypass that Montana has." Defs.' Opp. Br. 16. This egregiously misrepresents the record. *See* Pls.' Resp. to Defs.' Facts J 85.

abuse and/or cany to term. Pls.' Opp. Br. 21-22; Pls.' Resp. to Defs.' Facts ¶¶ 76,78.

In short, Defendants fail to explain how any state interest necessitates or justifies inflicting this level of harm on abused minors. And the evidence demonstrates that it does not. *See generally* Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Summ. J. Br.") 16-24. Notably, several other states have allowed abused minors to avoid the bypass, and Defendants have presented no evidence that these laws are insufficient. *Cf, e.g,* Md. Code Ann., Health-Gen. § 20-103(c)(l) (authorizing abortion where, in physician's professional judgment, notice "may lead to physical or emotional abuse" or "would not be in the best interest of the minor"); Ariz. Rev. Stat. Ann. § 36-2152(H)(1) (incest and sexual abuse exceptions); Colo. Rev. Stat. Ann. § 12-37.5-105(l)(b) (abuse and neglect exceptions); Idaho Code Ann. § 18-609A(7)(a) (rape and incest exceptions); 750 Ill. Comp. Stat. Ann. 70/20(4) (sexual abuse, neglect, and physical abuse exceptions); Iowa Code Ann. § 135L.3(4)-(5) (child abuse and sexual abuse exceptions); Minn. Stat. Ann. § 144.343(4)(c) (abuse and neglect exceptions); Neb. Rev. Stat. Ann. § 71-6902.01 (abuse exception); S.C. Code Ann. § 44-41-30(D) (incest exception); Va. Code Ann. § 16.1-241 (abuse and neglect exceptions); Wis. Stat. Ann. § 48.375(4)(b) (exceptions for rape, psychiatric emergency, abuse or incest).

In addition to misrepresenting these facts about the bypass, Defendants attempt to "dispute" a number of Plaintiffs' facts by claiming that they are "argumentative" or not "universally accepted"—or, in some cases, by merely stating "disputed." *See, e.g.,*

Defs.' Resp. to Pls.' Facts ¶¶ 2-7,10-11,55,60,68-69, 78-79,85,93. They even go so far as to deny that their own experts' opinions constitutes "constitute 'undisputed facts.'" *See, e.g.,* Defs.' Resp. to Pls.' Statement of Undisputed Facts U 21-22 ("Defs.' Resp. to Pls.' Facts").[6] Yet, they offer no supporting *evidence. See, e.g.,* Defs.' Resp. to Pls.' Facts ¶¶ 3,4, 5,34. They also attempt to rely on speculative assertions by their experts unsupported by any direct experience or other evidence, but such "speculative statements by an expert are insufficient to raise a material issue of fact to defeat summary judgment." *Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indent Co.,* 2006 MT 133, ¶27,332 Mont. 352,359,137 P.3d 522,527.

Defendants' conclusory denials do not satisfy their burden of showing a genuine dispute that would foreclose summary judgment. A party opposing a motion for summary judgment must affirmatively "present material and substantial evidence to raise a genuine issue of material fact." *Hill Ciy. High Sch. Dist. No. A v. Dick Anderson Constr., Inc.,* 2017 MT 20, ¶6, 2017 WL 491783, at *2, — P.3d — (citation omitted). This means that the party must "set forth facts demonstrating that a genuine issue exists." *Minnie v. City of Roundup,* 257 Mont. 429,432,849 P.2d 212,214 (1993). "[M]ere denial, speculation, or conclusory statements" will not do. *Fasch v. MK Weeden Const., Inc.,* 2011 MT 258, ¶ 16,362 Mont. 256, 262 P.3d 1117 (internal quotation marks and citations omitted). For these reasons, Defendants have failed to call into question the material facts supporting

[6] It is particularly surprising that Defendants attempt this tactic, as elsewhere they rely on (generally mischaracterized) statements made by *Plaintiffs'* experts. *See supra* § III.

Plaintiffs' summary judgment motion. *See* Pls.' Summ. J. Br. § EH; "Pls.' Reply to Defs.' Resp. to Pls.' Facts § I.

II. Defendants Misconstrue the Montana Constitution

As Plaintiffs set forth in their opening brief, the Acts violate minor's rights guaranteed by three independent provisions of the Montana Constitution: the Equal Protection Clause, the Privacy Clause, and the Minors' Rights Clause. *See Armstrongs. State,* 1999 MT 261 ¶ 33-34,296 Mont 361,989 P.2d 364 (applying Privacy Clause); *Wicklund v. State,* Case No. ADV 97-671,1999 Mont. Dist. LEXIS 1116 at *4—7 (1st Jud. Dist. Feb. 11,1999) (Order on Summary Judgment) (all three clauses); *Planned Parenthood of Mont. v. State* No. DDV-2010-787, at *18 (1st Jud. Dist. May 4,2012) (Privacy and Minors' Rights Clause); *Jeannette R v. Ellery,* No. BDV-94-811,1995 WL 17959708, at *5-7 (Mont. Dist. Ct. May 19, 1995) (Privacy and Equal Protection Clauses); *see generally* Pls.' Summ. J. Br. 11-15. The Acts cannot withstand the strict scrutiny these provisions require because, based on undisputed evidence, they create distinctions among pregnant minors, and impose burdens on one class of these minors, that are not narrowly tailored to any compelling state interest. *Id.* at 16-24. Defendants have responded by: 1) attempting to shift this Court's focus away from binding Montana law and towards the less protective federal constitution, and 2) proposing a novel reading of the Montana Constitution that would radically restrict minors' rights. Both of these tactics are barred by precedent.

To make up for the fact that they have no actual evidence to withstand strict scrutiny, Defendants rely heavily on federal precedent allowing parental involvement laws under a lower standard of review. Defs.' Opp. Br. 13, *passim*. But while federal constitutional law allows states to treat abortion differently from other reproductive decisions because For some people [it] raises profound moral and religious concerns," *Bellotti v. Baird,* 443 U.S. 622,640 (1979) (Powell, J., concurring), the Montana Supreme Court has rejected this approach and held that it is unconstitutional—*and "morally indefensible* "—for the state to do so. *Armstrong,* ¶ 60 (striking down law, under the Montana Constitution, that had been upheld by the U.S. Supreme Court under the Federal Constitution (emphasis added)).

Based on this principle, Montana courts have repeatedly made clear that they do not follow federal precedent when applying Montana's Equal Protection Clause and Montana's Privacy Clause to laws restricting reproductive rights. *See Armstrong,* 5 33-34 (in privacy context, declining to follow federal precedent); *Wicklund,* 1999 Mont. Dist. LEXIS 1116, at *3 (striking down notice law under the Equal Protection and Privacy Clauses, while noting contrary federal district court decision); *Jeannette R,* No. BDV-94-811,1995 WL 17959708, at *6 (holding that the challenged law violated both privacy and equal protection rights, noting contrary federal constitutional precedent, and holding that nonetheless "once a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality"); *Planned Parenthood of*

Mont., No. DDV-2010-787, at *11 (same). Similarly here, this Court should reject Defendants' invitation to nullify binding precedent on Montanans' privacy and equal protection rights.

Defendants also propose a peculiar reading of the Minors' Rights Clause, which states: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protections of such persons." Mont. Const, art. II, § 15. On Defendants' proposed reading, this clause "expressly limits the rights of minors," including their rights to privacy and equal protection. Defs' Opp. Br. 1. Defendants' reading goes directly against the framers' stated purpose for this provision: to "*recognize* that persons under the age of majority have the *same* protections from governmental and majoritarian abuses as do adults," Mont. Const. Convention Proceedings vol. 2,635-36 (Mont. Legis. in cooperation with Mont. Legis. Council & Const. Convention Editing & Publ'g Comm 1981), *available at* http://courts.mt.gov/libraiy/statehood (emphasis added) (quoted in *In re S.L.M.,* 287 Mont. 23,35,951 P.2d 1365,1372-73 (1997)); *see also* Rick Applegate, Montana Constitutional Convention Studies, No. 10, Bill of Rights 12 (1972) ("[T]he issue is how the limits of adult control may be drawn so as not to infringe on the child's right to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution.") (quoted in Matthew B. Hayhurst, *Parental Notification of Abortion and Minors' Rights Under the Montana Constitution,* 58 Mont. L. Rev. 565 (1997)).

Not only did the framers add this provision to strengthen minors' rights, but they stated that "[t]he only exceptions permitted to this recognition are in cases in which rights are infringed by laws designed *and operating to* enhance the protection for such persons," Mont. Const. Convention Proceedings vol. 2 at 635 (emphasis added) and that such exceptions require a "clear showing that such protection is being enhanced." *Id.* at 636 (emphasis added). Thus, the framers made clear that good intentions were not enough, and that the State must marshal actual, clear evidence that a challenged restriction *operates* to protect minors. The framers also considered and *rejected* language that would have qualified the Minors' Rights Clause to accommodate "the demands of a proper parent-child relationship," making plain that the State may act only to protect the minor's *own* welfare, not the independent interests of her parents. *Compare* Mont. Const. Convention Proceedings vol. 1 at 166, with Mont. Const., art. II § 15 (final language of provision). Finally, when the Delegates discussed protective legislation that would be permissible under the Minors' Rights Clause, they discussed only laws of general application, such as minimum driving and drinking ages, not laws that single some minors out for greater restrictions than others. Mont. Const. Convention Proceedings, vol. 5 at 1751.

Ignoring this history. Defendants reconceive the Minors' Rights Clause as a blanket authorization to "limit minors' rights for their own protection," including by singling out particular classes of minors for restrictions. Defs.' Opp. Br. 4. They base this on the puzzling assertion that "the Delegates cited the United States Supreme Court's precedent concerning

parental involvement in abortion laws to describe the motivation and Breadth of Article n, Section 15." Defs.' Opp. Br. 4. Not only is there no record of this in the constitutional history, but it would have required clairvoyance on the part of the Delegates meeting in 1972, since as late as 1976, the United States Supreme Court was *striking down* parental involvement laws, *see Planned Parenthood of Cent. Mo. v. Danforth,* 96 S. Ct. 2831 (1976), and only later did that court begin to develop the line of cases on which Defendants rely, *see Bellotti v. Baird, 443* U.S. 622 (1979).

Defendants also base their reading of the Minors' Rights Clause on a single case, *Matter of C.H.,* 210 Mont. 184,683 P.2d 931 (1984) that they describe as "seminal" without acknowledging that it was expressly limited by the Montana Supreme Court in *S.L.M.* 287 Mont at 37,951 P.2d at 1373 (finding *C.H.'s* equal protection analysis "distinguishable"). They read *CM.* as requiring that rights that would otherwise receive strict scrutiny review, be replaced for minors with a "balancing test," a phrase nowhere used in that case. Whatever ambiguity there was in *CM.* about the proper legal analysis of constitutional claims brought by minors, the Montana Supreme Court subsequently made plain in *S.L.M.* that courts must consider each constitutional right asserted independently and that the Minors' Rights Clause itself is applied using strict scrutiny, not a balancing test. *See S.LM,* 287 Mont, at 34,951 P.2d at 1372 ("As in *Matter of CM.*... we must therefore apply a strict scrutiny analysis and determine whether there is a compelling state interest sufficient to justify such an infringement *and* whether such an infringement is

consistent with the mandates of Article II, Section 15 of the Montana Constitution." (emphasis added)); *id.* at 35,951 P.2d at 1373 ("[I]f the legislature seeks to carve exceptions to [the Minors' Rights Clause's] guarantee, it must *not only* show a *compelling state interest* but must *also show* that the exception is designed to enhance the rights of minors." (emphases added)).[7]

In addition to misreading the constitutional history and the relevant case law, Defendants seem to fundamentally misunderstand Plaintiffs' argument. Plaintiffs do not argue that the State cannot single out minors or youths as a whole for reasonable protective legislation *(e.g,* limiting their driving or drinking). Rather, Plaintiffs argue that State action is subject to strict scrutiny when it: 1) discriminates between groups of minors that, as a matter of established law, are similarly situated, *see Armstrong,* ¶ 49 ("[T]he State has no more compelling interest or constitutional justification for interfering with the exercise of [a woman's right to choose] if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term."), *Wicklund,* 1999 Mont. Dist. LEXIS, at *5 (minors carrying to term and minors terminating are similarly situated), *Jeannette R,No.* BDV-94-811,1995 WL 17959708, at *7-8 (same holding for pregnant patients generally); and 2) limits the fundamental rights of one of these groups.

To the limited extent that Defendants attempt to address some of the precedent applying strict scrutiny

---

[7] Even on a balancing test, the Acts would fail based on these facts. *See* Pls.' Summ. J. Br. 16-22.

to parental involvement laws—such as this Court's decision in *Wicklund* and the Alaska Supreme Court's recent decision striking down a parental notice law, *Planned Parenthood of the Great Northwest v. State,* 375 P.3d 1122 (Alaska 2016), and a prior decision striking down a parental consent law, *State v. Planned Parenthood of Alaska,* 171 P.3d 577 (Alaska 2007)—their attempt fails. Defendants first argue that *Wicklund* is entitled to "no weight" because, like all district court decisions, it is unpublished. Defs.' Opp. Br. 6. They rely on a Montana Supreme Court case preventing citation to a decision that the Court itself has designated an "unpublished disposition." 77 (citing *State v. Oie,* 2007 MT 328, ¶ 16,340 Mont. 205,174 P.3d 937). But as the Montana Supreme Court has explained elsewhere, what is dispositive is whether the court that *issues* the decision has specified whether it can be cited. *See McDonald v. Dep't Envtl. Quality,* 2009 MT 209, ¶ 53,351 Mont. 243,214 P.3d 749 ("[U]npublished decisions of other courts may be cited as legal authority to the extent the rules of the rendering court allow."); *see also McDermott v. Carie, LLC,* 2005 MT 293, ¶ 23,329 Mont. 295,124 P.3d 168 (citing unpublished decision). *Wicklund has* not been designated by this Court as non-citable, and the Montana Supreme Court itself, in its collateral estoppel ruling in this case, contemplated that "[w]hether a parental consent law can pass constitutional muster when the *Wicklund court* held that a parental notice law could not is no doubt an argument that will be made to the District Court when this matter is resolved on its merits." *Planned Parenthood of Mont. v. State,* 2015 MT 31,121,378 Mont 151,157,342 P.3d 684,688. Thus, *Wicklund* clearly is entitled to weight in this case, as

are the other relevant district court precedent Plaintiffs cite and Defendants ignore: *Jeannette R*, No. BDV-94-811, 1995 WL *7959708; *Planned Parenthood of Mont.,* No. DDV-2010-787.

Defendants next attempt to distinguish *Wicklund* based solely on the fact that the law struck down in that case, tire 1995 Notice Law, only allowed for judicial bypass if the minor established eligibility through "clear and convincing evidence," a higher standard than the Acts' "preponderance" standard.[8] But *Wicklund's* analysis does not at all turn on this fact. To the contrary, *Wicklund assumed* that "virtually all requests for judicial bypass are granted," and *nonetheless* found that they significantly harm minors by subjecting them to "needless stress, anxiety, delay and breaches of confidentiality." 1999 Mont. Dist. LEXIS, at *15; s*ee also id.* at 15-16 (recognizing that the delay caused by the bypass, in turn, imposes "additional health risks"). Nothing about the Acts' lower standard of proof distinguishes *Wicklund's* holding. Moreover, while the Acts require a lower standard of proof than the 1995 Notice Law, several other aspects of the Consent Act are far *more* restrictive and burdensome than that law. *See* Pls.' Opp. Br. 7-8; Pls.' Summ. J. Br. 8-9. Indeed, the Montana Supreme Court already has recognized that

[8] Defendants inexplicably attribute to the Montana Supreme Court the position that the preponderance standard in the Acts' bypasses makes them "much more simplified and easy to navigate." Defs.' Opp. Br. 15. Nowhere does the Court say this, and it makes no sense on its face; the standard of evidence affects how likely a minor is to obtain a bypass, but not how "simple" or "easy to navigate" the bypass is—or for that matter how much delay it will cause.

the Consent Act is "more restrictive" than the 1995 Notice Law struck down in *Wicklund*. *Planned Parenthood of Mont.,* 2015 MT 31, ¶ 18- In other words, Defendants have failed to distinguish *Wicklund*.

For similar reasons, Defendants' attempt to distinguish Alaska Supreme Court precedent invalidating a consent requirement and a subsequent notice requirement also fails. First, Defendants point out that the Alaska Notice Act bypass also required the minor to prove her case by clear and convincing evidence. But, as with *Wicklund,* that fact was irrelevant to the court's analysis. While Defendants cite to a *concurrence* that discussed the bypass standard, *Planned Parenthood of Great Nw.*, 375 P.3d at 1128, the majority opinion struck down Alaska's parental notice requirement solely on equal protection grounds, finding that (as Plaintiffs argue here) the state had no basis for singling out minors seeking an abortion because minors carrying to term are as, if not more, in need of supportive parental involvement. *Id.* at 1137-1142.

Second, Defendants mistakenly focus on the fact that Alaska had provided a narrow *alternative* to the bypass for abused minors: the option of submitting a notarized witness statement attesting to the abuse. This provision was deemed too restrictive by the *concurrence,* but again was irrelevant to the majority's equal protection holding. At any rate, the Acts would fail even under the concurrence's analysis because whatever flaws Alaska's witness statement provision had, it was an *alternative* to the bypass for abused minors. *See Planned Parenthood of Great Nw.,* 375

P.3d at 1149-50 (Fabe, C.J., concurring) (analyzing statement and bypass separately as alternative avenues for avoiding notice).[9] That the Montana legislature did not even attempt to craft an alternative to the judicial bypass for abused minors is simply one more way in which the Acts are *more* restrictive than the laws found unconstitutional by the Alaska Supreme Court.

In short, Defendants cannot distinguish any of the relevant precedent striking down parental involvement laws under a strict scrutiny standard similar to that required by the Montana Constitution.

III Montana Minors Are Not Incompetent "As a Matter of Law"

In their opening brief. Plaintiffs set forth at length why the Acts are not narrowly tailored to the State's asserted interest in "protecting minors against their own immaturity." Pls.' Summ. J. Br. 16-22. First, as the Alaska Supreme Court explained in rejecting this same asserted state interest, "immaturity in and of itself is not a harm" *Planned Parenthood of Great Nw.,* 375 P.3d at 1139, and therefore the State's burden is to show that the Acts are narrowly tailored to protect minors from specific harms that might follow if they have an abortion without parental involvement (or in the case of the Consent Act, without actual parental consent). Pls.' Summ. J. Br. 16-19; *see also* Pls.' Opp. Br. 13. Second, and independently, the Equal Protection Clause does not allow Defendants to single

---

[9] Oddly, Defendants deny this obvious fact, Defs.' Opp. Br. 15 (describing statement alternative as a "requirement," and as a "significant distinction" making Alaska's law more restrictive).

out minors seeking an abortion to "protect [them] against their own immaturity" when minors carrying a pregnancy to term are equally or more in need of such protection. Pls.' Summ. J. Br. 6. Rather than addressing Plaintiffs' actual argument, Defendants recast it as an argument that "adolescents are as competent as adults in considering abortion" and set about refuting that version. Defs.' Opp. Br. 6-7.

To refute an argument Plaintiffs never actually made, Defendants cite to *Matter of C.H.* and claim this case decided "as a matter of law" that minors are less competent than adults in their decision-making. Defs.' Opp. Br. 7. Not so, for at least three reasons. First, the holding in *C.H.* is not that minors as a class are uniformly less competent than adults, but that some vulnerable minors need to be "cared for and rehabilitated" by the State if their parents cannot fill this role. *C.H.,* 210 Mont, at 203,683 P.2d at 941. Second, to the degree *C.H.* is about adolescent decision making, it is about the decision making of juvenile *delinquents,* which raises fundamentally different competency issues from those here because delinquent adolescents are categorically less mature than normative adolescents, and criminal acts generally occur in contexts where individuals are far more influenced by impulsivity and peer pressure (two areas where minors show particular immaturity) than are medical decisions that occur in private consultations with others, including medical providers. Ex. G-l, Pls.' Summ. J. Br., Expert Rep. of Dr. Bonnie Halpem-Felsher ¶¶ 19-23 ("Halpem-Felsher Rep."); Ex. G-2, Pls.' Summ. J. Br., Pls.' Reb. Rep. of Dr. Bonnie Halpem-Felsher ¶¶ 4-6,14-19 ("Halpem-Felsher Reb. Rep."). And third, even if *C.H.*

had made some broad finding about normative adolescent decisionmaking, such a factual finding in 1984 could not be settled "as a matter of law." Defendants surely know this, since they also argue, though without evidence, that *Wicklund's* factual findings are "outdated," Defs.' Opp. Br. 6.[10]

In addition to their misplaced reliance on *C.H.,* Defendants misrepresent key facts about adolescent development. To justify imposing a blanket consent requirement on all minors seeking an abortion (most of whom are sixteen or seventeen), they claim Dr. Stotland stated "that *minors* 'have an exaggerated fear of the reactions of authority figures, especially their parents, to unexpected and unwelcome news.'" Defs.' Opp. Br. 20. But they cut off the beginning of her sentence in which she made this statement about "younger adolescents"—not minors as a whole.[11] Defendants similarly misrepresent the research and testimony of Plaintiffs' expert Dr. Halpem-Felsher. Defs.' Opp. Br. 7. Specifically, to support their position that adolescents cannot make reproductive decisions without their parents' help, they seize on language in a 2001 study in which she found differences between adolescent and adult decisionmaking in certain specific domains (not abortion-related), while ignoring: 1) observations in that same article that decisionmaking competence varies widely by domain and within age categories, and 2) Dr. Halpem-

---

[10]Plaintiffs agree that social science evolves, which is why Plaintiffs have not simply relied on prior judicial factual findings but have presented the current state of the evidence.

[11] For girls, "adolescence" is linked to puberty, which can begin as early as nine. Earlier in the passage, Dr. Stotland refers to twelve-year-olds as young adolescents.

Felsher's testimony, and sources, showing that the *current* state of the social science literature recognizes that adolescents *are* capable of understanding risks and benefits in a medical context. Halpem-Felsher Rep. ¶¶ 7-13; Halpem-Felsher Reb. Rep. ¶¶ 4-25. Defendants also ignore Plaintiffs' extensive, and unrebutted, evidence that minors who seek an abortion *do* make that decision responsibly and thoughtfully, recognize the value of supportive adult involvement, and make reasoned decisions about which adults to involve. *See* Halpem-Felsher Rep. ¶¶ 24-28; Halpem-Felsher Reb. Rep. ¶¶ 23-25,28-35. Finally, they ignore undisputed evidence that adolescents who decide to terminate a pregnancy do not *make or carry out* that decision on their own; if they cannot involve a parent, they involve other family members or other surrogate parent figures. Pls.' Facts ¶38.

Thus, the undisputed record demonstrates that the Acts cannot be justified as narrowly tailored to ensuring adolescents make competent decisions about their pregnancy.

