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

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

HELEN WEEMS, et al., Plaintiffs, v. THE STATE OF MONTANA, et al., Defendants.	Cause No.: ADV-2018-73 **ORDER – MOTIONS FOR SUMMARY JUDGMENT**

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

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

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

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

ISSUES

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

STATEMENT OF FACTS

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

The Statute's History

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

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

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

Current controversy

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

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

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

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

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

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

PRINCIPLES OF LAW

Summary Judgment

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

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Constitutional Issue

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

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

ANALYSIS

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

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

Before the Court addresses the statute's constitutionality, the Court must first consider two foundational issues:

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

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

Scope of Practice

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

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

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

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

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

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

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

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

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

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

Thompson Aff., Ex. 9-A.

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

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

Thompson Aff., Ex. 9-B.

The Board asked whether abortion services require specific authorization or whether abortion is within the scope of practice without specific authorization. The Board concluded that the current structure, which requires APRNs to know their own scope of practice and competencies, adequately addresses the issue.

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

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

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

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

The Fundamental Right to Privacy and Procreative Autonomy

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

to dictate who performs the abortion. On the contrary, Montana recognizes the "fundamental privacy right to obtain a particular lawful medical procedure from a health care provider [who] has been determined by the medical community to be competent to provide that service and who has been licensed to do so." *Armstrong* at ¶ 62; *Wiser v. State*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133; *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 440 P.3d 4. Specifically, the *Armstrong* court held "Article II, Section 10, protects a woman's right of procreative autonomy--here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, *from a health care provider of her choice.*" *Armstrong* at ¶ 75 (emphasis added). The Montana Constitution protects not only a patient's right to obtain lawful medical procedures, but also the patient's right to choose the health care provider who performs the procedure if the medical community deems the health care provider qualified.

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

Strict Scrutiny

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

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

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

22 Even if the Court finds the State has an interest in the health and
23 welfare of Montana citizens seeking an abortion:
24 /////
25 /////

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

Armstrong at ¶ 62.

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

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

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

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

CONCLUSION

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

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

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

4 Accordingly,

5 **ORDER**

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

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

12 DATED this 25th day of February 2022.

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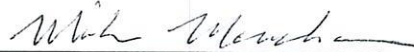

15 MIKE MENAHAN
16 District Court Judge

17

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