No. DA 21-0521

In the Supreme Court of the State of Montana

PLANNED PARENTHOOD OF MONTANA AND JOEY BANKS, M.D.,

Plaintiffs-Appellees,

v.

STATE OF MONTANA,

Defendant-Appellant.

On Appeal from the Thirteenth Judicial District, Yellowstone County, No. DV-21-999
The Honorable Michael G. Moses, Presiding

Brief of Amicus Governor Gianforte Supporting Defendant-Appellant State of Montana

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Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, and Rules

Other Authorities

Interest of Amicus

Amicus Greg Gianforte is the Governor of Montana. As governor, he is "vested with [t]he executive power" and "shall see that the laws are faithfully executed." Mont. Const. art. VI, § 4(1). He is "the chief executive of the state," tasked with "formulat[ing] and administer[ing] the policies of the executive branch of state government." Mont. Code Ann. § 2-15-103. He "has full power [to] supervis[e], approv[e], direct[ ], and appoint" all unelected departments and their units, *id.*, and "shall…supervise the official conduct of all executive and ministerial officers," *id*. at § 2-15-201(a).

As the CEO of the State of Montana, Governor Gianforte represents one co-equal branch of its government:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Mont. Const. art. III, § 1. It is respect for these distinct branches that motivates his participation in this case.

For American governments to properly function, all branches must faithfully execute their respective purposes. The Rule of Law transcends and applies to all branches of government. Here, because *Dobbs v. Jackson Women's Health Organization,*, 142 S. Ct. 2228 (2022) overruled *Roe v. Wade*,

410 U.S. 113 (1973) and its progeny, the Court must necessarily revisit its decision in *Armstrong v. State,* 119 MT 261, 296 Mont. 361, 989 P.2d 364. *See Armstrong,* ¶ 48 (including in its analysis "jurisprudential recognition, following the close of the Constitutional Convention, of a woman's right to seek and obtain a pre-viability abortion," i.e., *Roe* and its progeny). As part of that review, the Court will need to re-assess without *Roe* the limits of its authority to interpret a constitutional right to include that which was expressly intended and believed to be excluded from the Declaration of Rights and instead reserved to the Legislature. *See id.* at ¶ 44 ("Significantly, the Convention determined not to deal with abortion in the Bill [Declaration] of Rights 'at this time' and rather chose to leave the matter to the legislature because of the historical debate as to 'when a person becomes a person.' *Roe*, handed down a year after the Convention, resolved this debate from a legal standpoint, …") (internal citation omitted). Amicus Governor Gianforte files this brief to protect preservation of the balance of powers as enshrined and intended in the Montana Constitution.

Introduction[1]

Families are the basic fabric of a free society. Consistent with this reality, Montana's elected representatives since statehood have protected the life of the unborn, *see* §§ 94-401, 94-402, R.C.M. 1947, reaffirming post-*Roe* "the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick," and "the intent to extend the protection of the laws of Montana in favor of all human life." Mont. Code Ann. § 50-20-102(1).

The prerogative to establish such policy has been long understood in Montana to belong to the legislature, not the executive or judicial branches. *See, e.g.*, Cmt. of Del. Dahood, Mont. Constitutional Convention, Verbatim Tr. Vol. 5, 1640 (Mar. 7, 1972). In light of *Dobbs*, the Montana Supreme Court must reconsider *Armstrong* and return the issue to the legislature, where it rightly belongs.

Summary of the Argument

The Montana Supreme Court in *Armstrong v. State* concluded that the Right to Privacy in the Montana Constitution includes a right to abortion. In reaching this conclusion, the Court relied in part on *Roe v. Wade*, decided after the Montana Constitution was adopted and ratified. The United States Supreme

[1] Lt. Gov. Juras assisted counsel in researching the history of abortion law in Montana.

Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization*, concluding that history and tradition did not support such a right and so returned the issue back to state legislatures, where it had resided pre-*Roe*. With *Roe* overturned, this Court should reconsider *Armstrong*'s reasoning.