IV. Defendants Fail to Justify the Acts As Improving Medical Safety

Plaintiffs' opening brief explained why the Acts, and their distinction between classes of pregnant minors, are not narrowly tailored to protect minors from medical complications from abortion. Pls.' Summ. J. Br. 17-18. To begin with, the American Medical Association, the American Academy of Pediatrics, and other medical organizations, along with the U.S. Centers for Disease Control and Prevention, all oppose parental involvement requirements because

the evidence shows these laws deter minors from seeking care, thereby exposing them to increased medical risk. Pls.' Facts ¶¶ 64-66; *see also* Mont. Dep't Pub. Health & Human Servs., Montana Title X Family Planning Administrative Manual § 8.6.3 ("Confidentiality is critical for adolescents and can greatly influence their willingness to access and use services."). Indeed, Defendants' own experts conceded that adolescents may not seek healthcare if they fear that it will not be confidential. Pls.' Facts ¶¶ 63. Moreover, abortion, as compared to pregnancy and childbirth, is equally safe (in fact far safer), involves *fewer* medical decisions, and requires far less from patients in terms of giving a complete medical history, keeping regular appointments, reporting symptoms, seeking care for complications, and eliminating lifestyle risks. Pls.' Facts 2-17,26-31.[12] At any rate, the undisputed record evidence is that adolescents *do* give relevant medical history and that family history is almost never relevant to abortion safety. Ex. F-2, Pls.' Summ. J. Br., Pls.' Reb. Rep. of Philip Darney, M.D., M.Sc. ¶¶ 5-9 ("Darney Reb. Rep.") (testifying that, in his decades of clinical and training experience, not once has he encountered a situation where a

[12] Defendants assert that the comparison between abortion and pregnancy and *childbirth* breaks down because "minors do not (and cannot) conceal the birth of a child." Defs.' Opp. Br. 10. They present no evidence for this, nor is it self-evident. Many pregnant adolescents live apart from their parents, and/or are estranged from them, and/or their parents are incapacitated. Pls.' Facts K 53-55.

complication arose because a minor was unaware of relevant family history).[13]

Rather than cite any testimony their three physician experts gave over nearly nine months of the parties' exchanging expert reports and taking depositions, Defendants respond by quoting the Voter Information Guide for the Notice Act and citing legislative testimony from a nurse, never offered as a witness in this case, that "young girls are often not familiar with their family history or medical history" and that they may mistake post-abortion complications for other illnesses. Defs.' Opp. Br. 9-10,12. Without any information about the sources for the Guide, or the testifying nurse's qualifications, relevant knowledge or experience, scientific sources, or potential biases, these isolated and conclusory statements are meaningless. Notably, Defendants have not produced a single example of a minor who suffered an untreated abortion complication, or indeed any complication, because her parents were unaware of her situation.[14]

For these reason, and based on record facts not subject to real dispute, the Acts cannot be justified as

---

[13] One of Defendants' experts voiced a nonspecific concern that minor patients might be unaware of family medical history, but failed to give a single example related to abortion (instead noting a single example related to contraception). Defs.' Summ. J. Br. 24.

[14] Defendants' consistently ignore expert testimony produced and tested over months of discovery and instead cite previously undisclosed sources, which only serves to *highlight* how one-sided the record evidence is in this case, and how clearly Defendants have failed to raise genuine issues of material facts as to whether the Acts are narrowly tailored to protect minors.

narrowly tailored to improve medical safety. Notably, Defendants do not even attempt to justify the *Consent* Act on this ground.

V. Defendants' New Mental Health Argument Fails

Plaintiffs have presented overwhelming evidence that, when a minor is faced with an unwanted pregnancy, she is at no greater psychological risk if she decides to terminate her pregnancy than if she decides to carry it to term. Pls.' Summ. J. Br. 17; Pls.' Opp. Br. § D. 1. They have also presented undisputed evidence that there are psychological and emotional risks associated with *preventing* minors from accessing abortion confidentially. Pls.' Summ. J. Br. 19-20. For these reasons, Defendants cannot meet their burden of showing that the Acts are narrowly designed to protect the mental health of minors seeking an abortion.

It is hard to address Defendants' position on this issue because it keeps changing. At the outset of this case, Defendants and their witless Dr. Anderson argued that the Acts were justified because abortion *causes* mental health problems. Defs.' Summ. J. Br. 15 ("[T]he emotional and psychological impact of abortion can be immense, especially for minors."); Expert Report of Dr. Jane Anderson ¶ 5 ("[R]esearch demonstrates emotional and mental health concerns may be a complication of abortion."). Once confronted with the overwhelming evidence that these assertions were false, Dr. Anderson backtracked. Anderson Dep. 213:3-16 (clarifying that she no longer intended to offer this opinion). Defendant's other expert, Dr. Ryan, also conceded that there is no evidence of a

causal association. Ex. 26, Pls.' Rep. to Defs.' Resp. to Pls.' Facts, Deposition of Eileen Ryan at 218:8-16,219:8-11 ("Ryan Dep."). Now Defendants themselves seem to be backtracking, stating that "the State is not arguing that abortion causes psychological problems for minors, but simply noting that the evidence establishes that minors who have abortions are much more susceptible to these problems." Defs.' Opp. Br. 8.[15]

Defendants' latest attempt to justify the Acts on mental health grounds also fails, because it fundamentally misunderstands the nature of the association between abortion and mental health. A woman with mental health risk factors is more likely to have an abortion than to carry to term because her pregnancy is more likely to be unintended and unwanted. Poverty, domestic violence, prior mental health history, and other risk factors (including lower-quality parent-child relationships) are all associated with *unintended and unwanted pregnancy.*[16] *See* Ex.

---

[15] While backing down from earlier assertions that abortion causes mental health problems, Defendants continue to assert that abortion—as compared to pregnancy, childbirth, and parenthood—is more likely to "trigger[]" or "contribute^ to" psychiatric symptoms, Defs.' Opp. Br. 9. This assertion is baseless. As Dr. Ryan conceded, pregnancy in general is a time of mental health vulnerability—indeed, it is all the more so when that pregnancy is unintended—and there is no evidence whatsoever that terminating pregnancy makes these symptoms more likely to manifest than continuing the pregnancy. Ex. N, Pls.' Facts, Ryan Dep. 40:15-41:25; *see also* Pls.' Opp. Br. 18 (in one study relied on *by Defendants,* "most distress was reported *prior to* abortion and levels of distress *decreased* following abortion").

[16] The one study Defendants cite in their opposition, Fergusson, fails to control for whether a pregnancy was wanted,

7, Risken Deck, Stotland Dep. 247:10-21; *see also* Halpem-Felsher Reb. Rep ¶32 (higher quality mother-daughter relationships correlated with lower risk of unintended pregnancy). Moreover, for minors, especially younger minors, *most* pregnancies are unintended and unwanted. *See* Ex. 13, Pls.' Rep. to Defs.' Resp. to Pls.' Facts, Mulcaire-Jones Dep. 96:1—17; Ex. F-4, Pls.' Summ. J. Br., Leppalahti et al, *Is Underage Abortion Associated With Adverse Outcomes in Early Adulthood? A Longitudinal Birth Cohort Study Up to 25 Years of Age,* 31 Human Reproduction 1 -8 (2016). Thus a pregnant minor is at the same heightened risk for mental health problems, as compared to the general population, whether she decides to terminate her pregnancy or to carry to term.

Moreover, the evidence shows that, while individuals may experience a mix of emotions after an abortion, the predominant emotion is *relief*. Pls.' Opp. Br. 18; Ex. 26, Pls.' Rep. to Defs.' Resp., Ryan Dep. 237:11-15; Ex. 0-1, Pls.' Summ. J. Br., Expert Report of Dr. Nada Stotland, MD, MPH ¶¶ 15-17 ("Stotland Rep."). The evidence further shows that being turned *away* from an abortion causes negative emotions, as does encountering non-supportive reactions from parents and others. Pls.' Opp. Br. 16; Pls.' Facts ¶ 70. In other words, all the reliable scientific evidence about the associations between mental health risk factors, unintended pregnancies, and abortion

---

and contains other limitations that make it impossible to draw any causal associations, as their own expert conceded. *See* Pls.' Opp. Br. 19-20.

undermines, rather than advances, Defendants' justification for the Acts.

Faced with these facts, Defendants try to create an issue as to whether Plaintiffs adequately address the negative emotions some patients feel after an abortion, claiming that "Planned Parenthood does not pre-screen or ask any questions about mental health history." Defs.' Opp. Br. 9. That claim is false. Plaintiffs do screen for risk factors related to mental health. Ex. 1-2, Pls.' Summ. J. Br., Plaintiffs' Rebuttal Report of Rebecca Howell ¶ 3 ("Howell Reb. Rep."). Specifically, Plaintiffs: have patients fill out a medical history, which includes multiple questions about anxiety and depression, as well as screening questions about domestic abuse, coercion, and her feelings about being pregnant, Howell Dep., Ex. 4 at 1,20; use a worksheet to facilitate a private discussion with the patient, which includes detailed questions about her feelings and state of mind, safety and support system, as well as a discussion of her other options, *id.* at 21; ask open-ended questions to draw out any concerns, Ex. 23, Pls.' Rep. to Defs.' Resp. to Pls.' Facts, Howell Dep. 84:15-23; halt the process and refer the patient to counseling if they feel she is not ready to proceed, *id.* at 90:16-91:2; and provide patients with referrals both for licensed counselors and for peer-to-peer support groups in case they find themselves struggling with negative emotions after the abortion, *id.* at 183:10-185:9. *See* Pls.' Resp. to Defs.' Facts ¶ 15. Plaintiffs also specifically inform patients that they may experience negative emotions after the abortion and that, if they do, they should contact Plaintiffs for help finding whatever resources they need to cope with these feelings. *See Risken Deci.,* Ex. 36, Informed

Consent Form for Surgical Abortion, (Bates number 000248).

For all of these reasons, Defendants have failed to raise any factual issues as to whether the Acts are necessary, and narrowly tailored, to protect minors from mental health risks. Notably, Defendants do not even attempt to justify the *Consent* Act on this ground.

VI. Defendants Fail to Justify the Acts Based on Sexual Abuse Concerns

In their opening summary judgment brief, Defendants attempted to justify both Acts based on a state interest not articulated by the legislature: protecting minors from sexual abuse. Plaintiffs explained in their response why the Acts are not narrowly tailored to this goal: briefly, there are already protections in place to address sexual abuse (indeed, *Plaintiffs* run multiple programs to protect abuse victims, and also report suspected abuse); there is no evidence that the Acts would enhance these protections; in fact, they could undermine them by preventing some minors from obtaining care that will help them escape an abusive partner, and at any rate this justification fails equal protection review because the evidence shows that minors *carrying io term* are at least as, and in fact more, in need of protection from sexual victimization. Pls.' Opp. Br. § III.B.; Pls.' Facts ¶¶ 57.

Now, Defendants appear to be conceding that the Notice Act cannot conceivably protect minors from sexual victimization, because (so they argue) an abusive partner can easily evade a parental notice

requirement by pretending to be the father. Defs.' Opp. Br. 18. And Defendants appear to be arguing that the Consent Act, with its notarization and documentation requirements, is necessary to prevent such fraud. They also argue that, for this same reason, minors cannot be permitted to involve another adult family member in their decision in lieu of a parent because that other family member might be "the person perpetrating the abuse." Defs.' Opp. Br. 18. This argument is puzzling, given that "the person perpetrating the abuse" is more likely to be a father, step-father, or male legal custodian (who *can* consent, or indeed withhold consent, under the Consent Act) than an aunt, adult sister or grandmother (who *cannot* under the Act).

Moreover, Defendants appear to be basing their argument that only a requirement of notarized consent from a documented parent or custodian can adequately protect minors from sexual victimization on a single instance in Ohio where allegedly a minor and her much older sexual partner (her soccer coach) evaded a parental notice requirement by pretending that he was her father. Defs.' Opp. Br. 18.[17] This turns the concept of "narrow tailoring" on its head. While deplorable, this single, out-of-state incident from 2007 (out of the *hundreds of thousands* of minors who have had an abortion between then and now)[18] cannot

---

[17] Defendants here too try to pad the record with untested and unsubstantiated statements made in legislative testimony and on the Voter Information Guide, *see supra* § IV.

[18] This Court may take judicial notice of this uncontroversial legislative fact. *See, e.g.,* Guttmacher Institute, Induced Abortion in the United States (Jan. 2017), *available at* https://www.guttmacher.org/fact-sheet/induced-abortion-united-

justify depriving *all* Montana minors under 18 (most of whom have a partner close in age) of the right to decide for themselves whether to bear a child. Nor can it justify imposing unnecessary obstacles on the majority of minors who would have involved their parents anyway. *See* Pls.' Opp. Br. 9. Still less can it be used to justify a requirement that a *parent* consent, even in situations where the minor has another family member, such as a grandmother, who would be more supportive. *See* Pls.' Facts ¶¶ 38,56.

Not only are the Acts wildly overinclusive, but they are also underinclusive, and plainly violate the Equal Protection Clause, because they leave unprotected those pregnant minors *most* likely to have an abusive and/or substantially older sexual partner: minors carrying to term. Defendants fixate on the possibility that abusive partners will coerce minors into having an abortion to "cover [their] tracks," Defs.' Opp. Br. 12, but reproductive coercion occurs in the opposite direction; abusive partners coerce or trick adolescent or adult women into becoming pregnant and bearing children as a means of exerting and tightening control over their lives. Pls.' Facts ¶¶20, 57, 62; Darney Reb. Rep. ¶41 ("Reproductive and sexual exploitation—i.e., behavior intended to maintain power and control in a relationship related to reproductive health, including contraceptive sabotage and pressure to continue a pregnancy to term—as well as intimate partner violence (IPV) are significant public health problems."). And available information "suggests teenage women are somewhat more likely to *keep* the baby when their partners are older." Pls.' Opp. to

---

states (reporting that in 2014, 29,648 minors had an abortion in the United States).

Defs.' Facts ¶91; Darney Reb. Rep. ¶43 (citing Michael Males, Research Center for Adolescent Pregnancy (ReCAPP), Teens & Older Partners (2004)).[19]

For these reasons, Defendants have failed to raise a material factual dispute as to whether the Acts, and the distinctions they create, are narrowly tailored to protect minors from sexual victimization.

VII Defendants Fail to Address the Undisputed Evidence that the Acts will Delay Minors Seeking an Abortion

In their opening brief, Plaintiffs summarized the undisputed record evidence that parental involvement laws impose delays in a number of ways (delays associated with, *e.g.,* notifying parents, obtaining notarized parental consent, obtaining official documentation of identity and parentage, seeking out information about a judicial bypass, preparing for a judicial bypass, arranging the time and transportation necessary' to confidentially consult with a lawyer and attend a bypass hearing, and appealing the denial of a bypass). Pls.' Summ. J. Br. 9. As Plaintiffs explained, the Notice Act *already* causes delay, and has *already* worked to deprive minors of the option of a non-surgical (medication) abortion, which is only available early in pregnancy. Pls.' Facts ¶¶ 89,94. The undisputed record evidence also shows that, with each week of delay, a minor faces increased medical risk and other harms: her

---

[19] Despite evidence that minors are at risk of being coerced into carrying a pregnancy to term, the State has specifically criminalized coercion to have an *abortion* but *not* coercion to carry to term. Mont. Code. Ann. § 50-20-510(3).

pregnancy may become apparent to an unsupportive or abusive parent (or partner), she may have fewer provider options, and those options may be farther away and/or costlier. Pls.' Facts ¶¶ 87-89,94-99.[20]

Rather than address any of this evidence. Defendants claim the Acts do not really harm minors because, whatever their effects, they do not *prevent* minors from having a safe and legal abortion altogether.[21] Defs.' Opp. Br. 17. That claim misses the point (since there are serious harms short of outright prevention), but it is also incorrect. The evidence *does* show that the Acts will prevent some minors from having a safe and legal abortion—if a parent withholds consent and a judge denies a bypass application; if a minor is deterred from seeking a judicial bypass by limited resources, confidentiality and safety concerns, confusion, or an inability to discuss family abuse or other intimate details with a judge in a courthouse; if a parent prevents her daughter from seeking a bypass and/or an abortion; or if the Acts delay a minor until the procedure becomes too expensive or becomes unavailable because of gestational age. Pls.' Facts ¶¶ 72,74-79,82-87,90-95; *see also id.* ¶97 (after Texas required parental

---

[20] As this Court noted in *Wicklund,* such barriers are especially harmful in Montana because they compound other obstacles that Montana women (adolescent and adult) already face obtaining care in a rural state with few providers. 1999 Mont. Dist. LEXIS 1116, at *18-19.

[21] Defendants also note that some minors delay their abortion for other reasons. Defs.' Opp. Br. 17. But this is all the more reason why the delays caused by the Acts are especially harmful; they compound other delays, pushing minors to gestational ages where they may have few options, if any. *See* Pls.' Facts ¶¶ 91—97.

involvement, teen birth rates *increased* in that state, while decreasing nationally); *cf.* Ex. 10, Risken Deci. Pinto Dep. 60:10-18 (testifying that she has seen minors who carried to term because they were afraid to involve their parents and lacked the resources to obtain an abortion on their own). The record also reflects that, rather than carry to term, some minors will risk their own lives by attempting to self-induce. Pls.' Facts ¶99; *see also* Darney Rep. K 30 (citing, among evidence, case of Indiana teenager who died after self-inducing to avoid a parental involvement law).

Thus, on the undisputed record, the Acts fail the narrow tailoring component of strict scrutiny (or even, for that matter, any sort of balancing test) because they will not only interfere with minors' reproductive autonomy but also expose them to medical risk, other safety risks, and emotional harm.

VIII. Defendants' Opposition Does Not Address Plaintiffs' Due Process Arguments

As set forth in Plaintiffs' opening brief, the Acts violate Plaintiffs' Due Process rights by exposing them to criminal liability without any mens rea requirement or clarity about the lengths to which Plaintiffs must go in verifying patients' age, patients' legal status (e.g. whether or not they are married or emancipated), or the identity and parentage of notified or consenting parents. *See* Pls.' Summ. J. Br. 27-28. Plaintiffs have also pointed to laws in other states that are more carefully drafted to avoid this problem. *See id* at 28. Defendants have failed to counter these arguments, or explain why any

compelling state interest necessitates punishing providers for good-faith errors.

To begin with. Defendants argue that due process is satisfied if there are *any* situations in which the law's application would be clear. Defs.' Opp. Br. 23. Not only is that assertion inconsistent with the cases Plaintiffs cite, but it is not supported by any of the cases Defendants cite, none of which concern laws imposing criminal penalties without adequate notice as to what conduct is proscribed. *See Mont. Cannabis Indus v. State,* 2016 MT 44 ¶ 14,382 Mont. 256,368 P.3d 1131 (challenge to provision prohibiting probationers from becoming registered cardholders for medical marijuana use); *United States v. Salerno,* 481 U.S. 739 (1987) (challenge to provisions permitting pretrial detention on the basis of future dangerousness).[22] Defendants then claim that Plaintiffs merely need to make "reasonable efforts" to comply with the Acts. Defs.' Opp. Br. 24,[23] which is not what the statute says, nor would it clarity the scenarios Plaintiffs presented in their opening brief.

Finally, Defendants are simply wrong when they assert that "similar laws in other states... have never

---

[22] Defendants also cite *State v. Martel,* 273 Mont. 143, 902 P.2d 14 (1995) for the proposition that Plaintiffs bear "the burden of proving the statute is unconstitutional in all its applications beyond a reasonable doubt." Defs.' Opp. Br. 24. Nowhere does *Martel* state this standard.

[23] Defendants also assert that the Consent Act's documentation requirements add clarity about some aspects of compliance. Defs.' Opp. Br. 24. That may be so, but it does not address the possibility that this Court could invalidate the Consent Act, but not the Notice Act, on the other legal grounds Plaintiffs assert.

been found to violate due process," Defs.' Opp. Br. 23. In fact, other courts have struck down parental involvement laws for precisely this reason. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall,* 180 F.3d 1022 (9th Cir. 1999), *opinion amended on denial of reh 'g,* 193 F.3d 1042 (9th Cir. 1999); *Nova Health Sys. v. Fogarty,* No. 01-CV-0419-EA, 2002 WL 32595281, (N.D. Okla. June 14,2002); *Planned Parenthood Ass 'n of Nashville, Inc. v. McWherter,* 716 F. Supp. 1064 (M.D. Tenn. 1989), *vacated as moot after change to law,* 945 F.2d 405 (6th Cir. 1991); *cf. Planned Parenthood of Great Nw. v. State,* 3AN-10-12279 CI, 2010 WL 8913458 (Alaska Super. 2012) (finding that vagueness, and chilling effect, were one additional reason why an Alaska parental consent law failed the "narrow tailoring" prong of strict scrutiny review).

For these reasons, Defendants have failed to effectively oppose Plaintiffs motion for summary judgment as to their due process claim.

CONCLUSION

For all of the foregoing reasons as well as those set forth in Plaintiffs' opening brief, this Court should grant Plaintiffs motion for summary judgment, declare the Acts unconstitutional, and permanently enjoin their enforcement.

Respectfully submitted this 3rd day of March, 2017.

Eric E. Holm
Tanis M. Holm
Sather & Holm, PLLC
2301 Montana Ave., Ste. 202

P.O. Box 1115
Billings, MT 59103
Telephone: (406) 294-1700

Alice Clapman*
Richard Muniz*
Planned Parenthood
Federation of America
1110 Vermont Ave. NW,
Suite 300
Washington, DC 20005
(212) 973-4800

Attorneys for Plaintiffs

* Admitted to appear *Pro Hac Vice*

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served by Email and Regular Mail, postage prepaid, on the following interested parties this 3rd day of March, 2017.

Timothy C. Fox
Dale Schowengerdt
Patrick M. Risken
Montana Attorney General's Office
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

_____

Eric E. Holm
Sather & Holm, PLLC

APPENDIX G

TIMOTHY C. FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
PAT RISKEN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COUNSEL FOR THE STATE

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, v. STATE OF MONTANA and TIM FOX, ATTORNEY GENERAL OF MONTANA, in his official capacity, and his agents and successors, Defendants.	Cause No. BDV-2013-407 **Defendants' Brief in Support of Motion for Summary Judgment**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Abbey B. Berenson, et al., *Prevalence of Physical and Sexual Assault in Pregnant Adolescents,* Journal of Adolescent Health 1992; 13:466-469 12

Ambuel B. & Rappaport J., *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion,* Law & Hum. Behav. 1992 23

American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy-Current Trends and Issues: 1998* 11

B. Finger et. al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk-Taking in the Columbia Card Task,* 35 J. Experimental Psych 22

D. Scott Poehlmann & Bruce Ferguson, *Medical Evaluation and Management in,* A Clinician's Guide to Medical and Surgical Abortion 53 20

David A. Grimes, *Sequela of Abortion,* in Modern Methods of Inducing Abortion, 98 21

E. Steve Lichtenberg et al., *Abortion Complications: Prevention and Management, in* A Clinicians Guide to Medical and Surgical Abortions 197 21

Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001) 22

Hearings on Tex. H.B. 623 Before the House Comm, on State Affairs, 76th Leg., R.S. 21-22 (Apr. 19, 1999) 27

J. Horwood, and E. M. Ridder. *"Abortion in Young Women and Subsequent Mental Health," Journal* of Child Psychology & Psychiatry 47 (2006) 16

J. Horwood, and E. M. Ridder. *"Abortion in Young Women and Subsequent Mental Health" Journal* of Child Psychology & Psychiatry 47 (2006) 18

Jay N. Giedd et. al., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study,* 2 Nature Neuroscience 861 22

Michael Males, *'Teens and Older Partners"* (2004) 11

Nitin Gogtay et. al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood,* 101 Proc. Nat'l Acad. Sci. (2004) 22

Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting,* 1 Guttmacher Report on Public Policy 3 (1998) 12

Phillip G. Stubblefield and David A. Grimes, *Current Concepts: Septic Abortion,* New England J. Med., Aug. 4, 1994 21

Planned Parenthood, *"Pregnancy and Childbearing Among U.S. Teens,"* (2013) 11

Robert H. Mnookin, *In the Interest of Children: Advocacy, Law Reform, and Public Policy 239* (1985) 27

Somerville et. al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to*

INTRODUCTION

There is perhaps no issue that causes more division than abortion. But one thing on which nearly all sides of the issue agree is that it is a weighty decision, which should receive the full and informed deliberation by those considering it.

It should also be undisputed that minors do not possess the same maturity, cognitive development, and decision-making capacity as adults. Anyone who has had a teenager (or who has been a teenager for that matter) knows that well enough.

And it is undisputed that minors in a healthy relationship with one or both parents would benefit from having a parent's help in deciding whether to have an abortion. But, sadly, it is also undisputed that, absent parental involvement laws, most minors will not involve their parents in their decision because of unrealistic fears about what their parents' reactions will be.

Montana has thus adopted the common-sense policy to require parental involvement in a minor's abortion decision, with a straightforward judicial bypass option for minors who are in a situation where parental involvement is not a reasonable option. It is not a novel idea: thirty-six other states have similar laws, and the United States Supreme Court has repeatedly held that it is a constitutional and even laudable policy judgment for a state to make.

The Montana Constitution does not require a different result. Indeed, Article II, section 15, of the Montana Constitution provides the Legislature with

authority to circumscribe a minor's rights in order to enhance their protection. That is precisely what the Parental Involvement Laws do by 1) protecting minors from sexual victimization by adult men; 2) protecting minors' psychological and physical wellbeing by having informed parents who can monitor post-abortion complications and provide helpful medical history; and 3) protecting minors from rash or poorly reasoned decisions that often result from an adolescent's diminished decision-making capacity.

This Court should therefore grant the State's Summary Judgment Motion and uphold the constitutionality of the Parental Involvement Laws.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). It encourages judicial economy through the elimination of unnecessary trial, delay, and expense. *Wood v. Old Trapper Taxi,* 1996 Mont. Dist. LEXIS 376 at *2-3 (Mont. 1st Jud. Dist. 1996), citing *Bonawitz v. Bourke,* 567 P.2d 32, 33 (1977).

The moving party has the initial burden to show that there is an absence of any genuine issue of material fact. To satisfy this burden the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. When the record, as made by the movant, discloses no genuine issue as to any material fact, the burden then shifts to the party opposing the summary judgment motion to present

evidence of a material and substantial nature raising a genuine issue of fact. *Harris v. Horne,* 1994 Mont. Dist. LEXIS 159 at *1-2 (Mont. 1st Jud. Dist. 1994), citing *Kober v. Stewart,* 148 Mont. 117, 122, 417 P.2d 476, 479 (1966), and *Cole v. Flathead County,* 236 Mont. 412, 416, 771 P.2d 97, 100 (1989). In making its determination, the court must consider the entire record. *Cowser v. Rocky Mountain Development Council,* 2005 Mont. Dist. LEXIS 1132 at *2 (Mont. 1st Jud. Dist. 2005), citing *Smith v. Barrett,* 242 Mont. 34, 40, 788 P.2d 324, 326 (1990).

In this case, the parties agree that there are no genuine issues of material fact that preclude the Court's resolution of the issues on summary judgment.

BACKGROUND

A. Montana's Parental Consent Laws

"Given the societal interest that underlies parental notice and consent laws, it comes as no surprise that most States have enacted statutes requiring that, in general, a physician must notify or obtain the consent of at least one of her parents or legal guardian before performing an abortion on a minor." *Hodgson v. Minnesota,* 497 U.S. 417, 486 (1990). Indeed, at least 37 states have laws requiring parental involvement in a minor's decision to have an abortion.[1]

The Supreme Court has explained why these laws are so ubiquitous: "There can be little doubt that the

---

[1] https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." *H. L. v. Matheson,* 450 U.S. 398, 409-10 (1981).

Thus, over the course of the last 25 years, Montana has enacted three laws requiring parental involvement in a minor's decision to obtain an abortion. In 1995, the legislature passed a law prohibiting physicians from providing an abortion to a minor under the age of 18 without first giving notice to the minor's parents or legal guardian. *See* Parental Notice of Abortion Act, Mont. Code Ann. §§ 50-20-201 -215 (1995) (repealed 2011). Planned Parenthood challenged that statute in 1999, and the district court eventually ruled in an unpublished decision that the law was unconstitutional. *Wicklund v.* State, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999). The State did not appeal that ruling.

In 2011, the Legislature placed LR-120 on the ballot, which prohibited physicians from performing an abortion on a minor under 16 without giving notice to one of the minor's parent's [or legal guardian?]. 2011 Mont. Laws 307. The referendum passed with 70.55% of the vote.[2]

In 2013, the Legislature enacted the Parental Consent for Abortion Act of 2013. The Parental Consent law requires a physician to obtain signed

[2] http://sos.mt.gov/Elections/2012/2012_General_Canvass.pdf.

consent from a parent or guardian before performing an abortion on a minor under 18 years of age. *See* Mont. Code Ann. §§ 50-20-501 to -511. Passage of this act replaced the 2011 notification law. Unless specifically noted, the State will refer to both statutes as "parental involvement laws."

B. Montana's Judicial Waiver Provisions

A Montana court must grant a petition for judicial waiver of the parental involvement laws, if by a preponderance of the evidence, the court finds that the minor is competent to decide whether to have an abortion. Mont. Code Ann. §§ 50-20-232(4), -509(4)). Even if she is not competent to decide, a court must still grant a waiver if there is evidence of physical, sexual, or emotional abuse by one or both parents, or if the court finds that parental involvement is not in the minor's best interests. *Id.;* Mont. Code Ann. §§ 50-20-232(5), -509(5). The state public defender's office will represent the minor in that proceeding. § 50-20-509(2).

All proceedings are confidential and must ensure the anonymity of the minor. Mont. Code Ann. §§ 50-20-232(3) (2011), -509(3) (2013). Indeed, the Montana Supreme Court has held that the legal intent to provide the strongest possible protection for the privacy of the petitioner is the laws' intent. Defendants' Statement of Undisputed Facts ("SOF") ¶ 87. All documents relating to the proceedings are confidential and not available to the public. SOF 87; Mont. Code Ann. §§ 50-20-232(3) (2011), -509(3) (2013). A petition for judicial waiver must take priority over pending matters. Mont. Code Ann. § 50-20-509(3) (2013). Appeals to the Supreme Court must

be expedited and confidential. SOF ¶ 89; § 50-20-232(8) (2011). Any documents, proceedings, or recordings in an appeal are sealed. Mont. R. App. P. 30(6). The Supreme Court recognized that the confidentiality requirements are broader than just protecting the evidentiary record, but also require that the lower court's findings of fact and conclusions of law to remain confidential. SOF ¶¶ 87, 88; *see* Mont. Code Ann. §§ 50-20-232(7) (2011), -509(3) (2013). In short, the confidentiality of these proceedings is so strong that there is no parallel in Montana law. SOF ¶¶ 88, 89.

C. Litigation History of Parental Involvement Laws

Shortly after the Parental Consent law's passage, plaintiffs challenged both the 2013 consent statute and the 2011 notice statute. The State agreed to stay enforcement of the 2013 consent act pending resolution of this case. Thus, the 2011 notice law went back into effect, and Planned Parenthood is complying with it.

Initially, Judge Sherlock ruled that the State was collaterally estopped from defending the Parental Involvement Laws based on the district court's decision in *Wicklund.* But the Montana Supreme Court reversed, finding that the 2011 and 2013 Acts were not substantively identical to the 1995 Act and, thus, collateral estoppel did not apply. *Planned Parenthood v. State,* 2015 MT 31, HV5-17, 378 Mont. 151, 342 P.3d 684. Among other things, the Court found it significant that the 2011 and 2013 Acts imposed a much lower burden of proof on minors seeking judicial bypass. While the law at issue in

Wicklund required clear and convincing evidence that the minor met a criteria for bypass, the 2011 and 2013 acts require that she only meet the preponderance of the evidence standard. *Id.* At 5 16. Moreover, the 2011 notice act only applied to minors under 16, while the 1995 act at issue in *Wicklund* applied to minors under 18. *Id.*

ARGUMENT

I. The Parental Involvement Laws Are a Constitutional Exercise of the Legislature's Authority to Protect Minors.

Planned Parenthood is of course correct that the Montana Supreme Court has recognized that the Montana Constitution protects a woman's access to abortion under Article II, Section 10's right to privacy. *Armstrong v. State,* 1999 MT 261 U 34. But that does not mean that a minor's right to abortion is unrestricted. The Montana Constitution erects an important caveat to the rights of minors challenging laws designed for their protection. Article II, § 15 provides that "the rights of persons under 18 years of age shall include ... all the fundamental rights of this Article *unless specifically precluded by laws which enhance the protection of such persons."* (Emphasis added.)

The Montana Supreme Court found that the delegates to the 1972 Constitutional Convention sought, through Article II, § 15, to explicitly recognize "that the State's interest in protecting children may conflict with their fundamental rights." *In re C.H.,* 210 Mont. 184, 202, 683 P.2d 931 (1984). The Court noted that "constitutional rights of children cannot be

equated with those of adults . . . [T]he interests of minors and adults are quantitatively different because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *Ibid.* In fact, the Montana Supreme Court cited the Supreme Court's case law regarding parental involvement in abortion laws like the one at issue in this case as "precisely what the drafters of the 1972 Montana Constitution had in mind when they explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, unless exceptions were made for their own protection." *Id.* at 203 *(citing Bellotti v. Baird,* 443 U.S. 662 (1979) (holding that the government may require parental involvement in a minor's abortion decision when there is a judicial bypass).

Evidence from the Constitutional Convention confirms that special considerations apply to adolescents. Delegate Monroe, author of § 15, described the "crux" of the provision as ensuring that minors had the same "basic civil rights" as adults, particularly the rights of a criminal defendant, "except where it is specifically precluded by any laws." *See* Montana Constitutional Convention, Verbatim Transcript, March 8, 1972, at 1750-51 (citing as examples laws which prohibit minors from driving or purchasing alcohol). Monroe also expressed his belief that § 15 would "enhance the proper parent-child relationships in Montana families, and help strengthen the family unit." *Id.* Also sensitive to the family integrity concerns implicated by § 15, chairman of the Bill of Rights Committee Wade

Dahood clarified that giving adult rights to minors would, in no way, affect "the relationship of parent and child . . . with respect to someone under the age of majority." *Id.*

The difficulty of Planned Parenthood's burden in establishing that the Parental Notice of Abortion Act and the Parental Consent for Abortion Act are unlawful cannot be overstated. Both statues retain a strong presumption of constitutionality. *State v. Lilburn,* 265 Mont. 258, 262, 875 P.2d 1036, 1039 (1994). That heavy burden for Planned Parenthood is reflected by the fact that the Montana Supreme Court has found a violation of § 15 a grand total of *once,* and that case involved an extraordinary statute that *decreased* protections to minors by doubly sentencing underage offenders as adults *and* juveniles. *See In re S.L.M.,* 287 Mont. 23, 26, 951 P.2d 1365 (1997).

Although infringements on the right to privacy, which is a fundamental right, must be supported by a compelling interest, the State Constitution "recognizes that the States' interest in protecting children may conflict with their fundamental rights." *In re C.H.,* 210 Mont, at 202 (citing Article II, § 15). The Court noted that the minor's liberty interest "must be balanced against her right to be supervised . . . and cared for." *Id.* at 203. Indeed, the Montana Supreme Court has already intimated that judicial wavier of the parental involvement requirements in appropriate situations strikes the right balance in protecting a minor's right to abortion. *See* SOF ¶ 78.

In light of Article II, Section 15 and the commonsense rule that the Legislature has authority to enact laws that protect minors from the

consequences of their relative immaturity, many laws in Montana, and every other state and the federal government, constrict minors' rights in ways that would never be permitted for adults. For example, the state permits municipalities to impose a juvenile curfew, Mont. Code Ann. § 7-32-2302, even though minors have a fundamental right to physical liberty, *see in re C.H.,* 201 Mont, at 201-03 (harmonizing the preamble of the Montana constitution with §§ 4, 15, and 17 of Article II). Several cities have adopted such provisions, without constitutional challenge. *See, e.g.,* Billings, Mont., Code § 10.08.010 (1967); Helena, Mont., Ord. 2252, (1982). While adults have a right to purchase pornography, *see Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (declaring unconstitutional a statute which criminalized dissemination of computer-generated child pornography), minors do not, Mont. Code. Ann § 45-8-206. Parental approval is required before persons under age 16 can enter marriage. Mont. Code Ann. § 40-1-213. Nor can minors receive a tattoo without parental consent. Mont. Code Ann. § 45-5-623(l)(e). The Montana Supreme Court has recognized that a minor under the age of 16 cannot waive his or her right to self-incrimination without parental permission or advice of counsel. *State v. Schwarz,* 2006 MT 120, ^ 14, 332 Mont. 243, 136 P.3d 989 (citing Mont. Code Ann. § 41-5-331(2). Nor can a minor, without the agreement of her parents or counsel, "consent to the search of her *own* apartment." *Ibid,* (citing *State v. Allen,* 188 Mont. 135 (1980)).

As Justice Stevens pointed out:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision: it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

H.L. v. Matheson, 450 U.S. 398, 421-22 (Stevens, J., concurring). And as Justice Stevens further recognized, "The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory." *Id.* at 422.[3]

---

[3] The United States Supreme Court has recognized several other examples in federal law that requires parental consent in decisions arguably much less important than the decision whether to have an abortion. *Hodgson v. Minnesota,* 497 U.S. 417

The Montana Supreme Court recognized that the decision to have an abortion is a serious one, and the maturity of the minor seeking the abortion must be considered when determining whether she is competent to make the decision. SOF ¶ 4. The United States Supreme Court has long held that parental involvement laws are not only constitutionally permissible, but laudable. "Those [parental involvement] enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Planned Parenthood v. Casey,* 505 U.S. 833, 895 (1992). Thus, "parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision." *Bellotti v. Baird,* 443 US. 622, 640-41 (1979).

The State advances the highest possible interests in enacting parental involvement laws, including:

454-55 (1990) (citing 10 U.S.C. §§505(a), 2104(b)(4), 2107(b)(4) (minor needs consent of parent or guardian to enlist in armed services or Reserve Officers' Training Corps (ROTC)); 22 CFR § 51.27 (consent of parent or guardian needed to obtain passport); 45 CFR §§ 46.404, 46.405) (consent of parent or guardian needed to participate in most forms of medical research).

1) protecting minors from sex crimes and sex trafficking; 2) ensuring that, if a minor decides to have an abortion, someone is there to monitor for post-abortion complications and especially mental health trauma, and 3) ensuring immature minors make fully informed decisions and promoting family integrity.

Parental Involvement Laws Increases the Detection and Prevention of Sexual Assault and Sex Trafficking.

The first of three compelling government interests that the parental involvement laws advance is increasing the detection and prevention of sexual assault. Protecting minors from sexual assault is clearly a compelling government interest. *See In re Marriage,* 2002 MT 72, ¶ 35, 310 Mont. 537, 52 P.3d 401 (2002) (citing *In re E.A.T.,* 1999 MT 281, 296 Mont. 535, 989 P.2d 860 (1999) (Removing a child from the risk of sexual assault overcame—under strict scrutiny—parents' "fundamental liberty interest in raising their children"). Furthermore, privacy rights may be abrogated to protect minors from sexual abuse. *See* Mont. Code Ann. § 46-23-508 (requiring convicted sex offenders to make their personal information publically available).

Statutory rape is the largest cause of adolescent pregnancy. National surveys indicate that "[a]lmost two thirds of adolescent mothers have partners older than 20 years of age." American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy-Current Trends and Issues: 1998,* 103 Pediatrics 516, 519 (1999).[4] In a study of over 51,000

[4] *available at* http://www.aap.org/policy/re9828.html.

high school pregnancies in California, researchers found that babies born to girls under the age 15 were *as likely* to have been fathered by man over age 25 as by a peer male. Michael Males, *"Teens and Older Partners"* (2004) (citing the California Center for Health Statistics, 2002). Women ages 15-17 were *twice* as likely to have been impregnated by a man over 20 years old than a male their own age. *Id.* Planned Parenthood in 2004 documented that "6.7% of women age 15-17 have partners six or more years older. The pregnancy rate for this group is *3.7 times as high* as the rate for those whose partners is no more than two years older." Planned Parenthood, *"Pregnancy and Childbearing Among U.S. Teens,"* (2013) at 2 (emphasis added).[5]

Sexual assault of children and teens is a substantial problem in Montana. Thirteen percent of Montana high school females were raped in 2011. See Prof. Collett Expert Report, *Risken Deci. Ex.* 31; U.S. Dept, of Health & Human Servs., Office of Adolescent Health, *"Montana Adolescent Reproductive Health Facts,"* 2011, at 7;[6] *compare,* U.S. Dept, of Health & Human Servs., Center for Disease Control & Prevention, *"Youth Risk Behavior Surveillance-United States,* 2013," 63 *Morbidity & Mortality Weekly Report, Surveillance Summaries,* No. 4, p. 10 (June 13, 2014) (reporting the nationwide high school rape

---

[5] This figure is likely much higher, since Planned Parenthood evidently either does not ask the father's age or simply does not report incidents of statutory rape, as is evidenced by Planned Parenthood's policies and practices. Statement of Undisputed Fact, ¶ 46,47,49,50.

[6] *available at* http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/states/pdfs/mt.pdf;

percentage at 10.5 percent). Nearly 52 percent of all Montana rape victims are adolescents. Montana Board of Crime Control, 2012-2013 Report, at 43 (2014).

Sexual relationships between youths and much older men are exploitive. *See* Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting,* 1 Guttmacher Report on Public Policy 3 (1998)[7]. When a minor conceals her pregnancy from both parents, the adolescent's boyfriend becomes the most involved person in her decision 89 percent of the time, and also finances the abortion 76 percent of the time. *See* Henshaw & Kost, 24 *supra* at 205. That is especially concerning because physical abuse by a boyfriend or spouse often increases significantly when a minor becomes pregnant. Abbey B. Berenson, et al., *Prevalence of Physical and Sexual Assault in Pregnant Adolescents,* Journal of Adolescent Health 1992; 13:466-469 (finding that when abuse increased during pregnancy, the boyfriend or mate was the attacker 80% of the time). Ungoverned, abortion can be used by abusive men to conceal their sexual exploitation of minors.

Planned Parenthood of Montana knows this first hand, given that one of the two judicial bypass cases in which it has assisted involved a 15-year-old who had been impregnated by an 19-year-old male. Deposition of Rebecca Howell, 98:24-99:16; 253:21-

---

[7] The Guttmacher Institute was founded by Planned Parenthood in 1968 as a semi-autonomous research institute, https://www.guttmacher.org/about/history

256:17, *Risken Deci. Ex. 14 UNDER SEAL.*[8] Even though this minor was clearly a victim of sexual intercourse without consent, *see* Mont. Code Ann. §§ 45-5-501(l)(a)(ii)(D) and -503(1),(3), Planned Parenthood failed to timely or sufficiently report the incident, even after the district court judge informed them of their duty to report and asked them to fulfill that duty. *See* SOF ¶¶ 46,47,49. Indeed, failing to fulfill that duty is a crime. Mont. Code Ann. § 41-3-207(2). Instead, the district court judge overseeing the bypass proceeding was forced into the difficult position of having to contact authorities because he believed Planned Parenthood would do nothing to address the situation. SOF ¶ 47. Had it not been for the notice statute, the fact that this minor was a victim of a sex crime would never have come to light, and she could have been subjected to further, unknown abuse at the hands of her 19-year-old sexual partner.

That is unfortunately not at all unusual. Even Planned Parenthood's expert on judicial bypass, who is a longtime board member of a Planned Parenthood affiliate in Texas, testified that she does not abide by Texas mandatory reporting requirements, and, worse, does not follow up with the minors she represents to

---

[8] Although Ms. Howell testified that the male was 18 years-old, he was actually 19. Planned Parenthood made the same error when it eventually made a report to DPHHS. The criminal penalty for sexual intercourse without consent is much higher when the minor is under 16 and the difference in age between the minor and adult male is four years or more, which was evidently the case here, despite Ms. Howell's incorrect testimony and report. Mont. Code Ann. § 45-5-503(3)(a). Ms. Howell also testified that she did not recognize that situation as involving abuse. Howell Depo at 98-99, *Risken Deci. Ex. 14 UNDER SEAL.*

determine whether they received counseling or other assistance. Lucido Dep 72:3-15; 75:6-22; 80:3-7; 108:20-109:18, *Risken Deci. Ex. 19,* SOF 98. Other examples abound. *See, e.g., People v. Cross,* 134 (Cal. App. 4th) 500, 504-06 2005 LEXIS 1844 (the abuse of a 13-year-old girl continued well after she was raped by her step-father and received an abortion because neither Planned Parenthood nor San Francisco General Hospital notified the authorities or the girl's mother); *Jane Doe v. Planned Parenthood of Central and Northern Arizona, et. al.* No. CV 2001-014876, Order of Partial Summary Judgment (Superior Ct., Ariz., Cty. of Maricopa, Nov. 26, 2002) (12-year-old girl was raped and impregnated by her 23 year old foster brother *twice* because a Planned Parenthood affiliate did not report the first abortion to the authorities);[9] Expert Report of Professor Teresa Collett, 5-7, *Risken Deci. Ex. 31.*

All of these examples happened because parents were not informed of their minor daughter's pregnancy and abortion. Predicating a minor's right to have an abortion with parental involvement therefore serves an obvious compelling interest: bringing to light adult men who prey on children and helping those children out of an abusive situation. If

---

[9] *See also, e.g., Harlon Reeves, et. al. v. West Side Clinic, Inc.,* Cause No. 141-165086-96, 141st Judicial District of Tarrant County (1997) (a mentally-handicapped 12 year old was impregnated by a child predator and twice forced to have an abortion until her parents discovered the abuse); *People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic,* 249 Cal.Rptr 762, 763-76 (3d Dist. 1988) (finding an abortion clinic liable for failing report sexual abuse after they performed an abortion upon a 13-year-old girl impregnated by her 21-year-old boyfriend).

parents are informed of their daughter's situation, they are in a position to intervene and prevent the minor from being victimized further. But without parental involvement laws, most minors will not inform their parents of the pregnancy and involve them in their abortion decision. SOF ¶ 20.

B. Parental Involvement Laws Significantly Enhances Psychological and Medical Well Being of Minors.

The United States Supreme Court has long recognized that parental involvement laws protect a minor's psychological and medical well-being, recognizing that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *H.L. v. Matheson,* 450 U.S. 398, 411 (1981); *Gonzales v. Carhart,* 550 U.S. 124, 159, (2007) (finding that "[s]evere depression and loss of esteem can follow" abortion). Parental involvement in a minor's abortion decision helps identify psychological impacts so that they can be treated before they become severe or turn into self-destructive behavior. Parents can also provide necessary medical information, which minors often do not know or do not have the maturity to adequately convey.

1. The Psychological Impact of Abortion.

Planned Parenthood usually focuses solely on the medical complications of abortion, arguing that abortion is physically safer than delivering a baby. Even assuming that they are correct, the argument misses the point. As Justice Stevens points out, "the most significant consequences of the abortion decision

are not medical in character." *L. v Matheson,* 450 U.S. 398, 423 (1981) (Stevens, J., concurring) (quotation omitted). Rather, the emotional and psychological impact of abortion can be immense, especially for minors.

Over one-third of women who obtain elective abortions experience significant psychological distress afterwards. Maureen Curley, *An Explanatory Model to Guide Assessment, Risk and Diagnosis of Psychological Distress After Abortion,* Open Journal of Obstetrics and Gynecology, 4, 944-953, *Risken Deci. Ex. 1* (citing Bradshaw, Z. and Slade, P., *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature,* Clinical Psychology Review, 23, 929-958). Compared to other reproductive events such as child birth, post abortion psychological distress includes higher rates of depression, suicide, anxiety, sleep problems, and substance disorders compared to other reproductive events. Curley, *An Explanatory Model,* at 945.