Montana's historical precedent overwhelming supports a similar conclusion as was reached in *Dobbs*. Like a majority of states pre-*Roe*, Montana had restrictive abortion laws in place since it was a territory. The record from the Constitutional Convention shows the delegates' intent for the Declaration of Rights to exclude abortion. And on the passage of the new Constitution, no one made any effort, legislatively or legally, to amend or repeal Montana's abortion laws because they violated Montana's Constitution. All changes to those laws were in response to *Roe* and its progeny until 1999, when *Armstrong* was decided.

The Montana Constitution cannot properly be interpreted to include the right to an abortion. This policy question should be returned to the legislature where it was understood to belong.

Argument

The seminal and sole abortion-related precedent of this Court is *Armstrong v. State*, 1999 MT 261. In *Armstrong*, the Court concluded that 1) Montana's right to privacy includes "procreative autonomy," and that 2)

procreative autonomy includes the right to an abortion. *Armstrong,* ¶ 49. To arrive at these conclusions, the *Armstrong* court identifies four fundamental premises.

First, the Court asserted "Montana's broad, yet undefined, concept of individual privacy—historically predating even the 1972 Constitution." *Id.* at ¶ 48. To support this premise, the Court cited to select portions of the Convention record that show that "the Bill of Rights Committee proposed 'a broad provision' to permit flexibility to the courts in resolving the tensions between public interest and privacy." *Id.* at ¶ 36 (citing Mont. Constitutional Convention, Committee Proposals at 632-33 (February 22, 1972)). The court also concluded that the fact "that the Convention delegates deliberately drafted a broad and undefined right of 'individual' privacy was more a testament to and culmination of Montanans' continuous and zealous protection of a core sphere of personal autonomy and dignity than it was an attempt to create a greater right than that which already existed by historical precedent." *Armstrong,* ¶ 36.

Second, the Court recognized "the Constitutional Convention's unmistakable intent to textualize this tradition by explicitly protecting citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Id.*

at ¶ 48. Recorded delegate discussions expressing this precise intent. *Id.* at ¶ 30.

Third, the Court observed "the Convention's reliance on *Griswold*." *Id.* at ¶ 48 (referencing *Griswold v. Connecticut*, 384 U.S. 479 (1965)). This observation relies on documented discussion among delegates who referred to the United States Supreme Court's recognition of an implicit right to privacy in *Griswold* to advocate an express right to privacy in Montana's Constitution. *Armstrong*, ¶ 46.

Fourth, the Court cites to "jurisprudential recognition, following the close of the Constitutional Convention of a woman's right to seek and obtain a pre-viability abortion," that is, *Roe*. *Id.* at ¶ 48.

While the second and third premises on which the *Armstrong* court relied appear unaffected, the *Dobb* decision invalidates the fourth and requires closer scrutiny of the first. Under such review, the *Armstrong* court's conclusion that a right to an abortion exists in the Montana Constitution must be reversed.

I. *Roe* cannot inform Montana constitutional interpretation.

While it is legally problematic for a state constitution to be interpreted in light of a subsequently-decided United States Supreme Court decision,[2] the

[2] A state constitution that was intentionally left silent on a policy issue to reserve it to the legislature, *see infra* Part II.A., cannot lawfully be construed as

Armstrong court's reliance on *Roe* for Montana constitutional interpretation can no longer hold in light of *Dobbs*.

Dobbs expressly overruled *Roe* and its progeny, finding that "[t]he [U.S.] Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. … [Due Process] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2242 (citing *Wash. v. Glucksburg,* 521 U.S. 702, 721 (1997)). With *Dobbs*, jurisprudential recognition "of a woman's right to seek and obtain a pre-viability abortion" as identified in *Armstrong* no longer exists. The Court can no longer rely on the fourth premise.

With the removal of the court's fourth premise from the analysis, the *Armstrong* court's abortion determination is not valid. On finding a right to "procreative autonomy," the *Armstrong* court then held that:

> Implicit in this right of procreative autonomy is a woman's 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.

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amended to speak to that policy issue by virtue of a federal decision addressing a federal constitutional issue. *See, e.g.*, Mont. Const. art. XIV (establishing robust and comprehensive procedures for amending the Montana Constitution).