Research suggests that minors are far more vulnerable to post-abortion emotional and psychological trauma, including major depression, anxiety disorder, and suicidal ideation. For example, in a 2006 study, researchers found that minors in the study age 15-18 who had an abortion had a rates of major depression, anxiety disorders, and suicidal ideations that were far higher, and in fact in some categories double, the rate of women between 18 and 25. Risken Declaration, Ex. 4, D. M. Fergusson, L. J. Horwood, and E. M. Ridder. *"Abortion in Young Women and Subsequent Mental Health," Journal* of Child Psychology & Psychiatry 47 (2006): SOF in 3-

9.[10] Below is Table 1 from this study showing the astronomically heightened mental and emotional risk for minors under age 18:

Table 1 Rates of disorder (15-18, 18-21, 21-25 years) by cumulative history of pregnancy/abortion to age 18, 21, 25 years respectively

Measure	Not Pregnant	Pregnant No Abortion	Pregnant Abortion
Major depression (%)			
15-18 years	31.2	35.7	**78.6**
18-21 years	27.5	34.5	45.1
21-25 years	21.3	30.5	41.9
Pooled risk ratio (95% CI)[11]	.35[a] (.20-.59)	.49[a] (.27-.91)	1[b]
Anxiety disorder (%)			
15-18 years	37.9	35.7	**64.3**
18-21 years	15.2	25.0	25.5
21-25 years	16.9	29.8	39.2

[10] The authors note that their research is at odds with the American Psychological Associations' conclusion that abortion does not increase risk of psychological harm, which Plaintiffs also hang their arguments on. But they note that the APA's conclusion is unreliable because it was based on a small number of studies that lacked a comprehensive assessment of mental disorders, lacked comparison groups, and had limited statistical controls. *Id.* at 23.

[11] The results of planned comparisons of the rate of each outcome across the three groups are indicated by the superscripts (a, b). Different superscripts indicate that the groups were significantly ($p < .05$) different on their rates of disorder. Similar superscripts indicate that groups were not significantly different in their rates of disorder.

Measure	Not Pregnant	Pregnant No Abortion	Pregnant Abortion
Pooled risk ratio C95% CPU	.35[a] (.19-.63)	.54[a'b] (.27-1.07)	l[b]
Suicidal ideation (%)			
15-18 years 18-21 years 21-25 years	23.0 12.5 8.0	25.0 17.9 13.0	**50.0** 25.5 27.0
Pooled risk ratio (95% CI) 11	.25[a] (.13-.50)	.31[a] (.14-.69)	l[b]

The State's expert on child psychology and development, Professor Eileen Ryan, who is the Medical Director of the University of Virginia's Institute of Law, Psychiatry & Public Policy, also testified about the increased risk of post-abortion mental health problems.

> Several methodologically sound studies that include adolescents suggest that abortion may be associated with an increased risk for mental health problems. In the only meta-analysis of the literature to date, Coleman (2011) found an overall 81% increased risk of mental health problems in the 22 studies she analyzed. Women with a history of abortion had higher rates of anxiety (34%), depression (37%), heavier alcohol (110%) and marijuana use (230%), and suicidal behavior (155%).

Expert Report of Professor Eileen Ryan, 19-20, *Risken Deci. Ex. 29*. The rates of mental health and substance abuse found for post-abortion women were far higher than the rates for women who had carried their child to term. *Id.* at 20.

Untreated, serious psychological distress can result in depressive, self-destructive behaviors, including suicide and anxiety disorders. Curley, *An Explanatory Model,* at 945. Parents informed of their minor's abortion can help identify emotional and psychological problems early, and intervene or seek professional assistance for their daughter before the problems manifest into more serious problems or self-destructive behavior. Minors who have had a history of mental or emotional health problems are at a significantly higher risk. D. M. Fergusson, L. J. Horwood, and E. M. Ridder. *"Abortion in Young Women and Subsequent Mental Health" Journal* of Child Psychology & Psychiatry 47 (2006): pp. 16-24, *Risken Deci. Ex. 4; see also* SOF ¶¶ 3-10.

Yet Planned Parenthood does not investigate mental health or medical history, at all. SOF 15, 26, 27. They have no idea if a minor has had suffered depression or emotional disturbances that an abortion may trigger. And they conduct no follow-up after the abortion to ensure that the minor is not experiencing emotional trauma. SOF H 35. Thus, in many cases parents will be the only ones with that vital information and are clearly in the best possible position to monitor and detect post-abortion complications, including and especially emotional disturbance, and to get help for the minor before it turns to long-term harm or self-destructive behavior.

2. Informed and Involved Parents Can Provide Doctors With Important Information Concerning a Minor's Medical and Psychological History.

"Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *L. v. Matheson,* 450 U.S. at 411. Even Planned Parenthood's psychological expert agreed that an abortion can trigger sever psychological consequences in patients with a history of depression or emotion and psychological trauma. SOF 7-8, 10-12, 14-15. Yet Planned Parenthood does not ask for that history, and does not follow up with patients who are post-abortion. SOF 16. It is one or both parents that will initially identify emotional and psychological distress, and they are clearly in the best position to get professional help for the minor before self-destructive behavior sets in. SOF ¶¶5-7.

In addition to protecting the psychological health of adolescents, the United States Supreme Court has recognized three medical benefits when parents are involved in a minor's decision to obtain an abortion. First, parents have greater experience and discernment when selecting healthcare providers. *Bellotti v. Baird,* • 443 U.S. 622, 641 n.21 (1979) (plurality opinion) *(Bellotti II)* ("[M]inors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical."). This distinction is important since abortion clinics have a financial stake in the minor's decision to terminate her pregnancy. As a result, clinics can be emotionally insensitive and prone to be "interested only in [providing abortions] for a remunerative basis." *See Women's Med. Ctr. v. Archer,* 159 F. Supp. 2d 414, 425 (S.D. Tex. 1999)

(summarizing the testimony of Dr. Fred Hansen). *See* SOF ¶¶ 21-23, 30.

Second, parental involvement is key to providing physicians with the minor's full medical history. *Matheson,* 450 U.S. at 411. "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature," the Court observed. *Id.* Indeed, abortion is a unique medical procedure in that it entails significant emotional, psychological, physical, moral, and societal consequences. Yet Planned Parenthood is interested in only a limited medical history, and only in what the minor chooses to disclose. SOF 24-27, 31, 34. The physician does not even bring up potential risks. SOF 30, 34.

Moreover, the medical field has concluded that a complete patient medical history requires information of past bleeding disorders, respiratory disease, allergies, medications, details of prior surgeries, and reactions to anesthetics. *See* D. Scott Poehlmann & Bruce Ferguson, *Medical Evaluation and Management in,* A Clinician's Guide to Medical and Surgical Abortion 53, 53 (Maureen Paul et al. eds., 1999). Planned Parenthood covers this, but only through the minor's understanding. SOF ¶¶ 25-27, 30. In addition, adequate medical care also requires *family* medical history. Expert Report of Jane E. Anderson, M.D. 3-4, *Planned Parenthood v. Alaska,* Case No. Civ. 3AN-10-12279 CI (concluding adolescent healthcare providers would be considered negligent if they did not obtain "pertinent family history"). Relying on a teenager to provide this information is unsafe since they may be unaware of

medical disorders in their family history, or which occurred during their infancy. As an example, Dr. Jane Anderson adjusted the oral contraceptive prescription of an adolescent patient after discovering the youth had positive family history of thromboembolism (blood clots). *Id.* at 4. This information surfaced after the patient's parents were consulted. *Id.*

Third, parental involvement in a minor's abortion increases the likelihood of a quick and knowledgeable response to post-abortion complications. *See Ohio v, Akron Ctr. For Reproductive Health,* 497 U.S. 502, 519 (1990). This added layer of monitoring is critical because only one-third of abortion patients return for a post-abortion checkup. Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective* in *A Clinician's Guide to Medical and Surgical Abortions* at 20 (Maureen Paul et. al., eds. 1999). Abortion complications such as infection may take 48-96 hours to become recognizable. *See* SOF ¶¶ 31-32; *see also* E. Steve Lichtenberg et al., *Abortion Complications: Prevention and Management, in* A Clinicians Guide to Medical and Surgical Abortions 197, 206 (Maureen Paul et al. eds., 1999). Left untreated, post-abortion infections threaten fertility and, in some cases, the girl's life, SOF ¶ 33; see Phillip G. Stubblefield and David A. Grimes, *Current Concepts: Septic Abortion,* New England J. Med., Aug. 4, 1994, at 310, 310.[12] Other complications occur even later, generally after 28 days, and include sterility and emotional distress. *See* David A. Grimes, *Sequela*

[12] Dr. Stubblefield was cited by the United States District Court for the Federal District of Nebraska in *Carhart v. Stenberg.* 11 F. Supp. 2d 1009, 1116 (D. Neb. 1998).

of Abortion, in Modern Methods of Inducing Abortion, 98 (David T. Baird et al. eds., 1995). *Id.* At 101, 103-04. Planned Parenthood does not require follow-up exams and reacts only if contacted by a physician or a hospital emergency room. SOF 35, 41-42.

C. Neuropsychological and Behavioral Research Shows That Adolescents Lack Capacity for Fully Informed Decision-making.

Most recognize from experience that the decision-making capacity of a minor is often lacking. Indeed, even Planned Parenthood recognizes this fact in practice, training its staff to assess the "level of maturity" of minors and providing a specific training "for teens", in order to respond effectively to a minor's questions. *See* SOF ¶ 44.

Magnetic resonance imaging (MRI) studies show why minors' brains function differently. They indicate that the adolescent brain is developmentally impaired particularly with regard to decision-making and risk evaluation. Longitudinal MRI research has allowed scientists to plot milestones as individual brains mature. *See, e.g.,* Jay N. Giedd et. al., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study,* 2 Nature Neuroscience 861, 861 (1999) (examining 145 children and teens over a period of ten years). Among the last milestone in the development of the adolescent brain is the maturation of the frontal lobes. *See,* Nitin Gogtay et. al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood,* 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004). The frontal lobes govern the executive or "CEO" functions of the brain,

including foresight, consequential thinking, and goal-directed actions. *See* Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23 (2001). The emotional, reward-based circuitry develops long before consequential thinking. B. Finger et. al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk-Taking in the Columbia Card Task,* 35 J. Experimental Psychol. Learning, Memory, and Cognition X, 709-30 (2009). This imbalance causes adolescents to think and act impulsively—especially in emotionally turbulent situations. Somerville et. al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues,* 72 Brain & Cognition X, 124-33 (2010). In this case, Planned Parenthood's own experts have published books and other scholarly works which described in great detail the disadvantages of minors, because of this lack of development. SOF ¶¶ 51-73. Indeed, Dr. Halpern-Felsher is recognized by the American Psychological Association as an expert on this issue in amicus briefing submitted to the U.S. Supreme Court. SOF 70-73.

Not surprisingly, and as noted in detail above, law mirrors this reality. For example, in Montana minors are denied the right to vote, Mont. Code Ann. § 13-1-111, and because of their age they may disaffirm certain contracts that would be binding on adults. *See also, e.g.,* Mont. Code Ann. § 41-1-304 (permitting minors to disaffirm certain contracts which would be binding on adults); *id.* at § 3-15-301 (prohibiting minors from jury service). State laws precluding minors from giving consent are also perfectly constitutional. *See, e.g.,* Mont. Code Ann. § 45-5-501

(removing the ability of adolescents under the age of 16 to consent to sexual touching or intercourse); *State v. Ellis,* 2009 MT 192, ¶¶ 31-32, 351 Mont. 95, 210 P.3d 144 (holding minors cannot consent to a police search of their parent's home or waive the right against self-incrimination unless advised to do so by their parents or counsel) (citing *State v. Schwarz,* 2006 MT 120, ¶ 13; Mont. Code Ann. § 41-5-331(2)).

The United States Supreme Court has also recognized that not all minors possess the requisite age or maturity to give "effective consent for the termination of her pregnancy." *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 75 (1976). Experts have reached similar conclusions. In the abortion context, a mature minor's decision to terminate her pregnancy should demonstrate "(a) understanding the nature and probable consequences of one's situation; (b) thoroughly understanding consequences associated with each alternative, including both risks and benefits; (c) comparing alternatives based upon this evaluation of consequences (d) integrating personal values and goals; and (e) making a voluntary, proactive decision that is not overly influenced by others." Ambuel B. & Rappaport J., *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion,* Law & Hum. Behav. 1992, 16:129-154. Adolescents, especially adolescents in relationships with much older men, fail all of these indicia. Minors often lack information about their own medical history, which has been recognized as essential to making an informed decision and monitoring for post-abortion complications, especially emotional and psychological consequences. *See* Part I.B.2, *infra.* Moreover, any

minor capable of meeting these criteria would be able to access the judicial bypass. *See* Part II, *supra.*

Finally, these laws also promote the integrity of the family and protect the parental right to be involved in their minor child's decision making process. The Supreme Court has long held that it remains cardinal "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *see also* Hodgson *v. Minn.,* 497 U.S. 417, 444-45 (1990) ("the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest."); *id.* at 483 (O'Connor, J., concurring) (recognizing the "right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf.").

There is no doubt that not all parents will respond well to their daughter's pregnancy, and may even be unhelpful in her decision. But the fact that some parents may not respond well is not sufficient reason to doom the entirety of the parental involvement laws. *Hodgson,* 497 U.S. at 485-86 (Kennedy, J., concurring); *Matheson,* 450 U.S. at 424 (Stevens, J., concurring). For minors in such a situation, the judicial waiver is available, *see, supra,* next section.

II. The Parental Involvement Laws Are Narrowly Tailored By Providing A Carefully-Designed Judicial Waiver Procedure.

The Montana Supreme Court recognized that a minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the court finds that the minor is mature and well-informed, or, even if she is not, if the desired abortion would be inter her best interests. SOF ¶ 78. That judicial bypass option is precisely what both the Parental Consent and Parental Notice laws provide.

The parental involvement statutes define a minor as "a pregnant female under 18 years of age and who is not an emancipated minor." Mont. Code Ann. § 50-20-503(5). Emancipated minors are persons "under 18 years of age who is or has been married or has been granted an order of limited emancipation by a court." *Id.* at (3).[13] Minors unable to establish the requisite

---

[13] Youths may be given limited emancipation if a judge determines, pursuant to Mont. Code Ann. § 41-1-501(2): * * *

> (c) that limited emancipation is in the youth's best interests;
> (d) that the youth desires limited emancipation;
> (e) that there exists no public interest compelling denial of limited emancipation;
> (f) that the youth has, or will reasonably obtain, money sufficient to pay for financial obligations incurred as a result of limited emancipation;
> (g) that the youth, as shown by prior conduct and preparation, understands and may be expected to responsibly exercise those rights and responsibilities incurred as a result of limited emancipation;
> (h) that the youth has graduated or will continue to diligently pursue graduation from high school, unless circumstances clearly compel deferral of education; and
> (i) that, if it is considered necessary by the court, the youth will undergo periodic counseling with an appropriate advisor.

maturity to be granted emancipation are nevertheless exempted from the parental involvement requirements in the following circumstances:

> (1) the attending physician or physician assistant certifies in the minor's medical record that a medical emergency exists and there is insufficient time to provide consent;
>
> (2) consent is waived, in a notarized writing, by the person entitled to give consent; or
>
> (3) consent is waived under 50-20-509.

Mont. Code Ann. § 50-20-507. Section 3 further allows unemancipated minors to override parental involvement in the following instances:

> (4) If the court finds that the minor is competent to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent or legal guardian.
>
> (5) The court shall issue an order authorizing the minor to consent to an abortion without the consent of a parent or legal guardian if the court finds that:
>
> > (a) there is evidence of physical abuse, sexual abuse, or emotional abuse of the minor by one or both parents, a legal guardian, or a custodian; or

> (b) the consent of a parent or legal guardian is not in the best interests of the minor. * * *
>
> (8) The supreme court may adopt rules providing an expedited confidential appeal by a minor if the youth court denies a petition. An order authorizing an abortion without the consent of a parent or legal guardian is not subject to appeal.

Id. at § 50-20-509. In short, the parental involvement law exempts all underage persons who (1) are or have at one point been married, (2) have obtained court-ordered emancipation, (3) are in medical danger, (4) have been determined mature by a local judge, (5) may be at risk of physical abuse, (6) sexual abuse, (7) emotional abuse or, even if *none* of the seven preceding exemptions can be met, (8) a court is still empowered to determine that parental involvement is not in the minor's best interests. If, in the confidential bypass proceeding, a court cannot find grounds by a preponderance of the evidence in the above eight categories to exempt an adolescent, she can appeal to the Supreme Court of Montana, which expedites the proceeding and maintains strict confidentiality. SOF¶ 89.

A survey of the 16,000 judicial bypass petitions filed between 1981-1999 in Massachusetts revealed only 13 denials, and 11 of those were reversed on appeal. *Hearings on Tex. H.B. 623 Before the House Comm, on State Affairs,* 76th Leg., R.S. 21-22 (Apr. 19, 1999) (testimony of Ms. Jamie Sabino); see *also* Robert H. Mnookin, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* 239 (1985) (finding 100% of petitions to bypass parental consent were approved).

Indeed, even Planned Parenthood's expert on judicial bypass admitted that of the hundreds of bypass cases in which she's represented minors, only around five were not successful at the district court, and of those that were appealed, only one or two cases were unsuccessful on appeal. *Lucido* Dep. at 13:8-13-14:15-19, Risken Deci. Ex. 19.

Another study of judicial bypass in Massachusetts found that the average hearing lasted a mere 12.2 minutes. *See* Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: the Massachusetts Consent Statute,* 78 Am. J. Pub. Health 646, 648 (1988). Given that Montana does not explicitly require a hearing, if a court grants a judicial waiver based on the testimony presented in affidavits (for example, evidence from a caregiver that the minor has suffered abuse), the burden is even lower than most states, as Planned Parenthood's experts admit. SOF ¶¶ 80-82, 84-85.

In sum, Montana's judicial waiver process reflects the Legislature's diligent effort to address only those teenagers who will be the most protected by parental involvement, and allow judicial waiver for minors for whom it is appropriate.

III. The Parental Notice Laws' Constitutionality Is Not Undermined Simply Because It Does Not Apply to Other Medical Conditions Such as Pregnancy.

The United States Supreme Court has flatly rejected Plaintiffs' argument that the Parental Involvement laws should be struck down as

unconstitutional simply because the State does not require parental notification or consent for pregnancy related treatment.

> Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carriers the child to term. But a state's interest in full-term pregnancies are sufficiently different to justify the line drawn by the statutes. *Cf. Maher v. Roe,* 432 U.S. 464, 473-74 (1977). If the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

Matheson, 450 U.S. at 412-13. Elective abortion changes a woman's pregnancy status. Continuing with a pregnancy, and seeking medical treatment for that pregnancy, does not. In other words, in regard to pregnancy, once a minor becomes pregnant a birth is going to happen and the minor will need medical care regardless of what other decisions she makes. But abortion is a choice, and changes the status quo significantly. It is reasonable for the State to want parental involvement in that decision, especially given the emotional and psychological risks associated with a minor's abortion decision.

As the Supreme Court has repeatedly emphasized, "[t]he abortion decision has implications far broader than those associated with most other kinds of medical treatment." *Bellotti,* 443 U.S. 622, 649 (1979). Thus, the Court has repeatedly found that, because of

the profound emotional, psychological, social, and moral dimensions of abortion, parental "consultation is particularly desirable with respect to the abortion decision . . . ." *Matheson,* 450 U.S. at 409-10. Indeed, Justice Stevens, a staunch abortion supporter, recognized that the distinction between abortion and other medical conditions, such as pregnancy, justifies parental involvement laws. "[T]he special importance of a young woman's abortion decision . . . provides a special justification for reasonable state efforts intended to ensure that the decision be wisely made." *Id.* at 422-23 (Stevens, J., concurring).

And as detailed above, the emotional and psychological risks associated with abortion are far greater than those associated with pregnancy. *See,* D. M. Fergusson, L. J et. al., *"Abortion in Young Women and Subsequent Mental Health"* pp. 16-24, *Risken Deci. Ex. 4* (noting minors who had an abortion are significantly more likely to develop major depression, anxiety disorder, and suicidal ideation compared with minors who do not have an abortion).

Thus, the State is fully justified in requiring parental involvement for minors seeking abortions, but not requiring parental involvement for minors seeking medical related to pregnancy. This Court should follow the Supreme Court's lead and reject Plaintiffs counterfeit comparison.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted this __ day of _____, 2016.

TIMOTHY C. FOX
Montana Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By:_____
DALE SCHOWENGERDT
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing document to be mailed to:

Ms. Tanis M. Holm
Crist, Krogh & Nord, LLC
2708 First Avenue North
Suite 300
Billings, MT 59101
tholm@cristlaw.com

Ms. Alice Clapman
Planned Parenthood Federation of America
1110 Vermont Avenue NW
Suite 300
Washington, DC 20005
alice.clapman@ppfa.org

DATED:_____ _____

APPENDIX H

Tanis M. Holm
Eric E. Holm
SATHER & HOLM, PLLC
2301 Montana Avenue, Ste. 202
Billings, Montana 59103
Telephone: (406) 294-1700
Facsimile: (406) 794-0673
tanis@satherandholm.com
eric@satherandholm.com

Alice Clapman
Richard Muniz
Planned Parenthood Federation of America
1110 Vermont Ave, NW, Suite 300
Washington, DC 20005
Telephone: (202) 973-4800
alice.clapman@ppfa.org
richard.muniz@ppfa.org

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, vs.	Cause No. BDV-2013-407 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

STATE OF MONTANA and)
TIM FOX, ATTORNEY)
GENERAL OF MONTANA,)
in his official capacity, and)
his agents and successors,)
)
Defendants.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

This case concerns Montana's continuing efforts to single abortion out from all other reproductive healthcare and require minors to involve a parent before obtaining this care. One of the laws challenged in this case, the Notice Act, revives a restriction similar to one already considered and invalidated by this court in a well-reasoned decision, *Wicklund v. State*, Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999). The other law challenged here, the Consent Act, would take that restriction *further*, and actually remove the abortion decision from minors' hands entirely. These Acts cannot be squared with the Montana Supreme Court's clear holdings that: 1) when an individual finds herself pregnant, she has a "moral right and moral responsibility" to make her own decisions about that pregnancy; and 2) this right must be vigilantly protected against "the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular." *Armstrong v. State*, 1999 MT 261, ¶ 2, 296 Mont. 361, 989 P.2d 364.

With barely any acknowledgment of *Armstrong* or *Wicklund*, and none of the other precedent protecting Montana women's reproductive freedom, Defendants have moved for summary judgment, asking this Court to uphold both acts. Their supporting arguments are flawed in four critical ways: First, Defendants limit their argument to the issue whether a parent should be *notified* of her daughter's decision, and never even try to justify the Consent Act's burdensome and

intrusive additional requirements that the parent *consent and document* her identity and parentage. Second, Defendants rely heavily on federal case law, ignoring fundamental differences between the state and federal constitutional standards. Third, in their discussion of the Montana Constitution, Defendants focus entirely on the Minors' Rights Clause, even though Plaintiffs also have brought privacy and equal protection claims as well. And finally, Defendants mischaracterize facts (and concessions by their own experts) that are fundamental to their argument, such as how many minors voluntarily involve a parent (most do) and whether abortion causes mental health problems (it does not).

Based on these and other flaws, Defendants have failed to meet their burden, and the Court should deny their summary judgment motion.

ARGUMENT

I. Defendants Argue the Wrong Legal Standard

While Defendants' brief focuses mostly on federal due process case law, the Montana Supreme Court has held that "Montana's Constitution affords significantly broader protection than does the federal constitution," including "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong*, ¶ 41, 34, citing Mont. Const. art. II, § 10 ("Privacy Clause"); *see also* Mem. in Supp. of Pls.' Mot. for Summ. J ("Pls.' Summ. J. Br."). The Montana Constitution also guarantees stronger protection than the federal Constitution of its citizens' right to equal protection, *see* Montana

Constitution, art. II, § 4 ("Equal Protection Clause"), and it expressly guarantees minors a right not found anywhere in the Federal Constitution, *See* Mont. Const. art. II, § 15("Minors' Rights Clause"). Based on these protections, Montana courts apply a higher level of scrutiny to abortion restrictions than federal courts have applied. *Armstrong*, ¶ 40–41. Indeed, this Court has already applied that standard to strike down a parental notice law, based on the same evidence and same state interests asserted here. *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *3–4.

Of critical importance here, while federal constitutional law allows states to treat abortion differently from other reproductive decisions because "for some people [it] raises profound moral and religious concerns," *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (Powell, J., concurring), the Montana Supreme Court has held that it is unconstitutional—and "morally indefensible"—for the State to do so. *Armstrong*, ¶ 60 (striking down law, under the Montana Constitution, that had just been upheld by the U.S. Supreme Court under the Federal Constitution); *see also Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959708, at *6 (Mont. Dist. Ct. May 19, 1995) ("[O]nce a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality."); *Planned Parenthood of Mont. v. State*, No. DDV-2010-787, at *11 (1st Jud. Dist. May 4, 2012) (same). Thus, Defendants are simply wrong when they rely on federal case law to argue that, under the Montana Constitution, the Acts can be justified based on what Defendants believe to be the "moral . . . consequences

of abortion." Defs.' Br. in Supp. of Mot. for Summ. J. 20 ("Defs.' Summ. J. Br.").

Defendants also err in their reading of the Montana Constitution. Although the rights to privacy and equal protection, and rights of minors, are interrelated, each independently renders the Acts invalid. *See, e.g.*, *Armstrong*, ¶ 2 (striking down statute based on privacy right alone); *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *4-6 (striking down parental involvement law based on Montana Equal Protection Clause); *Planned Parenthood of Mont.*, No. DDV-2010-787, at *18 (striking down discriminatory family planning policy under both the Privacy Clause and the Minors' Rights Clause); *In re S.L.M.*, 287 Mont. 23, 39, 951 P.2d 1365, 1375 (1997) (finding separate violations of both the Minors' Rights Clause and the Equal Protection Clause). And the Acts violate these three rights in different ways: Privacy, because the Acts interfere with decisions and medical care that are consequential and deeply personal; equal protection, because the Acts discriminate *between* similarly situated minors; and minor's rights, because they single minors out for unique restrictions that harm rather than protect them.

In their motion, Defendants blur all these distinctions, and focus exclusively on the Minors' Rights Clause and on the Acts' distinction between minors and adults, without addressing the other rights at stake in this case or the Acts' discrimination *between* classes of minors.[1] Defendants describe the

[1] Defendants' only justification of their discrimination *between* classes of minors is to cite *federal due process* law. Defs.' Summ. J. Br. 28–29. For all of the reasons set forth in Pls.' Summ. J. Br.

Minors' Rights Clause as a "caveat" and treat it as though, for minors, it limited or replaced all the constitutional rights afforded to Montanans. Defs.' Summ. J. Br. 6. But the constitutional history makes plain that this clause was meant to reinforce other rights, not limit them. Specifically, the drafters cited the need to "respect" "young adults," and to make Montana "the leader among all the states in recognizing the rights of people under the age of majority." Monroe Statement, Mont. Const. Convention Proceedings vol. 5, 1750 (Mont. Legis. & Les. Council 1981), *available at* http://courts.mt.gov/portals/113/library/mt_cons_convention/vol5.pdf. And while Defendants suggest that the framers drafted the Minors' Right Clause mainly to protect "the rights of a criminal defendant," Defs.' Summ. J. Br. 7, in fact the clause was added to make clear that minors more broadly have "the basic guarantees that citizens have with respect to their person, their property and their liberty." Dahood Statement, *id.* at 1751.

The Montana Supreme Court's analyses in two companion cases, *In re C.H.*, 210 Mont. 184, 683 P.2d 931 (1984), and *S.L.M.*, reinforce that the Minors' Rights Clause is a supplement to other rights, not a "caveat." In *C.H.*, the Supreme Court upheld a provision of the Youth Court Act that gave courts discretion to designate a minor offender as either a

---

and *infra*, this justification fails because: 1) the Montana Constitution, and particularly the Equal Protection Clause, sets a higher burden for Defendants; and 2) the record facts do not support a more restrictive approach to abortion under the Montana Constitution, particularly not to the point of entitling Defendants to summary judgment.

"youth in need of supervision" or a "delinquent youth," holding that this discretion was consistent with both the Equal Protection Clause and the Minors' Rights Clause because it narrowly served the compelling state interest in protecting minors by allowing for more individualized treatment emphasizing rehabilitation over retribution.[2] A decade later, the Court struck down an amendment to that same act that would have broadened its aims to including public safety. *In re S.L.M.*, 287 Mont. at 35-36, 951 P.2d at 1373. The Court held that, while the State can punish minors differently for their own protection, it cannot do so for other purposes. *Id.* at 40, 951 P.2d at 1376.

Specifically, the Court in *S.L.M.* explained "we must . . . apply a strict scrutiny analysis and determine whether there is a compelling state interest sufficient to justify such an infringement *and* whether such an infringement is consistent with the mandates of [the Minors' Rights Clause]." *Id.* at 34, 951 P.2d at 1372 (emphasis added). The Court further explained that

---

[2] Defendants incorrectly attribute to *C.H.* the statement that the federal case law on parental involvement laws was "precisely what the drafters of the 1972 Montana Constitution had in mind" when they drafted the Minors' Rights Clause to guarantee minors equal liberties except insofar as a restriction is necessary to "enhance the protection of such persons." Defs.' Summ. J. Br. 6–7 (citing *C.H.*, 210 Mont. at 203, 683 P.2d at 941). In fact what the court said (in a case that had nothing to do with privacy) was that the *principle* that "a juvenile's right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated" was "precisely what the drafters of the 1972 Montana Constitution had in mind" when they drafted the qualification to the Minors' Rights Clause (nearly a decade before the U.S. Supreme Court even held that parental involvement laws were permissible). *Id.*

the Minors' Rights Clause "must be read in conjunction with the guarantee of equal protection found in Article II, Section 4," because it was intended "to remedy the fact that minors had not been accorded full recognition under the equal protection clause of the United States Constitution." *Id*. at 34-35, 951 P.2d at 1372. Finally, *S.L.M.* held that:

> Clearly under Article II, Section 15, minors are afforded full recognition under the equal protection clause and enjoy all the fundamental rights of an adult under Article II. Furthermore, if the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors.

Id., at 35, 1373. Under *S.L.M.*, then, the Acts are only constitutional if: 1) the distinctions they create are narrowly tailored to a compelling state interest; 2) the burdens they impose are narrowly tailored to a compelling state interest; *and* 3) they single out minors only to the extent necessary for their *own* protection. Defendants, therefore, are urging this Court to adopt the wrong standard when they claim they can restrict minors' rights to address what they see as the "social, and moral dimensions of abortion" or to enforce freestanding "parental right[s]." Defs.' Summ. J. Br. 24, 28. They also err in suggesting that the Minors' Rights Clause overrides all other constitutional protections for minors. *See also Planned Parenthood of Mont.*, No. DDV-2010-787, at **11–14*; *Wicklund,* 1999 Mont. Dist. LEXIS, at *5.

In addition to ignoring two of the three constitutional rights at issue in this case, Defendants overlook that, under each of these constitutional provisions, the burden shifts to the State to justify any infringement. Thus, while Defendants assert that Plaintiffs bear a "heavy burden" "that cannot be overstated" of establishing that the Acts are unconstitutional, Defs.' Summ. J. Br. 7, in fact it is Defendants who bear the burden, under the Privacy and Equal Protection Clauses, of proving "by clear and convincing evidence" that the Acts, and the distinctions they create, are narrowly tailored to a compelling state interest. *Armstrong*, ¶ 59; *Wicklund*, 1999 Mont. Dist. LEXIS, at *5-6; *Jeannette R.*, No. BDV-94-811, 1995 WL 17959708, at *7. Indeed, the framers of the Privacy Clause took the unusual step of emphasizing this burden when they provided that the right to privacy "shall not be infringed without the *showing* of a compelling state interest." Mont. Const. art II, § 10 (emphasis added). In addition, to prevail against Plaintiffs' Minors' Rights Clause claim, Defendants must provide a "clear showing" that the restrictions imposed by the Acts are narrowly tailored to protect the minors affected. Mont. Const. Convention Proceedings vol. 2, 635-36 (Mont. Legis. & Les. Council 1981), *available at* http://courts.mt.gov/portals/113/library/mt_cons_convention/vol2.pdf; *see also Planned Parenthood of Mont.,* No. DDV-2010-787, at *8-9.

In the absence of any state constitutional law supporting their position, Defendants attempt to characterize the Montana Supreme Court as having "intimated" in an unpublished abortion bypass decision, that 1) the Acts "strike[]the right balance in

protecting a minor's right to an abortion," and 2) "a minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver" if it finds sufficient maturity or other justification. Defs.' Summ. J. Br. 8, 25. Not so. The appellant in did not challenge the constitutionality of the Notice Act (nor the already-enjoined Consent Act), nor did the Montana Supreme Court address those issues sua sponte. There was no need to reach those issues, since the Court was *reversing* a bypass denial and *authorizing* the minor to have an abortion without notifying her parents. And in so doing, the Court held that the district court had applied too strict a standard to comply even with federal law. *See* ¶¶ 10-15. But nothing in that unpublished decision alters the Montana Supreme Court's clear guidance in *Armstrong*, ¶ 14 that the Montana Constitution goes well beyond the Federal Constitution in its protection of the right to privacy, including the right to terminate a pregnancy. Nor does in any way "intimate" that, under that more protective Montana Constitution, the Court would uphold either the Notice Act or the Consent Act.

Rather, the published state constitutional precedent on this issue is clear: Abortion is a fundamental right, protected by strict scrutiny, *Armstrong*, ¶ 2; the State must govern neutrally when it legislates in the field of reproduction, *Jeannette R.,* No. BDV-94-811, 1995 WL 17959708, at *6, *Planned Parenthood of Mont.,* No. DDV-2010-787, at *11; these protections apply to young women as well as adult women, *id.*, *Wicklund*, 1999 Mont. Dist. LEXIS, at *6; and, if the State seeks to require minors to involve their parents in their decision to have an abortion (but not in other

reproductive decisions), it must show that such a targeted restriction is narrowly tailored to a compelling state interest, *id.*, at *21–22. Because Defendants never even try to explain how the Acts conform to this precedent, their motion fails.

II. Defendants Offer No Argument Justifying the More Restrictive Consent Act

Defendants have moved for summary judgment as to the Consent Act, as well as the Notice Act, without even attempting to explain how the Consent Act can be narrowly tailored when it is substantially more burdensome than the Notice Act.

Defendants frame the Acts' purposes as: "1) protecting minors from sexual victimization by adult men; 2) protecting minors' psychological and physical wellbeing by having informed parents who can monitor post-abortion complications and provide helpful medical history; and 3) protecting minors from rash or poorly reasoned decisions that often result from an adolescent's decision-making capacity." Defs.' Summ. J. Br. 1–2. As set forth below, neither Act is narrowly tailored to any of these purposes. Beyond that, even on their face, these asserted purposes are all geared toward justifying a parental *notice* requirement, not the additional requirement that the minor's parent decide *for* her whether she must bear a child and assume the responsibility of parenthood. Nowhere do Defendants even attempt to explain why notifying parents *and then* giving them veto power over their daughter's medical decision-making better enables parents to protect their daughters from sexual victimization, better enables them to help their daughters obtain high-quality medical care, or better

enables them to make good decisions. Indeed, Defendants' own experts could not articulate any benefit to requiring consent, as opposed to notice. Pls.' Statement of Undisputed Facts ¶ 41 ("Pls.' Facts"); *see also State v. Planned Parenthood of Alaska*, 171 P.3d 577, 584 (Alaska 2007) (finding no conceivable benefit to requiring consent).

Not only do Defendants fail to provide any justification for a parental consent requirement, they fail to even acknowledge the gratuitous and severe burdens it imposes on minors. First of all, the Consent Act sweeps more broadly to include even older minors, including minors who are off at college. *Cf.*, *e.g.*, Del. Code Ann. tit. 24, § 1782 (limiting law to minors under 16); S.C. Code Ann. § 44-41-10 (minors under 17); Mont. Code Ann. § 41-1-402(2)(a) (allowing minors who have completed high school to consent to all medical care other than abortion). Second, the Consent Act imposes burdensome new notarization and documentation requirements (not in the Notice Act) that will substantially delay minors by requiring their parents to pull together official proof of identity and parentage. *See* Pls.' Facts ¶ 90; Mont. Code Ann. §§ 50-20-504, -506; *cf. Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 633–34 (N.J. 2000) (finding that notarization requirement was significant and unnecessary burden); Howell Dep. 248:11-13, 248:14-249:24 (PPMT sees homeless patients who lack any documentation, patients who have moved between states, and patients who do not have any time or resources to pull together government documentation).

Finally and most egregiously, the Consent Act tightens the requirement from one that the parent know of the minor's decision to one that the parent *make* that decision *instead* of the minor. The additional burdens of requiring consent are readily apparent. Indeed, Defendants' expert Dr. Anderson, while opining that parents should have "input" into a minor's decision whether to have an abortion, agreed that "ultimately the adolescent's decision about abortion should be made by the adolescent without coercion from anyone," and stated: "I want that teen to come to a decision with input from her parents, obviously, but I don't want things to be forced." Pls.' Facts ¶ 42. By amending its law from a notice requirement to a consent requirement, the State has done exactly what its own expert has opined it should not: empowered a minor's parents to take the ultimate decision out of her hands.

The Alaska Supreme Court expressed this very concern when it struck down a consent requirement in *Planned Parenthood of Alaska*, reasoning that 1) "[b]y prohibiting minors from terminating a pregnancy without the consent of their parents, the [law] bestows upon parents . . . a 'veto power' over their minor children's abortion decisions, . . . shift[ing] a portion of [their right to choose] from minors to parents," 171 P.3d at 583, and 2) in so doing "guarantees no more than a one-way conversation and allows parents to refuse to consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best

interests," *id.* at 384 (internal quotation marks omitted).[3]

Thus, even if every single fact Defendants asserted were undisputed (which is far from the case), this Court should still deny Defendants, and grant Plaintiffs, summary judgment on the issue whether the Consent Act is constitutional.

III. None of Defendants' Asserted Interests Can Support the Acts

Rather than defend the interests professed by the legislature when it enacted the Acts (all of which are addressed in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment), Defendants claim they are entitled to summary judgment because the Acts advance the following state interests: 1) "protecting minors from sexual victimization by adult men"; 2) "protecting minors' psychological and physical wellbeing"; and 3) "protecting minors from rash or poorly reasoned decisions."[4] Defs.' Summ. J. Br. 1–2. As explained below, Defendants' arguments turn on factual assertions that are wholly unsupported by the record, and cannot meet the strict

---

[3] After this decision, Alaska enacted a parental notice law, which the Alaska Supreme Court struck down as well. *Planned Parenthood of Great Nw. v. State*, 375 P.3d 1122, 1128 (Alaska 2016).

[4] As set forth *infra* § III.C, whether the state may restrict minors' decision-making based on the "rashness" of youth depends entirely on whether the state has crafted restrictions that are narrowly tailored to protect minors from concrete *harm* and is applying these restrictions evenhandedly. Otherwise, any restriction on minor's liberty could be justified as "protective," and the Minors' Rights Clause would be meaningless.

scrutiny standard required by the Montana Constitution.

A. The Record Does not Support Defendants' Assertion that Most Minors Hide Their Pregnancy and Abortion From Their Parents

Defendants repeatedly state that "most minors will not involve their parents in their decision because of unrealistic fears about what their parents' reactions will be." *See, e.g.*, Defs.' Summ. J. Br. 1. However, their own experts have conceded that most minors seeking an abortion *voluntarily* involve their parents in their situation, whether or not they are legally required to do so. Pls.' Resp. to Defs.' Statement of Fact ("Pls.' Resp. to Defs.' Fact") ¶ 20; *see also Planned Parenthood of the Great Nw. v. State,* No. 3AN-10-12279 CI, 2012 WL 4835506, at IV.a (Alaska Super. 2012) (finding "that over 60 per cent of parents of pregnant teenagers are informed or become aware of the pregnancy, and will learn of any abortion decision independently from the [parental notice law].") Moreover, the minors most likely to *benefit* from parental involvement are precisely the ones most likely to *tell* their parents: minors who are younger, minors who are uncertain, minors who are close with their parents, and minors who have history of being able to communicate with their parents. Pls.' Facts ¶¶ 35–37; *see also Wicklund*, 1999 Mont. Dist. LEXIS, at *7–9. Thus, it is not true that in "most" cases, parents are not informed; still less is it true that in most cases, they are not informed because adolescents have "unrealistic fears."

To contrary, Plaintiffs' expert Dr. Suzanne Pinto described the process she has observed adolescents follow in her decades of clinical experience:

> [W]hen things are difficult, for example, a child gets pregnant or a child is going on birth control or a child gets kicked out of school or has a minor run-in with the law . . . [e]very kid's initial reaction is one of great dismay and, oh, my God, what am I going to do? . . . [But] most kids I know when they're faced with a difficult situation, go through a process of saying, you know what, my mom is going to be so angry at me, but she loves me and she'll understand at some level or she'll get over it or she'll cope. And they have that based in knowledge, 16, 17 years of knowing their parents.

Pinto Dep. 71:4-24. Dr. Pinto also testified that minors who do not come around to telling their parents generally base that decision not on a whim but on "a long history and foundation of dysfunction, abuse, difficulty, disappointment, irreparable harm to the relationship." *Id*. at 70:15–22.

These facts critically undermine Defendants' arguments; the pool of minors who could theoretically benefit from the Acts is far smaller, and far less likely to actually benefit, than Defendants acknowledge (or prove), and certainly does not offset the harms broadly imposed by the Acts on all minors seeking an abortion.

B. The Acts Are Not Narrowly Tailored to Protect Minors from Sexual Abuse

Defendants claim that the Acts "advance" the State's interests in preventing sexual assault and sex trafficking. Tellingly, they do not claim that the Acts are narrowly tailored to that interest (as the Montana Constitution requires). Nor could they. To begin with, Montana already has a criminal law requiring that medical providers report sexual victimization, which of course would include sex trafficking. Mont. Stat. Ann. §§ 41-3-201, 41-3-207(2). Plaintiffs already screen for abuse, and report it, both because they are legally and professionally required to and because they are committed to protecting their patients.[5] Defendants have failed to explain why, in addition to that requirement, all minors who seek abortion (but no other reproductive health care) should be forced to involve their parents or a judge in their abortion

[5] Defendants accuse Plaintiffs of failing to comply with their reporting obligations. However, the record is clear that Plaintiffs screen for and report abuse. Pls.' Facts ¶¶ 58, 60. And while Defendants raise an issue as to whether Plaintiffs should be reporting every instance of sex involving a minor under 16, the Montana Department of Public Health and Human Services has advised Plaintiffs *not* to do so. Aff. of Rebecca Howell ¶¶ 8–9 ("Howell Aff."), attached as Ex. 13 to Pls.' Sealed Resp. to Defs.' Statement of Undisputed Facts ("Pls.' Resp. to Defs.' Facts"). Nor is there any conceivable relevance to Defendants' unsupported assertions that, in two isolated instances, separate Planned Parenthood organizations in other states (one of which had a parental involvement law) failed to report suspected abuse. Defs.' Summ. J. Br. 14. At any rate, neither of these instances, illustrates that abuse "happened because parents were not informed [by Planned Parenthood] of their minor daughter's pregnancy and abortion," Defs.' Summ. J. Br. 14. *See People v. Cross*, 36 Cal. Rptr. 3d 95, 99 (Cal. Ct. App. 2005) (the victim's *mother* found her naked in bed with her *stepfather*, who was raping her, yet failed to protect her daughter in any way; the victim had an abortion in a public hospital, not at a Planned Parenthood organization); Pls.' Resp. to Defs.' Facts ¶ 94.

decision. Nor have they presented any *evidence* that parental involvement laws provide enhanced protection over mandatory reporting laws.[6] The Acts seem particularly unsuited to the goal of protecting vulnerable minors given that: 1) some minors are being abused by their parents, and these minors face particular obstacles to obtaining a bypass, Pls.' Facts ¶¶ 76–78; and 2) judges (unlike providers) are not themselves mandatory reporters (and in fact are statutorily directed to protect the confidentiality of the proceedings), Mont. Stat. Ann. § 41-3-201; Defs.' Facts ¶¶ 86-87.

Defendants' only attempt at producing evidence that parental involvement laws protect minors from sexual victimization is to argue that the Notice Act protected one 15-year-old minor, who obtained a judicial bypass under the pseudonym [●]. They based their argument on the fact that the judge hearing her application went on to report her prior, consensual sexual activity to the police. Defs.' Summ. J. Br. 13. (This minor also was deemed mature enough by the Montana Supreme Court to make her own decision concerning her pregnancy without involving a parent.) Defendants go so far as to baldly assert that,

---

[6] Defendants claim that, in one study of minors who did not involve a parent, "the adolescent's boyfriend becomes the most involved person in her decision 89 percent of the time, and also finances the abortion 76 percent of the time." Defs.' Summ. J. Br. 12. As Defendants' own expert admitted, this is a mischaracterization because these statistics include *any* partner involvement, however slight and however benign. Anderson Dep. 242:11–21; 240:3–18. Moreover, while Defendants discuss these statistics in the same paragraph with a statement about "much older men," Defs.' Summ. J. Br. 12, these statistics refer to partners in general, regardless of age.

but for the bypass process, "she could have been subject to further, unknown abuse at the hands of her 19-year-old sexual partner." *Id*. But contrary to this assertion, there is no evidence that this minor was in any danger from her partner, nor that the police responded to the judge's report with any investigative or enforcement actions beyond speaking with the minor's lawyer. In fact, the minor's lawyer testified that, after she informed the police that the minor was not interested in pressing charges against her partner, *they took no further actions*. Dep. 37:1-11. Thus, according to the record evidence, the Notice Act (and specifically the bypass process) had no effect whatsoever on this minor's life other than to cause her severe stress and delay her abortion (thereby jeopardizing her confidentiality and exposing her to increased medical risks). Howell Rep. ¶ 3; Howell Dep. 187:25–188:9.

Not only have Defendants failed to produce any evidence—much less undisputed evidence—that the Acts are narrowly tailored to protect minors from sexual victimization, but one of the authors Defendants and their experts rely on, Dr. Michael Males, has concluded that the best way for states to protect minors from unequal sexual relationships would not be to impose legal *restrictions* on minors but rather to reduce teen poverty, because impoverished teens are in danger of entering these relationships as a means of escape or survival. Michael Males, Research Center for Adolescent Pregnancy (ReCAPP), *Teens & Older Partners* 7-8 (2004) (cited in Reb. Rep. of Dr. Bonnie Halpern-Felsher ("Halpern-Felsher Reb. Rep.")). Dr. Males also espouses educating minors in how to protect themselves from unequal

relationships, and credits a Planned Parenthood affiliate in New Jersey for developing such a curriculum. Halpern-Felsher Reb. Rep. ¶ 42. Another approach to protecting minors, less burdensome than the Acts, would be to support *PPMT*'s work: 1) training medical professionals to provide sexual assault forensic examinations to adolescents and adult victims; and 2) holding workshops on how to prevent child sexual abuse through policies and practices in schools, youth-serving organizations and community service agencies. Howell Aff., Ex. F, PPMT, Annual Report: Fiscal Year 2013–2014 at 9. Unlike the Acts, all of these measures actually protect minors— without sweeping in vast numbers of minors who are not being sexually victimized and imposing health risks and other severe harms on them. *See* Pls.' Summ. J. Br. 16–27.

Even if the Acts did provide additional protection beyond existing reporting requirements or other protective measures (which clearly they do not), they would still violate the Equal Protection Clause because they single out minors seeking an abortion for no good reason. Pregnant minors are equally if not more in danger of being coerced by an abusive partner *not* to have an abortion and are less likely to escape an abusive situation if they are *prevented* from accessing abortion. Pls.' Facts ¶ 57; Halpern-Felsher Reb. Rep. ¶ 40 (minors at particular risk of being coerced into keeping a pregnancy); Anderson Dep. 146:15–21 (conceding that women are at risk of being coerced both into having abortions and into keeping pregnancies); Collett Dep. 130:3-13 (conceding that partners may coerce minors to continue a pregnancy, and that this is reason to require parental

involvement for minors carrying to term). With respect to Defendants' specific concern about the potential for abuse when a minor is involved with an older partner, Dr. Males has concluded that the available information "suggests teenage women are somewhat more likely to *keep* the baby when their partners are older, meaning that pregnancies ending in abortion are likely to involve *younger* men than pregnancies ending in childbearing." Darney Reb. Rep. ¶ 43 (citing Males (2004) (emphasis added)); *see also* Pls.' Facts ¶ 62. Thus, there is no dispute that minors carrying to term are more likely to be involved in coercive relationships with older partners, and therefore *more* in need of parental or other protection, than minors terminating their pregnancy.

For all these reasons, Defendants' attempt to justify the Acts based on the State's interest in protecting minors from sexual victimization defies common sense and undisputed record evidence, and cannot be squared with the Equal Protection Clause or the other rights at issue.

C. The Acts Are Not Narrowly Tailored to Protect Minors from Their Own Immaturity

Defendants also argue that the Acts are justified because adolescents are prone to immature decision-making. In making this argument, they overstate the differences between adolescents and young adults, as well as understating the variability among adolescents. Halpern-Felsher Reb. Rep. ¶ 6–17.[7]

[7] For example, Defendants go so far as to say "Adolescents . . . fail all of [the indicia laid out in the Ambuel study]." Defs. Summ.

Regardless, under the Minors' Rights Clause, the bare fact that minors are less mature than adults cannot be a sufficient basis on which to claim the Acts support a compelling state interest, and certainly is not sufficient to demonstrate that the Acts are narrowly tailored to do so. As the Alaska Supreme Court recently explained in striking down similar (but less onerous) restrictions:

> On the most generalized level, the State has a compelling interest in protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities. But we note that the interest in protecting minors from their immaturity requires context—immaturity in and of itself is not a harm.

Planned Parenthood of Great Nw., 375 P.3d at 1139. Thus the relevant question is whether the Acts are narrowly tailored to prevent *specific* harms, not whether, as a general matter, adolescents are less mature than adults.

While it may be true that adolescents can be "impulsive[]," as Defendants assert, Defs.' Summ. J. Br. 22, there is no evidence that they make impulsive decisions to have an abortion. To the contrary, the

---

J. Br. 23–24. There is no evidence to support this bald statement—certainly, Defendants offer none—and it is directly contradicted by that very study. Expert Rep. of Dr. Bonnie Halpern-Felsher ¶ 31; Halpern-Felsher Reb. Rep. ¶ 40. And to the extent Defendants mean to suggest that no minor is mature enough to decide for herself whether or not to have an abortion, that extreme position was already rejected by the Montana Supreme Court, which recently deemed a 15-year-old minor sufficiently mature. ¶ 14.

process for having an abortion requires concerted planning, coordination, and activity sustained over time, and therefore is very unlikely to be completed on a whim. Halpern-Felsher Rep. ¶ 21. (By contrast, decisions to *self*-induce an abortion can be made and carried out impulsively out of desperation, which is one of the reasons why *obstructing* teens' access to safe, professional medical care is especially dangerous, *see* Pls.' Facts ¶ 99.) Finally, there is no dispute that minors who do not consult their parents *do* consult other adults and benefit from their input, and research relied on by Defendants' own witness suggests that (even for minors as young as 12) this consultation helps them make more mature decisions. Halpern-Felsher Reb. Rep. ¶ 19 (citing Engelmann study relied on by Defendants); Ryan Dep. 98:17–100:8. Thus there is no evidence whatsoever—much less undisputed evidence—that adolescents are harming themselves by making impulsive decisions to terminate unwanted pregnancies without 8 consulting an adult.[8]

---

[8] Moreover, there is evidence in the record that minors who avoid telling their parents generally are correct in anticipating that their parents would not respond helpfully. Dr. Pinto testified that minors judge intelligently, "based on 16, 17 years of knowing their parents." Pinto Dep. 71:4–24. Moreover, according to one study relied on by Defendants' experts, most minors whose parents found out about their pregnancy from someone else reported that their parents reacted negatively (*e.g.*, with anger, rather than support) and failed to discuss multiple pregnancy options with them. Ryan Dep., Ex. 15, Table 6, Henshaw & Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Fam. Plan. Persps. 196, 203 (1992); Ryan Dep. 212:10–214:17.

Defendants point to various restrictions that the state has imposed on minors—such as alcohol consumption, pornography consumption, tattoos, enrollment in medical research, or military enlistment—and suggest that abortion should fall in this same class. This comparison fails. As the California Supreme Court recognized in *American Academy of Pediatrics v. Lungren*, restricting abortion is not like restricting other decisions minors make "because the decision whether to continue or terminate her pregnancy has such a substantial effect on a pregnant minor's control over her personal bodily integrity, has such serious long-term consequences in determining her life choices, is so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and (unlike many other choices) *is a decision that cannot be postponed until adulthood*." 940 P.2d 797, 816 (Cal. 1997); *see also Bellotti*, 443 U.S. at 646 (Powell, J., concurring) ("[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.").

Moreover, Defendants' generalizations about adolescent maturity fail to reckon with the Montana Constitution's equal protection guarantee. Minors who carry to term are no more mature, or better able to make voluntary and informed medical decisions, than minors who have an abortion. Pls.' Facts ¶ 18. In fact, they score worse on various measures of decisional maturity, *id.*, and they tend to idealize what parenthood will be like and to underestimate its difficulties. *See* Pls.' Facts ¶ 25; Pls.' Resp. to Defs.' Facts ¶ 59 (quoting Nada Stotland, *Abortion Facts*

and Feelings, A Handbook for Women and the People Who Care About Them 128–29 (1998)). Many minors also have unrealistic fears about the pain and risk associated with abortion, Howell Reb. Rep. ¶ 15, fears that might deter them from considering this option. And both groups make their decision in an equally stressful, time-pressured situation. Pls.' Facts ¶¶ 19, 21. Additionally, safely carrying to term requires ongoing decision-making and self-control. *See* Pls.' Facts ¶ 29.

For these reasons, the Alaska Supreme Court concluded that "all pregnant minors, not just those seeking termination, may need their parents' assistance and counsel when making reproductive choices," *Planned Parenthood of Great Nw.*, 375 P.3d at 1140, and if anything, parental involvement is *more* critical for minors inclined to carry to term: "Few life decisions could benefit more from consultation with supportive parents than a minor's decision to carry to term; the decision to abort, comparatively, involves far fewer enduring consequences," *id.* Indeed, Defendants' expert Dr. Anderson testified that she has seen cases in which a parent counseled her daughter to *terminate* her pregnancy, and that this counsel improved the minor's decision-making by ensuring that she had the benefit of "an adult perspective" and that she understood and considered all her options. Pls.' Facts ¶ 24. Defendants other experts agreed that supportive parents should be involved in the decision to carry to term and the decision-making and responsibilities that follow. Pls.' Facts ¶¶ 19–31.

Thus, there is simply no evidence in the record—much less "undisputed evidence"—that the State has any valid protective reason to single out minors seeking an abortion and require them to notify a parent or obtain parental consent as a condition of receiving medical care.

D. The Acts Are Not Narrowly Tailored to Protect Minors' Mental or Physical Health

Finally, Defendants argue that the Acts are necessary to protect the mental and physical health of pregnant minors, but they have not presented undisputed facts to support that position. Moreover, based on their own experts' concessions, this argument fails equal protection analysis.

1. Mental Health

Defendants' psychiatric expert, Dr. Eileen Ryan, conceded at her deposition what the major psychiatric organizations in both the United States and the United Kingdom also have concluded: there is no credible evidence that abortion causes mental health problems. *See, e.g.*, Ryan Dep. 224:22-24 ("I would say that the state of the research is such that there is *no evidence* to support a causal relationship." (emphasis added)); *see also* APA (2008) ("The best scientific evidence published indicates that among adult women who have an *unplanned pregnancy* the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy."); NCCMH (2011) ("[O]n the best evidence available . . . [t]he rates of mental health problems for women with an unwanted pregnancy

were *the same* whether they had an abortion or gave birth." (emphasis added)); *see generally* Expert Rep. of Dr. Nada Stotland, MD, MPH ¶¶ 4–5; Pls.' Resp. to Defs.' Facts ¶ 5.[9]

Dr. Ryan further conceded that studies showing an association between abortion and mental health problems lack the methodological controls necessary to support any inference that abortion *caused* those problems. Ryan Dep. 218:8–16, 219:8–11. This is because, among other problems, those studies showing an association fail to control for confounders (such as pre-existing mental health problems, poverty, and/or domestic violence) that may cause unwanted pregnancies as well as mental health problems. Stotland Reb. Rep. ¶ 7–10. Indeed, the only research that compares women with *unwanted pregnancies* who terminate with those who do not has found *comparable or better* mental health outcomes for women who terminate. Stotland Rep. ¶¶ 17, 18, 25 (citing Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the*

---

[9] Despite Dr. Ryan's concessions, Defendants characterize her as testifying "about the increased risk of post-abortion mental health problems." Defs.' Summ. J. Br. 17–18. They also emphasize a 2010 study by Priscilla Coleman, even though Dr. Coleman's research "has been widely discredited (and refuted) as agenda driven and seriously deficient in methodological rigor" to the point where she has had to publicly correct her own work. Stotland Reb. Rep. ¶¶ 10–24. The particular study Defendants emphasize not only failed to control for prior mental health problems but actually recruited subjects from anti-abortion crisis pregnancy organizations; it was rated "very poor" by the Academy of Royal Medical Colleges' National Collaborating Centre for Mental Health (NCCMH). *Id.* ¶ 23 (citing NCCMH, *Induced Abortion and Mental Health* (Dec. 2011)).

United States, 104 Am. J. Pub. Health 1687 (2014); Corinne H. Rocca et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, PLoS ONE (July 8, 2015); Corinne H. Rocca et al., *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 45 Persps. on Sexual & Repro. Health 122 (2013)). Other large-scale recent research focused on pregnant minors shows the same. Pls.' Facts ¶ 12; *see also Farmer*, 762 A.2d at 639 (finding that "young women do not suffer greater psychological problems than the young women who carry their pregnancies to term"). And, as Dr. Ryan also conceded, although women can experience a range of emotions after an abortion, a predominant emotion is relief. Ryan Dep. 237:11–15.[10] (In fact, it is *the* predominant emotion. Stotland Rep. ¶¶ 15–17.)

Apparently dissatisfied with their own expert's opinions, Defendants attempt to rely on a previously undisclosed source from 2014 that the author herself paid to publish in an open-access journal: Maureen Curley, *An Explanatory Model to Guide Assessment, Risk and Diagnosis of Psychological Distress After*

---

[10] Dr. Ryan also conceded that "pregnancy is a pregnancy time of vulnerability for the expression of mental health problems in women who have had pre-existing mental illnesses, or—particularly—underlying vulnerabilities," Ryan Dep. 222: 4–8, and that minors facing an unintended pregnancy "may experience a range of emotions, positive and negative," regardless of whether or not they continue the pregnancy, *id.* 236:16–21. This is yet another reason why Defendants' asserted interest in protecting minors' mental health cannot survive Equal Protection review; they cannot credibly claim that minors carrying to term need less protection than minors seeking an abortion.

Abortion, 4 Open J. Obstet. & Gynecol. 944 (2014).[11] Defs.' Summ. J. Br. 15. Defendants attempt to introduce Curley's paper through attorney Risken's declaration. *See* Decl. of Patrick M. Risken, Ex. 1 ("Risken Decl."). This is improper for a number of reasons, and cannot be considered on Defendants' motion. Under Rule 56, a party may only rely on "the pleadings, the discovery and disclosure materials on file, and any affidavits." M. R. Civ. P. 56(c)(2). A court may consider only these documents in granting summary judgment. *Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 11, 372 Mont. 363, 365, 313 P.3d 107, 109. Moreover, a court can only consider evidence that is otherwise admissible. M. R. Civ. P. 56(e)(1); *Hiebert v. Cascade Cty.*, 2002 MT 233, ¶¶ 29–31, 311 Mont. 471, 479–80, 56 P.3d 848, 855. The Curley paper plainly is inadmissible hearsay, and though Dr. Ryan could have cited it as a basis for her opinion (and been examined about it at her deposition), she chose not to. Because the paper is not part of the summary judgment record and is not otherwise admissible, the Court may not consider it.

Even if this paper were admissible, it should not be given any weight because it does not present original research but rather inaccurately summarizes findings in another study, Zoë Bradshaw & Pauline Slade, *The Effects of Induced Abortion on Emotion Experiences and Relationships: A Critical Review of the Literature*, 23 Clinical Psych. Rev. 929, 929 (2003) (attached as Exhibit 1 to Pls.' Resp. to Defs.' Statement of Facts).

---

[11] The Open Journal of Obstetrics and Gynecology charges authors an $899 fee. Scientific Research Publishing, Inc., *Article Processing Charges*, http://www.scirp.org/journal/ojog/ (last visited Feb. 2, 2017).

Bradshaw & Slade (2003) does not support the statement in Curley, relied upon by Defendants, that over one-third of women worldwide experience significant psychological distress postabortion. To the contrary, Bradshaw & Slade found that the women who had experienced postabortion distress were among the 40–45% of women who experienced significant psychological distress "[f]ollowing discovery of pregnancy and *prior* to abortion." *Id.* at 929 (emphasis added). In other words, Bradshaw & Slade found that abortion did not cause significant psychological distress in these women; the distress predated the abortion, and in fact, *faded* after the abortion. *See id.* at 948 ("In terms of psychological distress, findings are generally in line with those reported by previous reviews in that most distress was reported prior to abortion and levels of distress decreased following abortion."). As the American Psychological Association ("APA") observed, Bradshaw & Slade's conclusions "'mirror those of earlier reviews'" that "'women who have abortions do[] no worse psychologically than women who give birth to wanted or unwanted children.'" APA, Report of the Task Force on Mental Health and Abortion 5 (2008) (quoting Bradshaw & Slade (2003), at 948) (attached as Ex. 2 to Pls.' Resp. to Defs.' Statement of Facts). Accordingly, the Court should disregard Defendants' Statement of Facts ¶¶ 1, 5, 7—which rely exclusively on the Curley paper and its misrepresentation of other research.

Defendants also rely heavily on Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. Child Psychology & Psychiatry 16 (2006), to escape their own expert's concession that

abortion does not cause mental health problems. Defs.' Summ. J. Br. 16-17. Both the APA and the NCCMH considered this study (which is not limited to minors) before concluding that the most reliable evidence indicates that women facing an unplanned pregnancy are at no greater risk if they terminate the pregnancy, as opposed to carrying it to term. Stotland Rep. ¶ 5; Stotland Reb. Rep. ¶ 5. Indeed, the NCCMH reanalyzed the data in this Fergusson study and concluded that it showed "no statistically significant difference between women who had an abortion and women who did not have an abortion in their odds of having a diagnosis of a mental health problem." APA (2008), at 97.

Moreover, Defendants' own expert Dr. Ryan conceded that Fergusson's 2006 data cannot support any inference that abortion causes mental health problems, for at least two reasons: First, the study fails either to compare women who have had an abortion to women who delivered an unwanted pregnancy or to control for pregnancy wantedness. Ryan Dep. 225–226:8 (conceding that failure to control for "wantedness" is a methodological flaw in studies purporting to show an association between abortion and increased risk of postabortion mental illness); *see also* Stotland Reb. Rep. ¶ 25. And second, because Fergusson looks at abortion in New Zealand, where it is only permitted on narrow grounds (such as medical necessity based on psychiatric or physical illness), their findings reflect a disproportionate share of patients with preexisting mental health problems or risk factors. Ryan Dep. 235:21–23; *see also* Stotland Reb. Rep. ¶ 27. Thus, the overwhelming weight of the evidence, conceded by Defendants' psychiatric expert,

is that abortion does not cause mental health problems. Defendants cannot reopen this issue through isolated citations to an inadmissible, pay-to-publish paper and a flawed study whose data do not even support Defendants' claim, particularly not on a summary judgment motion.

Alongside their failed argument that abortion poses a mental health risk, Defendants assert that "Planned Parenthood does not investigate mental health or medical history, at all," and that staff "have no idea if a minor has suffered depression or emotional disturbances that an abortion may trigger." Defs.' Summ. J. Br. 18. None of this is true. Given that the predominant emotion after an abortion is relief, Stotland Rep. ¶ 17 & n.11, it would be inappropriate for a provider to treat every abortion patient as though she were at significant risk of future mental illness. That said, Plaintiffs do carefully screen for risk factors related to mental health. Howell Reb. Rep. ¶ 3. Specifically, Plaintiffs: have patients fill out a medical history, which includes multiple questions about anxiety and depression, as well as screening questions about domestic abuse, coercion, and her feelings about being pregnant, Howell Dep., Ex. 4 at 1, 20; use a worksheet to facilitate a private discussion with the patient, which includes detailed questions about her feelings and state of mind, safety and support system, as well as a discussion of her other options, *id.* at 21; ask open-ended questions to draw out any concerns, Howell Dep. 84:15-23; halt the process and refer the patient to counseling if they feel she is not ready to proceed, *id.* at 90:16-91:2; and provide patients with referrals both for licensed counselors and for peer-to-peer support groups in case

they find themselves struggling with negative emotions after the abortion, *id.* at 183:10–185:9. *See* Pls.' Resp. to Defs.' Facts ¶ 15.[12]

Defendants' motion also fails to address the record evidence that the Acts will *subject* minors to emotional harm—by obstructing access to care, forcing parental involvement against a minor's will, placing some minors at risk of abuse, and forcing some minors into a legal process that is distressing for many and traumatic for some. As Defendants' expert Dr. Ryan conceded, the experience of encountering active disapproval and conflict can damage an individual's mental health. Pls.' Facts ¶ 70. More specifically, Plaintiffs have presented unrebutted evidence that minors who unwillingly involve a parent in their abortion and are met with disapproval or indifference are more likely to experience negative emotions (as compared with minors who do not involve their parents at all). *Id.* ¶¶ 68–69; *see also Farmer*, 762 A.2d at 637 ("Mandated disclosure to a parent 'may . . .

---

[12] Defendants also misleadingly quote and paraphrase unrelated testimony in a Texas case that "clinics can be emotionally insensitive and prone to be 'interested only in [providing abortions] for a remunerative basis." Defs.' Summ. J. Br. 19. In fact the testimony in that case was that requiring clinics to be licensed "has done some good in *deterring* '*individuals* who *would* establish *corner* clinics, *multistate* clinics, and be interested only in it for a remunerative basis.'" *Women's Med. Ctr. v. Archer*, 159 F. Supp. 2d 414, 425 (S.D. Tex. 1999) (emphasis added). Unlike hypothetical individuals opening unlicensed corner clinics, PPMT's providers are licensed medical professionals at a nonprofit provider of healthcare services, and Plaintiffs have provided undisputed testimony that they screen patients carefully and do not provide services unless they conclude that patients are firm, informed, and voluntary in their decision. Pls.' Facts ¶ 59.

cause serious emotional harm to the minor' and 'often precipitates a family crisis, characterized by severe parental anger and rejection of the minor.'" (quoting report by the AMA's Council on Ethical and Judicial Affairs)). They also presented unrebutted testimony that forced disclosure of a pregnancy will expose some minors to abuse, which in turn has negative mental health consequences. Pinto Dep. 21:21–24, 24:12–18; *see also id.* 33:6-34:11 (describing situations in her experience where parents abused their daughters for being sexually active). As for those minors who pursue a judicial bypass, experts on both sides also agree that this process also will cause distress and in some cases trauma. *See infra* § III.E.

Simply put, Defendants cannot justify the Notice Act—still less the Consent Act—as necessary to protect patients' mental health, when it is clear that: 1) minors will be at no greater risk of mental health problems if they have an abortion, as compared to carrying to term; 2) Plaintiffs already take steps to address potential mental health problems; and 3) the Acts will in fact be detrimental to mental health in many cases. At the very least, Defendants have failed to present undisputed facts that would justify the Acts as being narrowly tailored to protect minors' mental health.

2. Physical Health

Nor is there any evidence, let alone undisputed evidence, that the Acts are narrowly tailored to protect patients' physical health, as Defendants claim, *see* Defs.' Summ. J. Br. 19–21. Indeed, the unanimous opposition to these laws by the American Medical Association, the American Academy of Pediatrics, and

other medical organizations, along with the U.S. Centers for Disease Control and Prevention, would seem to indicate the opposite. Pls.' Facts ¶¶ 64-67. As set forth more fully in Plaintiffs' Statement of Undisputed Facts, these organizations oppose parental involvement requirements because the evidence shows they deter minors from seeking care, thereby exposing them to increased medical risk. *Id.* ¶¶ 64-66; *see also* Mont. Dep't Pub. Health & Human Servs., Montana Title X Family Planning Administrative Manual § 8.6.3 ("Confidentiality is critical for adolescents and can greatly influence their willingness to access and use services."). Indeed, Defendants' own experts conceded that adolescents may not seek care if they fear that it will not be confidential. Pls.' Facts ¶ 63.

Ignoring these professional organizations, as well as guidance from their own agency charged with protecting minors, Defendants assert three physical health benefits to parental involvement: choosing a good provider, providing a complete medical history, and monitoring for post-abortion complications. Under the Constitution's Equal Protection Clause, these benefits cannot possibly justify singling out minors seeking abortion because other pregnant minors need them as much or more. That is because not only is abortion an extremely safe procedure, but it also carries far lower risks than carrying a pregnancy to term. Pls.' Facts ¶¶ 1– 16, 40; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) ("Nationwide, childbirth is 14 times more likely than abortion to result in death."); *Planned Parenthood of Great Nw.*, 375 P.3d at 1141 (affirming district court finding "that abortion raises *fewer*

health concerns for minors than does giving birth, that abortion is 'quintessentially' and 'extraordinarily' safe, and that 'the majority consensus of American psychiatry is that abortion does not cause mental illness'"); *id*. ("[P]arental involvement is not required to manage complications, which are relatively rare and generally resolved by an obvious, immediate medical response."); *Lungren*, 940 P.2d at 828 ("[A]n abortion, when performed by qualified medical personnel, is one of the safest medical procedures, and . . . the risk of medical complications resulting from continuing a pregnancy and giving birth is considerably greater than that posed by an abortion."). Indeed, Defendants do not even dispute that pregnancy and childbirth carry risks that are equal to (and in fact far greater than) those associated with abortion. Defs.' Summ. J. Br. 21.

Not only does carrying a pregnancy to term and giving birth carry risks that are greater than those carried by abortion, but—as Defendants' own experts concede—carrying to term requires substantial medical decision-making, communication, and personal responsibility. Specifically, to effectively manage the medical risks associated with carrying a pregnancy to term and giving birth, a minor patient should: obtain early, continuous and high-quality prenatal care, including ongoing screening for complications; give her provider a complete medical history; follow her provider's medical advice; report any symptoms to her provider; and make any necessary lifestyle adjustments, such as eliminating use of drugs and alcohol. Pls.' Facts ¶¶ 26–27. A minor carrying to term also must give informed consent for prenatal care, which may include making decisions

about whether to undergo procedures (such as a surgical completion of miscarriage, induction or a cesarean section) that carry risks and require balancing her own health interests with the interests of the fetus. *Id.* ¶¶ 29–30. After delivery, she needs postpartum care (which includes monitoring for postpartum depression and other frequent complications). *Id.* ¶ 31. Thus, there is no logical argument that abortion care requires parental involvement any more than prenatal care.

Moreover, Defendants have presented no evidence that parental involvement laws actually benefit minors' physical health. They claim that "[m]inors often lack information about their own medical history," Defs.' Summ. J. Br. 24, but cite to nothing more than a nonspecific concern voiced by one of their experts, Dr. Anderson, that minor patients might be unaware of family medical history.[13] But Plaintiffs' expert Dr. Philip Darney has testified that adolescents are able to give relevant medical history, that family history is almost never relevant to

[13] Defendants also cite generally to a state trial court decision in Alaska. Defs.' Summ. J. Br. 20. It is unclear how they believe that decision helps them. The trial court in that case found "that minors are competent medical historians, and that they do an excellent job with after-care instructions," as well as that "minors are as competent as adults in managing their abortion care." *Planned Parenthood of Great Nw.,* Case No. Civ. 3AN-10-12279, 2012 WL 4835506, at II.g.2. More broadly, the court considered and rejected the argument that the parental notice law was necessary to protect minors from their own immaturity, to protect their physical or mental health, or to protect them from sexual abuse. *Id.* at II.h., IV.b&d. Moreover, although that court ultimately upheld a parental notice requirement in part, that decision was overturned on appeal. *Id.* at 64*; Planned Parenthood of Great Nw.*, 375 P.2d at 1128.

abortion safety and that, in his decades of clinical and training experience, not once has he encountered a situation where a complication arose because a minor was unaware of relevant family history. Darney Reb. Rep. ¶¶ 5–9. At any rate, Dr. Anderson's theoretical concern does not account for the fact that minors who cannot, or decide not to, involve a parent often involve another family member. Pls.' Facts ¶ 38. Thus, at the very least, the Acts are not narrowly tailored to address any concern related to medical history.

Defendants also claim that the Acts are necessary to ensure minors receive necessary follow-up care, citing to statistics indicating that patients (of all ages) sometimes do not follow up after an abortion. Defs.' Summ. J. Br. 20–21. This misses the mark. Although it is true that patients sometimes do not return for *general* follow-up care (*e.g.*, to confirm complete termination), there is no evidence that they are not treated for actual complications. To the contrary, Plaintiffs discuss the importance of follow-up with every patient and give them contact information for the 24/7 on-call clinician. Howell Reb. Rep. ¶ 14; Howell Dep. 143:17-19. Plaintiffs also work with those patients who have traveled farther to reach a clinic to find a more local alternative for follow-up care. Howell Dep. 151:13–152:2. And while Defendants claim that "Planned Parenthood . . . reacts only if contacted by a physician or a hospital emergency room," Defs.' Summ. J. Br. 21, the undisputed record testimony is that Plaintiffs have a clinician on call 24/7 to consult with patients by telephone, and treat patients in-clinic whenever possible. Howell Dep. 28:2–28:14, 150:9–23, 185:10–19; Henke Dep. 22:6–21. Further, in the rare cases where Plaintiffs refer patients for

emergency care, they follow up with both the hospital and the patient to coordinate follow-up care. Henke Dep. 23:6–24:8. Defendants present no evidence either that these protocols are insufficient or that requiring parental involvement would bring about improved care.

Thus, Defendants' factual assertions—far from being merely disputed—are inaccurate and wholly unsupported, and there is simply no medical argument for singling out minors seeking an abortion or infringing on their right to privacy.[14]

E. The Acts' Judicial Bypass Provisions Do Not Make the Acts "Narrowly Tailored"

Defendants concede that "not all parents will respond well to their daughter's pregnancy" and that some "may even be unhelpful in her decision," but assert that minors with "unhelpful" parents will not be harmed because they can simply obtain a bypass. Defs.' Summ. J. Br. 24 They claim this is so because: 1) there is some evidence that, in Massachusetts in

---

[14] Defendants fault Plaintiffs for relying on what patients tell them in a medical history review. Defs.' Summ. J. Br. 20. It is unclear how else any medical provider would take a medical history. At any rate, Plaintiffs use medical history as only one screening tool, along with a blood test, ultrasound, and other clinical measures to rule out contraindications. Howell Dep. 141:25– 142:15; Darney Reb. Rep. ¶ 5. Defendants also suggest Plaintiffs fail to disclose medical risks associated with abortion. *Id.* In fact, the undisputed evidence shows that they do. *See* Pls.' Resp. to Defs.' Fact ¶¶ 27–28, 41 (all patients advised on what potential complications to look for, and provided with a contact available 24/7); ¶¶ 3, 15 (finding that PPMT had advised 15-year-old minor of the risks associated with abortion).

the 1980s and '90s, most minors who managed to apply for a bypass eventually received one; and 2) Plaintiffs' expert Rita Lucido, a leading provider of legal representation in bypass proceedings, usually wins her cases eventually. Defs.' Summ. J. Br. 27. These facts are irrelevant; whether or not minors who seek a bypass will ultimately obtain one, many minors will be unable to access this process, and those who do access it will be exposed to delay, unnecessary stress, and other harms.

As an initial matter, the only evidence in the record specific to Montana is that, of two bypasses that were sought so far, one was initially denied. But even assuming it were true that the Montana courts would grant most applications, there is clear record evidence that, as this Court found in *Wicklund*, the process itself "increases stress, delay and potential medical complications," among other harms. 1999 Mont. Dist. LEXIS 1116, at *22;[15] *see also Lungren*, 940 P.2d at 829 ("[R]esort to this judicial procedure inevitably will delay the minor's access to a medically safe abortion, thereby increasing the medical risks posed by the

[15] Defendants also argue that the Acts impose a "lower" burden than parental involvement laws in other states because, on their face, they do not require the judge to hold a hearing. This again is irrelevant, particularly given that in the two bypasses that have taken place so far, the court held a hearing. Pls.' Resp. to Defs.' Facts ¶ 81. The Acts require the minor to "demonstrate" that there is a basis for granting her a bypass. *See* ¶ 13. Plaintiffs' bypass expert, Rita Lucido, testified that, given the stakes in a bypass application and the fact that it is a "fact finding" process, she would consider it "malpractice" to advise a client not to testify in person. Lucido Dep. 139:13–140:21. She also testified that in her experience, judges "almost always" want to question applicants, including about abuse. *Id*. 140:9–10.

abortion procedure, and will inflict emotional and psychological stress upon a minor…").

According to undisputed evidence, minors who seek a judicial bypass under the Acts will be subjected to delay, stress, and various other difficulties. The required steps of gathering information about the process, finding and meeting with an attorney, adequately preparing for a hearing, and attending that hearing—all without drawing parental suspicion—would be difficult, stressful, and time consuming for anyone, and are all the more so for minors. Pls.' Facts ¶¶ 82– 85. Other aspects of the bypass are equally stressful, such as the uncertainty about whether they will be permitted to have an abortion, and the experience of having to share personal and perhaps painful details with an imposing stranger in a formal setting who has total control over their future. *Id.* ¶¶ 74–77, 86, 89. Plaintiffs have produced unrebutted testimony that, for minors, the experience of having to testify in court can provoke extreme emotional distress, can cause or exacerbate physical and mental disorders, and can interfere with a minor's day-to-day functioning. Pls.' Facts ¶¶ 74, 79. The bypass process is particularly daunting and painful for minors who have been abused, and who must discuss the details of that abuse with a stranger in a formal setting. *Id.* ¶¶ 76–77. Indeed, Defendant's own expert Teresa Collett acknowledged that, in these circumstances, the bypass could work "emotional violence" against the minor. *Id.* ¶ 77.

Moreover, the bypass process, by its very nature, will delay minors. It may take some time for a minor

even to figure out that she has this option, since clerks are currently giving out inaccurate, discouraging information to callers, and since there do not appear to be any publicly available guidance or forms for minors. *Id.* ¶ 72. Even without such barriers, a bypass application takes time to prepare. *Id.* ¶ 84–85. Minors need to work meetings with their lawyer and a court hearing into their regular schedule (which includes school, and may include substantial work, family, and other obligations), and pull together transportation, without drawing parental attention. Pls.' Facts ¶¶ 82-85; *Wicklund*, 1999 Mont. Dist. LEXIS, at *9–11 (noting the difficulties adolescents face in trying to have confidential conversations with counsel and arrange transportation and time away from school and other obligations). This is especially hard for abused minors, who are under tighter parental control, both physically and psychologically. Pls.' Facts ¶ 82.

All of these factors delay her abortion. Pls.' Facts ¶ 85; *see also Farmer*, 762 A.2d at 635 ("Even assuming a confidential and expeditious waiver hearing, the process will nonetheless cause significant delay."); *Planned Parenthood of Alaska*, 171 P.3d at 584 (citing findings that "bypass procedures build in delay that may prove detrimental to the physical health of the minor, particularly for minors in rural Alaska who already face logistical obstacles to obtaining an abortion" (internal quotation marks omitted)). In some cases, a minor will be erroneously denied a bypass and will incur further delay and obstacles pursuing an appeal. (Indeed, this has already happened in Montana. *Id.* ¶ 73.) This delay can range from a couple of weeks to over a month. Pls.' Facts ¶¶

86, 88; (citing *In re Jane Doe*, No. 11 CO 34, 2011 WL 6164526 (Ohio Ct. App. Dec. 7, 2011) (five-week delay from filing of application to granting of relief on appeal)).[16]

By delaying minors, the bypass will harm them in numerous ways. Although abortion is a very safe procedure, it is undisputed that the risk of the procedure rises with each additional week the pregnancy advances; thus the Acts expose minors to increased medical risks. Pls.' Facts ¶ 16. Delay will also increase the risk that a minor's parents will discover her pregnancy, along with her plan to terminate the pregnancy—which in turn can expose her to abuse or other harms. Pls.' Facts ¶¶ 43–55, 68–71, 98. Finally, it is undisputed that, as a minor's pregnancy advances, her options for an abortion become fewer, costlier, and farther away.

Medication abortion, which allows women to safely terminate their pregnancy without a surgical procedure (and is strongly preferred by many patients and medically indicated for some), is only available through seventy days after the first day of the woman's last menstrual period; PPMT provides this method in Helena, Billings and Missoula. *Id.* ¶¶ 91–

---

[16] The bypass process also jeopardizes the confidentiality of a minor's decision, putting some minors at risk for abuse. *See* Facts ¶¶ 46–47, 79–80; *see also Farmer*, 762 A.2d at 635 ("The judicial proceeding itself presents a danger that the young woman's anonymity will be breached. A realistic concern is that a minor could be recognized by members of the community who know her while she is at the courthouse to attend the hearing."); *N. Fla. Women's Health & Counseling Servs.*, 866 So.2d 612, 632 (Fla. 2003) ("The chance of a breach in the confidentiality requirement is a real possibility, especially in small communities.").

95. If a patient is delayed past ten weeks, she loses her only non-surgical abortion option, an option many patients strongly prefer Pls.' Facts ¶¶ 92–93. After fourteen weeks, she can only obtain an abortion in Billings and Missoula. After sixteen weeks, her only option is in Billings. After twenty-one weeks, she has no options in Montana. *Id.* ¶ 91, 95. Nor are these facts hypothetical; they already *occur* under the Notice Act, despite the fact that it includes a bypass option. Pls.' Facts ¶¶ 73, 89, 94.

Not only will the bypass delay minors, but some minors will be unable to access the bypass at all—for example, because they cannot discuss the abuse they have suffered; because they are under tight parental control; because their time or transportation is too limited; because the bypass process would delay them past the point where an abortion is available; or simply because the process is too confusing or scary. *Id.* ¶¶ 45, 72, 74–87; *see also* Pls.' Summ. J. Br. 21-22; *Planned Parenthood of Alaska*, 171 P.3d 577, 584 (Alaska 2007) ("[N]ot all minors possess the wherewithal to embark upon a formal legal adjudication during a time of crisis."); *Lungren*, 940 P.2d at 829 ("[A]t least some minors who are too frightened or ashamed to consult their parents also will be too frightened or ashamed to go to court (often fearing that their presence at the courthouse might be discovered and disclosed by a neighbor or acquaintance) . . . ."). Or, they may be denied a bypass. Under the Notice Act, these minors will have to notify a parent, or carry to term. Under the Consent Act, they will have to obtain parental consent or carry to term.

Those who are forced to involve a parent will face various risks, depending on their circumstances: abuse, estrangement, severe conflict, retaliation, and/or being forced to carry to term. Pls.' Facts ¶¶ 43–55, 68–71, 98; *See also Farmer*, 762 A.2d at 634, 637 ("We know that '[m]any minor women will encounter interference from their parents after the state-imposed notification. In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision.'" (quoting *H.L. v. Matheson*, 450 U.S. 398, 438–39 (1981)); *Planned Parenthood of Alaska*, 171 P.3d at 584 (citing finding that delays and obstacles imposed by the judicial bypass procedure "increase the probability that the minor may not be able to receive a safe and legal abortion" (internal quotation marks omitted)). Indeed, after Texas's parental involvement law went into effect, the teen birthrate *increased* in Texas, even as it was falling generally in the United States—concrete evidence that, bypass or no bypass, these laws will prevent some minors from exercising their constitutional right to make this most personal and consequential decision. Pls.' Facts ¶ 97; *see also* Pinto Dep. 38:10-40:12 (describing situations from her professional experience where minors were prevented by their parents from obtaining an abortion).

Beyond these harms, some minors desperate to obtain an abortion without parental involvement will risk their own health and lives attempting to self-induce. *See* Pls.' Facts ¶ 99; *Planned Parenthood of Great Nw.*, 375 P.3d at 1142 n.107 ("As evidenced by the multitude of illicit abortions performed in this

country before *Roe v. Wade*, restrictive abortion laws do not guarantee compliance."); *Farmer*, 762 A.2d at 635 ("With time running out, it is inevitable that some minors will seek an alternative solution rather than tell an abusive parent or a judge who is a stranger about their decision to procure an abortion."); *Lungren*, 940 P.2d at 817 ("[A] minor who does not wish to continue her pregnancy but who is too frightened to tell her parents about her condition or go to court may be led by the statutory restrictions to attempt to terminate the pregnancy herself or seek a 'back-alley abortion'—courses of conduct that in the past have produced truly tragic results"); *cf. West Ala. Women's Center v. Miller*, Civil Action No. 2:15cv497-MHT, 2016 WL 6395904, at *11 (M.D. Ala. Oct. 27, 2016) (citing fact that some women arrive for care after unsuccessful attempts to self-induce, including by ingesting turpentine).

Thus, Defendants have failed to meet their burden of showing, based on undisputed facts, that the bypass process will protect minors. Indeed, the undisputed evidence is to the contrary— the Acts will harm minors in violation of the rights guaranteed to them by the Montana 17 Constitution.[17]

CONCLUSION

For all of the foregoing reasons, this Court should Deny Defendants' motion for summary judgment.

---

[17] Additional reasons why the Acts are not "narrowly tailored" are set forth in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment at 22–26.

Respectfully submitted this 17th day of February, 2017.

Eric E. Holm
Tanis M. Holm
Sather & Holm, PLLC
2301 Montana Ave., Ste. 202
P.O. Box 1115
Billings, MT 59103
Telephone: (406) 294-1700

Alice Clapman*
Richard Muniz*
Planned Parenthood Federation of America
1110 Vermont Ave. NW, Suite 300
Washington, DC 20005
(212) 973-4800

Attorneys for Plaintiffs

* Admitted to appear *Pro Hac Vice*

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served by Email and Regular Mail, postage prepaid, on the following interested parties this 17th day of February, 2017.

Timothy C. Fox
Dale Schowengerdt
Patrick M. Risken
Montana Attorney General's Office
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

_____
Eric E. Holm
Sather & Holm, PLLC

APPENDIX I

TIMOTHY C. FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
PATRICK M. RISKEN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406)444-2026
Fax: (406)444-3549
dales@mt.gov
prisken@mt.gov

COUNSEL FOR THE STATE

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA and PAUL FREDRICK HENKE, M.D., on behalf of themselves and their patients, Plaintiffs, V. STATE OF MONTANA and TIM FOX, ATTORNEY GENERAL OF MONTANA,	Cause No. DDV-2013-407 REPLY BRIEF OF DEFENDANTS

in his official capacity, and his agents and successors, Defendants.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. PLANNED PARENTHOOD CONTINUES TO MISUNDERSTAND HOW MINORS' RIGHTS ARE APPLIED AND BALANCED UNDER MONTANA'S CONSTITUTION.

A. Standard strict scrutiny does not apply to Planned Parenthood's Equal Protection and Due Process claims.

Planned Parenthood continues to misunderstand how Article II, Section 15 of the Montana Constitution applies in several respects. Its first mistake is that it argues, inexplicably, that rather than a limitation on a minor's rights, Article II, Section 15 actually imposes a *higher standard* than what applies to adult rights, requiring the State to meet strict scrutiny *plus* show that the legislation enhances a minor's protection. Pls. Summ. J. Opp. Br. at 5. (arguing that the parental involvement laws must be narrowly tailored to a compelling interest *and* single out minors only to the extent necessary for their protection). In other words, in Planned Parenthood's view, a minor's rights are actually greater than an adult's and require not only strict scrutiny, but strict scrutiny on steroids.

This makes no sense, and would turn Article II, Section 15 and its purposes on its head. As the Montana Supreme Court has explicitly recognized, "the constitutional rights of children cannot be equated with those of adults . . . because of the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing." *In re C.H.,* 210 Mont. 184, 203, 683 P.2d 931, 941 (1984) (citing *Bellotti v. Baird,* 443 U.S.

662 (1979). Indeed, the Court was clear that Article II, Section 15 "recognizes that the State's interest in protecting children may conflict with their fundamental rights." *Id.* at 202.

For example, in *In re C.H.,* the Court recognized that the minor had a legitimate right to physical liberty, which is a fundamental right, and that equal protection and due process claims thus would typically be subject to standard strict scrutiny. *In re C.H.,* 210 Mont, at 201-02. But because the case involved an equal protection claim by a minor, the analysis was different: "[W]e hold that a juvenile's right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated. This is precisely what the drafters of the 1972 Montana Constitution had in mind when they explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, unless exceptions were made for their own protection." *Id.* at 203. Although the Court recognized that the statute in that case, as here, was supported by a compelling interest, it clearly did not apply standard strict scrutiny to legislation designed to enhance the protection of minors. Rather, the minor's fundamental right was "balanced" against legislation designed to enhance her protection. Because the legislation did enhance her protection, it did not violate either equal protection or due process. *Id.* at 204.

It is true that the Court recognized in *In re S.L.M.,* 287 Mont. 23, 34, 951 P.2d 1365, 1373 (1997), that under Article II, Section 15, the State must show a compelling interest and that the exception is designed

to enhance the rights of minors. But that is not standard strict scrutiny. First, the Court did not require narrow tailoring, which is typically required under strict scrutiny. *Id.* Second, the interest in protecting youth is always a compelling interest. The bottom line is that the Court clearly does not apply standard strict scrutiny to these claims, and instead employs a balancing test that simply requires a clear showing that the legislation enhances the protection of minors. *Id.* at 35.

Planned Parenthood also errs in arguing that claims under due process, equal protection, and Article II, Section 15 are each subject to independent analysis. Rather, claims under due process and equal protection "must be read in conjunction" with Article II, Section 15. *Id.* at 34; *see also In re C.H.,* 210 Mont, at 201-203).

Planned Parenthood is simply incorrect that the State is ignoring their due process and equal protection claims. The State acknowledges that these claims involve fundamental rights, and if they were made by adults they would be subject to standard strict scrutiny. But because they are claims by minors, these claims are read through the lens of Article II, Section 15. The State has argued why the legislation makes distinctions between minors who seek an abortion and those carrying to term, why the legislation is supported by compelling interests of the highest order, and how it is narrowly tailored to achieve that interest. State's Summ. J. Br. at 10-24, 24-27. But the ultimate question is whether the legislation enhances a minor's protection. Because it does, a minor's constitutional right to abortion is sufficiently protected by a judicial waiver process like

Montana's. *See In re CONFIDENTIAL* at ¶ 11, Risken Deci., Ex. 2.[1]

B. Federal cases analyzing parental involvement laws use the same standard that applies under the Montana Constitution.

Planned Parenthood dismisses the plethora of federal case law holding that parental notice and consent laws are constitutional, arguing that Montana's constitution applies more stringently. Pls. Summ. J. Opp. Br. at 2. But what Planned Parenthood misses is that at the time the Supreme Court decided that parental notice and consent laws are constitutional under federal law, the Court required "that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Planned Parenthood v. Casey,* 505 U.S. 833, 871 (1992) (citing *City of Akron v. Akron Ctr. for Reprod. Health,* 426 U.S. 416, 427 (1983)). That is the same standard that Montana applies to abortion regulations under the right to privacy. *Armstrong v. State,* 1999 MT 261, 296 Mont. 361, 989 P.2d 364 ("legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis—i.e., the legislation must be justified by a

[1] Because this case was a judicial waiver case that the Montana Supreme Court sealed, the State is not using the name of the case, even though it is a pseudonym. The entire decision is filed in this case under seal, and is attached as Exhibit 2 to the Declaration of Patrick Risken in Support of the State's Motion for Summary Judgment.

compelling state interest and must be narrowly tailored to effectuate only that compelling interest.").

The United States Supreme Court eventually changed the standard for abortion cases, adopting the "undue burden" test in *Planned Parenthood v. Casey*. 505 U.S. at 874. But the decisions deciding that parental involvement laws were decided under the strict scrutiny regime. *Id.* at 871, 899. In other words, the Supreme Court applied the same standard to the right to privacy cases as the Montana Supreme Court applies to right to privacy cases. And as discussed, both the Montana Supreme Court and the United States Supreme Court apply a lesser standard in the face of legislation designed to protect minors. State's Summ. J. Br. at 6-10; State's Summ. J. Opp. Br. at 2-5. Thus, the United States Supreme Court's *many* cases upholding parental consent and parental notices requirements are highly relevant to this case. And as the Court noted in *Casey,* when courts analyze challenges to parental involvement laws, they are not writing on a blank slate.

> We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. *See, e.g., Akron II,* 497 U.S. at 510-519; *Hodgson,* 497 U.S. at 461 (O'Connor, J., concurring in part and concurring in judgment in part); *id.,* at 497-501 (Kennedy, J, concurring in judgment in part and dissenting in part); *Akron I,* 462 U.S. at 440; *Bellotti,* 443 U.S. at 643-644 (plurality opinion). Under these precedents, in our

> view, the one-parent consent requirement and judicial bypass procedure are constitutional.

Casey, 505 U.S. at 899.

Not surprisingly, the Montana Supreme Court followed this federal case law in interpreting Montana's parental notification law. The Court noted that the United States Supreme Court has outlined the bypass requirement that is required for consent laws like Montana's. *In re* CONFIDENTIAL at ¶10. The Court recognized that the same judicial waiver procedure would suffice for a notice statute *(ibid.),* and then outlined the requirements under Montana law:

> A minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired abortion would be in her best interests.' *Belotti,* 443 U.S. at 643-44; *accord Akron II,* 497 U.S. at 511. *We interpret the Montana parental notification statute in light of these holdings.*

Id. at ¶11 (emphasis added).

Planned Parenthood argues that this Court should disregard this case, claiming that it is "unpublished" and that the constitutionality of the parental involvement laws was not at issue. Pls. Summ. J. Br. at 5-6. Planned Parenthood's argument that it is "unpublished" is disingenuous. It was sealed, at Plaintiffs request, to maintain confidentiality of the proceedings for the minor's benefit. It was not unpublished as a non-cite. And while the

constitutionality of the parental involvement laws was not directly at issue, the Court clearly interpreted the parental notice statute "in light of" federal case law, and the Court stated in no uncertain terms that a "minor's constitutional right to seek an abortion is sufficiently protected by a statute" requiring a judicial waiver like Montana's. *Id.*

Curiously, after trying to dismiss *In re CONFIDENTIAL,* Plaintiffs' go on to argue that "published state constitutional precedent" supports their case. But then they cite only one published decision, *Armstrong,* which did not involve minor's rights, and three *unpublished* district court decisions: 1) the district court's unpublished and unreviewed decision in *Wicklund v. State,* 199 Mont. Dist. Lexis 1116 (1st Jud. Dist. Feb. 11, 2999) (ADV 97-671); 2) the district court's earlier unpublished decision in this case, which the Montana Supreme Court reversed; and 3) the district court's 1995 unpublished decision in *Jeanette R. v. Ellery,* No. BDV-94-811, 1995 WL 17959708 (Mont. Dist. Ct. May 19, 1995), which involved medical services for indigent women, and had nothing to do with parental involvement laws. *See* Pls. Summ. J. Br. at 6. The State submits that the Montana Supreme Court's recent, albeit sealed, decision in *In re CONFIDENTIAL,* which bears directly on the issues in this case, is more trustworthy guidance for this court than unpublished and unreviewed district court cases from twenty years ago.

II. Parental consent, rather than mere notice, does not give parents a veto and is necessary to prevent sex-offenders and other abusers from evading the law.

Planned Parenthood contends that the State does not show why parental consent is necessary, rather than mere notice to parents. But the State detailed that parental consent is necessary because parental notice statutes can be evaded, especially by sexual predators and other abusers. State's Summ. J. Opp. Br. at 18. Take, for example, the Ohio case in which a 21 year-old teacher and soccer coach impregnated a 13 year-old student. *Roe v. Planned Parenthood of Southeast Region of Ohio,* 912 N.E.2d 61, 64-65 (Ohio 2009). The perpetrator convinced the 13 year-old to have an abortion, and in order to evade Ohio's parental notice requirement, he instructed the student to give the abortion provider his cell number and say it was her father's. *Ibid.* His scheme worked and his abuse continued to go undetected until a fellow teacher became suspicious. *Ibid.* That tragic consequence may not have happened if notarized consent were required, as it is in Montana.

Even Planned Parenthood recognizes that notice statutes can be evaded, complaining that a doctor could be penalized for giving notice "to an individual whom she incorrectly believed to be the parent." Pls. Summ. J. Br. at 28. As the State has explained, a notarized consent requirement protects the minor and should give the abortion provider peace of mind that it is not giving notice to a non-parent trying to evade the law. In short, Planned Parenthood cannot have it both ways, complaining on the one hand that they fear giving notice to a non-parent, but then arguing against the notarized consent statute which would prevent just that.

Planned Parenthood is also incorrect that the parental consent law amounts to a parental veto, as the United States Supreme Court has already rejected that argument when there is a judicial waiver process in place just like Montana's:

> A pregnant minor is entitled in such a [judicial waiver] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto.

Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (citation and quotation omitted). As the State has already described, Montana's judicial waiver procedures for both the consent and notice statute have all these components, but are even less burdensome because they include an exception for abuse, and only require that the minor meet the preponderance of the evidence standard. *See* State's Summ. J. Br. at 4. *See* Mont. Code Ann. § 50-20-232,; -509(requiring a judicial waiver if the court finds that the minor is competent to decide, if there's evidence of physical, sexual, or emotional abuse, or if the court finds that

the abortion is in the minor's best interests); §§ 50-20-232(3) (2011); -509(3) (2013) (all proceedings are confidential and must ensure the anonymity of the minor. Mont. Code Ann. § 50-20-509(3) (2013) (a petition for judicial waiver must take priority over pending matters.); Id. and § 50-20-232(8) (2011) (appeals to the Supreme Court must be expedited and confidential.). As noted above, the Montana Supreme Court very recently recognized, consistent with the United States Supreme Court, that "[a minor's constitutional right to seek an abortion is sufficiently protected by a statute requiring a court to grant a waiver if the minor is sufficiently mature and well-informed, or, even if she is not, if 'the desired abortion would be in her best interests.'" In re CONFIDENTIAL at ¶ 11, Risken Deci. Ex. 2 (quoting Belotti, 443 U.S. at 643-44).

Thus, Planned Parenthood's argument that the parental consent law gives parents a "veto" is incorrect because the State has a very accessible judicial waiver process that sufficiently protects a minor's right to an abortion. And contrary to Planned Parenthood's assertions, that waiver process does not add undue delay. Take for example Planned Parenthood's 15-year-old patient who petitioned the district court for a waiver on January 15, appealed the district court's decision, and received an order from the Supreme Court granting her a waiver on January 23. Id. at ¶1-2. That is a grand total of 8 days from when she petitioned the district court to when the Supreme Court reversed. Planned Parenthood's judicial bypass expert testified that the process in Texas is similarly very fast. She testified that the entire process, from when the client contacts her to

when she receives approval for the bypass from the court, typically lasts no more than 7-10 days. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 8 at 46:4-11; 102 (describing the bypass process as significantly faster and no cost to the client, compared to other procedures like emancipation). In fact, she testified that the process is so fast and involves so little work that she does not even keep billing records for it. Id. at 44:17-45:6. Thus, Planned Parenthood's argument that the bypass process can harm minors is not only unsupported by any facts, it is contrary to their own expert's testimony.

In sum, any minor faced with a situation in which she is unable to approach her parents or is unable to get their consent may petition a court for a judicial waiver, which is a simple, straightforward, and expedient process.

III. Planned Parenthood's factual assertions are both unsupported by the record and irrelevant.

Planned Parenthood's brief is in large part a reiteration of its factual contentions that minor's diminished decision-making capacity, the risk of sexual abuse, and the high percentage of minors who do not voluntarily involve their parents in their decision to have an abortion are insufficient to support Montana's parental involvement laws. Planned Parenthood also disputes that abortion "causes" mental health disturbances and that there is no medical or other justification for parental notification or consent laws.

The State has already addressed Planned Parenthood's arguments and factual assertions in its previous briefing and response to Planned Parenthood's Statement of undisputed facts. The State, however, highlights a few important points below to reiterate both the State's compelling interests and some of the defects in Planned Parenthood's arguments.

A. Mandatory reporting laws and Planned Parenthood's teen outreach and marketing programs are insufficient to protect minors from sexual abuse.

Planned Parenthood argues that the there is no evidence that Montana's parental involvement laws will protect minors from sexual abuse. That argument, however, is rebutted by Planned Parenthood's own expert. It also exposes Planned Parenthood's flawed view of what constitutes sexual abuse. Planned Parenthood's child psychology expert, Suzanne Pinto, acknowledged that parental notification and consent laws may help bring to light abusive relationships, and she admitted that would be a salutary benefit. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 2 at 56:19-57:12. As the State explained in depth, the risk to minors of sexual predators and other sexual abuse is very real in Montana, and a parent's knowledge of illicit and harmful relationships, and pregnancies that develop from those abusive situations, is critical in stopping them. State's Summ. J. Br.at 10-14.

Planned Parenthood's argument that minors that carry to term are more likely to be involved in coercive

relationships is certainly disputed (see State's Resp. to Pls. Statement of Facts, ¶¶ 20, 62). But regardless, Planned Parenthood continues to miss the point. Unlike minors who bring a pregnancy to term, minors who have abortions can conceal that fact from their parents, which can occur repeatedly without some form of supervision. A pregnancy will manifest itself sooner or later, and the parents will know of the relationship. But for minors who conceal the pregnancy and the abusive relationship that caused it, laws requiring parental involvement in the abortion decision clearly can bring that abuse to light.

Contrary to Planned Parenthood's assertion, mandatory reporting laws are not a sufficient replacement for parental notice and consent laws to protect minors from sexual predators. First, Planned Parenthood evidently does not even believe that statutory rape is abuse. In its summary judgment opposition brief, it calls sex between a 19-year-old and a 15-year-old "consensual sexual activity," (Pls. Summ. J. Opp. Br. at 11), even though it is clearly not consensual because a 15-year-old cannot legally consent to sex with a 19-year-old. Under Montana law it is, by definition, sexual intercourse without consent. Mont. Code Ann. § 45-5-503. That case is even worse, since the criminal penalty for sexual intercourse without consent is much higher when the minor is under 16 and the difference in age between her and the adult is four years or more. Mont. Code Ann. § 45-5-503(3)(a). Nonetheless, Planned Parenthood's patient coordinator also testified that she did not recognize that a 15-year-old minor impregnated by a 19-year old as involving abuse. *See* Risken Deci., Ex. 14 at 98-99, FILED UNDER SEAL.

Planned Parenthood now claims, for the first time, that some employees at DPHHS instructed Planned Parenthood staff not to report every incident of statutory rape (Howell Supplemental Affid. ¶¶ 3-10), even though Planned Parenthood is a mandatory reporter under the law. Mont. Code Ann. § 41-3-207(2). But that is not accurate. An out-of-state attorney who evidently gave a presentation through DPHHS questioned whether each incidence of sexual intercourse without consent must be reported in every case, but suggested that those attending the training seek legal advice. *See* State's Br. in Support of Motion to Strike Howell Deci. DPHHS's policy is clear that statutory rape is sexual violence against the victim and mandatory reporters have a duty to report it. As DPHHS states on its website, "[s]exual violence is a sex act completed or attempted against a victim's will or when a victim is unable to consent due to age."[2] Moreover, Planned Parenthood's own child psychology expert, Dr. Pinto, testified in no uncertain terms that statutory rape is the abuse of a child. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 2 at 56:4-7). Planned Parenthood's apparent belief that it does not have to report incidents of sexual intercourse without consent is shocking, but, if nothing else, it shows why the mandatory reporting laws are insufficient to stop it; Planned Parenthood does not even consider it abuse.[3]

---

[2] http://dphhs.mt.gov/publichealth/wmh/rape.

[3] Planned Parenthood's expert on judicial bypass was explicit that although she may be a mandatory report under Texas law, she does not report abuse to Texas Child Protective Services because of her belief that the agency is "dysfunctional," even

Planned Parenthood's contention that its own outreach and marketing programs are sufficient to protect minors without parental involvement laws is just as flimsy. Pls. Summ. J. Opp. Br. at 11-12. As laudable as those programs may be, as is the effort to reduce teen poverty, they are not a sufficient replacement for a parent's involvement in a minor's decision whether to have an abortion, and especially in situations in which there is sexual abuse by an adult male that may come to light from the parent's involvement.

B. A minor's diminished decision-making capacity—which is established as a matter of law in Montana—is a compelling state interest and supports the parental involvement laws.

The State has already described at length the impact of an adolescent's immaturity on her decision-making process. Indeed, that premise undergirds the very purpose of Article II, Section 15's recognition that a minor's rights can be limited by laws that are for her own protection. *See* State's Summ. J. Br. at 21-24; State's Summ. J. Opp. Br. at 2-8.

Although Planned Parenthood admits that minors make "impulsive" decisions, it makes the illogical argument that impulsive decision-making may not apply to the decision to have an abortion because it "is unlikely to be completed on a whim." Pls. Summ. J. Opp. Br. at 13. Even if the argument were valid, the

---

though she has never made a complaint about Texas CPS. Lucido Dep. at 75:3-22; 79:8-80:14.

evidence is to the contrary. As Planned Parenthood's experts testified, minors often delay in considering whether to have an abortion because they pretend that they are not actually pregnant and thus avoid the issue altogether. State's Statement of Undisputed Facts, ¶¶53, 55, 58-59, 77; *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 2 at 63:6-16 (acknowledging that minors delay in dealing with pregnancy because they convince themselves that it is not true). Once they decide to have an abortion, the process can be completed within a week, if not within a day or two. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 1 at 169:5-8 (stating that Planned Parenthood can schedule the appointment within 24 hours of when a minor calls); *Id.* 170:2-171:10 (appointments scheduled very quickly). In other words, minors typically delay in even considering their options, and then, once they do, they make the decision very quickly. There is simply no evidence whatsoever that minors' impulsive decision-making does not apply to the decision to have an abortion.

As the United States Supreme Court and the Montana Supreme Court have recognized, the decision to have an abortion "is a serious one." *In re CONFIDENTIAL,* ¶11, Risken Deci., Ex. 2. It should be undisputed that it is one of the more weighty decisions a teen will make in her life, which would benefit from a parent's input. Nonetheless, Planned Parenthood makes the completely unsupported argument that even if minors do not involve their parents, they do consult "other adults" to get their input. There is simply no credible evidence that is true, or that some other adult's counsel and assistance

is an adequate replacement for a parent's. Indeed, the "other adult" could very well be an 18 year-old friend.

Planned Parenthood also tries to distinguish the many instances in which the State limits a minor's rights based on diminished decision-making—including voting, serving in the military, the drinking age, curfews, tattoos, and ear-piercing—as involving less substantial decisions. Pls. Summ. J. Opp. Br. at 14. The State submits that each of these decisions is substantial, which is why legislation is in place to protect minors in those instances. Regardless, Planned Parenthood is certainly correct that the abortion decision is substantial—and perhaps the most substantial. But that is precisely why it requires parental involvement.

Finally, Planned Parenthood continues its argument that the State does not require parental involvement for decisions related to pregnancy. As the State has already explained at length, the "state's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes . . ." because "[i]f the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." L. v. Matheson, 450 U.S. 398, 412-13 (1981). Indeed, as the United States Supreme Court has recognized, there are multiple reasons that minors carrying to term are not similarly situated to minors seeking an abortion. *Id.; see also* State's Summ. J. Opp. Br. at 11-13.

C. Parental Involvement Laws significantly increase the

percentage of minors that involve their parents in the abortion decision.

Planned Parenthood continues to claim that most minors voluntarily involve their parents in their abortion decision, even though their expert acknowledged that the most authoritative study on the issue shows that only 45% of minors will voluntarily involve their parents absent a parental involvement law. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 2 at 26:11-31:4; *see* Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions,* Family Planning Perspectives, Vo. 24, No. 5 199-200 Table 3, Risken Deci., Ex. 13 (noting that 45% of minors voluntarily involve their parents).

But even if Planned Parenthood is correct that 60% of minors voluntarily involve their parents, that leaves an enormous 40% that do not. Planned Parenthood's answer that all of these minors who do not involve their parents must have good reason not to is absurd. The State has already accepted that a small percentage of those minors will have reason to seek a judicial waiver of the parental involvement laws because they are in a family situation in which they cannot involve their parents. But that percentage of minors certainly does not equal 40%, and Planned Parenthood gives no evidence (or even serious argument) that it does.

Take Texas for example. As Professor Collett described in her expert report, "after the implementation of the Texas parental notice requirement 95% of the Texas parents know of their

daughter's decisions and therefore are able to help them respond to the unplanned pregnancies." Expert Report of Professor Teresa Collett, Risken Deci., Ex. 31, at 11-12. That represented an increase in over thirty percent of the parental involvement rate in Texas. The remaining 5% that did not involve their parents were able to get a judicial bypass. Id.

As the State described, evidence shows that most minors who do not involve their parents voluntarily in the abortion decision do so based on unrealistic fears about what their reactions will be. State's Summ. J. Opp. Br. atl9-20. Texas' experience adds additional evidence to that fact, and shows that State parental involvement laws greatly increase a parent's involvement in the abortion decision, which all parties should agree is an outcome that is beneficial to minors and protects their wellbeing.

D. The State's evidence shows that minors who have abortions are much more *susceptible* to mental disturbance.

Planned Parenthood spills a lot of ink rebutting an argument that the State is not even making. The State has been clear that it is not arguing that abortion causes mental disturbance. State's Summ. J. Opp. Br. at 8 ("To be clear, the State is not arguing that abortion causes psychological problems for minors, but simply noting that the evidence establishes that minors who have had abortions are much more susceptible to these problems."). But as the evidence and the State's experts show, there is a much higher incidence of serious mental disturbance in minors who have abortions compared to minors

who carry to term or minors who were never pregnant. State's Summ. J. Br. at 16-18; State's Summ. J. Opp. Br. at 12.

Professor Eileen Ryan, medical director of the University of Virginia's Institute of Law, Psychiatry & Public Policy, testified that "several methodologically sound studies that include adolescents suggest that abortion may be associated with an increased risk for mental health problems. In the only meta-analysis of the literature to date, Coleman (2011) found an overall 81% increased risk of mental health problems in the 22 studies analyzed." Expert Report of Professor Eileen Ryan, 19-20, Risken Deci., Ex. 29. Planned Parenthood's attempt to undermine these statistics by noting that Doctor Ryan acknowledged that there is insufficient information to conclude as to whether abortion causes mental disturbance is beside the point. The point is that there is a much greater risk of mental disturbance for minors who have abortions, and thus a much higher interest for the State to involve parents to monitor and detect those problems before they turn to self-destructive behaviors. State's Summ. J. Br. at 18.

Planned Parenthood attacks one of the articles that the State submitted to show that minors who have abortions are at an increased risk of psychological disturbance, arguing that the paper is somehow inconsistent with Dr. Ryan's conclusions. But that paper, An Explanatory Model to Guide Assessment, Risk and Diagnosis of Psychological Distress After Abortion, by Maureen Curley, analyzes available literature, just like Dr. Ryan, and comes to the same conclusion as Dr. Ryan: there is a much higher

incidence of psychological disturbance for minors who have had abortions.[4] Planned Parenthood makes the same attack against another influential journal article, Fergusson et al., Abortion in Young Women and Subsequent Mental Health, 47 J. Child Psychology & Psychiatry 16 (2006), which shows much higher incidents of mental health disturbance in minors who have abortions compared to minors who carry to term or are not pregnant. *See* Chart at State's Summ. J. Br. at 17.5 Planned Parenthood tries to undermine these sources by showing that they do not prove causation. But neither source nor Dr. Ryan purport to prove causation. The Court should ignore Planned Parenthood's unpersuasive attempt to conceal the reality of what these studies show.

Planned Parenthood also tries to rebut the evidence of high rates of post-abortion mental disturbance for minors by citing their expert, Dr. Stotland. But Dr.

---

[4] Planned Parenthood also makes the odd argument that the paper is inadmissible hearsay simply because it was not one of the many articles cited by Dr. Ryan. It is a published study, not testimony. As the State explained in its response to Plaintiffs' Statement of Undisputed Facts, this case involves legislative fact, and a court is of course unrestricted in what sources it consults in determining the legal issues involved. In accessing legislative facts, "the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present." Fed. R. Evid. 201, Advisory Committee Note (quotation marks omitted); see *also Daggett v. Commission on Governmental Ethics & Election Practices,* 172 F.3d 104, 112 (1st Cir. 1999) (Boudin, J.) ("[S]o-called 'legislative facts'. . . usually are not proved through trial evidence but rather by material set forth in the briefs.").

Stotland also focused on the irrelevant question whether abortion causes mental health disturbances. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 6 at 106:13-107:20 ("there is no reliable scientific evidence that abortion causes different psychological effects in women of different ages.")[5]. Moreover, Stotland relies exclusively on studies produced by either the Bixby Center, a research institute dedicated to promoting abortion,[6] and the Guttmacher Institute, which has been the research arm of Plaintiff Planned Parenthood, and was founded and funded by Planned Parenthood.[7] Moreover, Dr. Stotland was unfamiliar with much of the research that she was citing. For example, she did not know that a Guttmacher study that she cited related to 360 inner city black teenagers from Baltimore in 1989, involving economic and vocational outcomes rather than psychological outcomes. *See* Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 6 at 122:19-124:14; Expert Report of Nada Stotland, Risken Deci., Ex. 8 ¶ 10. She was also unaware that research she cited involved adult women, not adolescents. *See* Risken Deci. Re:

---

[5] As the authors of this study note, some of their research is inconsistent with the conclusions that that APA has drawn on whether abortion is linked to an increased risk of psychological harm. As an initial matter, it is unclear whether the APA was also addressing causation. But regardless, as these authors and others have noted, the APA's conclusion is unreliable because it was based on a very small number of studies that lacked a comprehensive assessment of mental disorders, lacked comparison groups, and had limited statistical controls. Fergusson, *et al.,* at 23.

[6] *See* http://bixbycenter.ucsf.edu/about-us.

[7] *See* https://www.guttmacher.org/about/history.

Supplemental Resp. to Additional Facts, Ex. 6 at 135:8-139:12.

Dr. Stotland's general unfamiliarity with the studies she cites should not be surprising, though, since she admitted in her deposition that she did not even maintain her own working file in this case, but instead that it was maintained by counsel for Planned Parenthood. Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 6 at 14:17-17:6. And that raises a problem that predominates all of Planned Parenthood's experts. Each of them is an advocate for abortion rights, often with close connections to Planned Parenthood, which calls into question the objectivity of the opinions that they advocate.[8] For example, Dr. Stotland admitted that she is an advocate for abortion, and that she has donated to Planned Parenthood and other organizations that advocate for abortion. Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 6 at 54:23-55:8; 21:11-24:3. Dr. Darney admitted that "I see my primary role as a scientist who advocates for abortion rights." Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 9 at 41:15-42:16. Dr. Pinto admitted that she waived her usual fees in this case and the Alaska parental involvement case "[b]ecause I believe strongly in the issue." Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 2 at 66:18-19. And Rita

---

[8] In fact, every expert witness identified by Planned Parenthood has waived his or her expert witness fee in this case, performing their services on behalf of PPMT *gratis*. *See* Risken Deci. Re: Plaintiffs' Statement of Undisputed Facts Ex. 1A (Darney), IB (Stotland), 1C (Halpern-Felsher), ID (Lucido), IE (Pinto) and IF (Novakovich). Ms. Howell is also paid employee of PPMT. *Id.,* Ex 1G.

Lucido has not only donated several thousand dollars to Planned Parenthood every year for the last fifteen years, she was also on the board of a Planned Parenthood affiliate. Risken Deci. Re: Supplemental Resp. to Additional Facts, Ex. 8 at 129:11-131:19.

In sum, Planned Parenthood's attempt to undermine the State's evidence showing that minors who have abortions are much more susceptible to mental health disturbance, and thus much more in need of a parent's care, is unavailing. The State is not trying to prove that abortion causes mental distress, but simply that it is more prevalent in minors who have had abortions, whatever the cause. Thus, much of Planned Parenthood's argument against this evidence should be dismissed as irrelevant, and its experts' conclusions unreliable because of their explicit bias. Planned Parenthood cannot overcome the fact that credible, reliable science and objective scientific opinion supports the State's concern for the welfare of its youth.

E. Planned Parenthood ignores that parents who do not know about their daughters' abortions will be unable to monitor and assist them in regard to medical complications.

Planned Parenthood acknowledges that medical complications can arise after an abortion, and can be serious. Pls. Summ. J. Opp. Br. at 23. They also acknowledge that patients do not return for follow up appointments after the abortion to ensure there are no medical complications. *Ibid.* But Planned Parenthood retreats to their familiar argument that there are risks associated with carrying a child to

term as well, and the State does not require parental involvement for pregnancy-related care. The two conditions, one immediate and urgent, and the other progressive over time, are completely distinguishable.

For example, Planned Parenthood continues to ignore the obvious fact that minors do not have pregnancies in secret. It is a basic fact of life that a minor's pregnancy will, sooner or later, manifest itself. Thus, there is little danger of a parent being unaware of his or her daughter's medical condition. But for the high percentage of minors who do not involve their parents in the abortion decision, each of them is unaware that their daughter had a serious medical procedure and, thus, will not be monitoring their condition for the immediate aftermath of that procedure. And if a complication should arise, the parent might not appreciate the potential severity simply because the parent is unaware of the cause. Moreover, as noted above and as the Supreme Court has recognized, there are few if any serious medical decisions to make during the pregnancy, unlike the abortion decision. *Matheson,* 450 U.S. at 412-13.

As the State and its experts have explained, having parents involved to give medical history and especially to monitor for post-procedure complications, which an unexperienced minor may be ill-equipped to recognize, is a very valid and compelling state interest. *Id.* at 411 ("Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."). State's Summ. J. Br. at 19-20.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant the State's motion for summary judgment and deny Plaintiffs'.

Respectfully submitted this 3rd day of March, 2017.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DALE SCHOWENGERDT
Solicitor General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document to counsel for the Plaintiffs via regular mail, postage pre-paid.

Tanis M. Holm
Eric E. Holm
Sather & Holm, PLLC
2301 Montana Ave., Ste. 202
PO Box 1115
Billings, MT 59103
tanis@satherandholm.com
eric@satherandholm.com

Ms. Alice Clapman
Planned Parenthood Federation of America
1110 Vermont Ave NW, Ste. 300
Washington, DC 20005
alice.clampan@ppfa.org
Richard.muniz@ppfa.org

Dated:_____ _____

Aleisha Solem
Paralegal