Armstrong, ¶ 49. To arrive at this implicit meaning, the *Armstrong* court reasoned that procreative autonomy—"presupposed in *Griswold*"— necessarily means both contraception (as recognized in *Griswold*) and abortion (as recognized in *Roe*).

Dobbs unequivocally refutes this conclusion: "all of the precedents *Roe* cited, including *Griswold* …, were critically different [from *Roe*] for a reason we have explained: None of the cases involved the destruction of what *Roe* called 'potential life'." *Dobbs*, 142 S. Ct. at 2261. "The exercise of the rights at issue in *Griswold* … does not destroy a 'potential life,' but an abortion has that effect." *Id.* Following *Griswold*'s right to privacy, even if desired by the Constitutional Convention, does not necessitate the recognition of, and is fundamentally distinguishable from, a right to abortion. So "procreative autonomy," insofar as it is a properly recognized component of personal autonomy under Montana's Right to Privacy, does not include within its scope a right to abortion.[3]

[3] Additionally, "attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. *Casey*, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like." *Dobbs*, 142 S. Ct. at 2258.

II. Historical context belies any interpretation that the Montana Constitution protects abortion.

The *Armstrong* court made clear that the Right to Privacy was not intended "to create a greater right than that which already existed by historical precedent." *Armstrong*, ¶ 36. Historical context demonstrates abortion is not part of the Right to Privacy.

A. Abortion was expressly intended to be excluded from the Declaration of Rights.

As acknowledged in *Armstrong*, the Bill of Rights Committee determined that the regulation of abortion should remain with legislature, with Committee Chairman Dahood addressing it as follows:

> Mr. Chairman, I stand in opposition to the amendment. What Delegate Kelleher is attempting to do at this time is, by constitutional command, prohibit abortion in the State of Montana. That issue was brought before the [Bill of Rights] committee. We decided that we should not deal with it within the Bill of Rights. It is a legislative matter insofar as we are concerned. The world of law has for centuries conducted a debate as to when a person becomes a person, at what particular state, at what particular time; and we submit that this particular question should not be decided by this delegation. It has no part at this time within the Bill of Rights of the Constitution of the State of Montana, and we oppose it for that reason.

Cmt. of Del. Dahood, Mont. Constitutional Convention, Verbatim Tr. vol. 5, 1640 (Mar. 7, 1972). While this position was expressed in the context of an amendment to "Article II, Section 3: Inalienable Rights," not the "Article II,

Section 9: Right to Privacy," the comment expressly transcends the specific section at issue to speak to the entire Declaration of Rights, to all of Article II.

And within this context, *Armstrong*'s first premise is shown to be inaccurate: However "broad" and "undefined" Montana's "concept of individual privacy" is—"historically predating even the 1972 Constitution"—it cannot mean the right to an abortion.

B. No legal change in abortion law occurred as a result of the new 1972 Constitution.

For the Court to uphold *Armstrong*'s conclusion that Montana's 1972 Constitution protects abortion, it must conclude that prior to *Roe*, the Montana Constitution recognized abortion rights more protective than those identified in *Roe*. *See Armstrong*, ¶ 41 ("Notwithstanding, and independently of the federal constitution, where the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution."). But to do so would fundamentally conflict with historical precedent. *Armstrong*, ¶ 36 (the Right to Privacy was not "an attempt to create a greater right than that which already existed by historical precedent.").

Since its inception as a territory in 1864, Montana has had laws restricting abortion on the books.[4] These laws continued in substantially similar form[5] through statehood and were codified at the time of ratification of the 1972 Constitution. §§ 94-401 and 94-402, R.C.M. 1947. And Montana was not alone:

> By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147.
>
> This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother.

Dobbs, 142 S. Ct. at 2253. So for Montana to have pivoted away from its historical practice of abortion legislation to create a constitutional right to abortion in 1972, prior to *Roe,* would have been a monumental and noteworthy change—not only within the state, but nationally.

Yet, on the Constitution's ratification on June 6, 1972, there was no effort of any kind to change those long-standing abortion laws in light of Montana's newly-minted Constitution. No lawsuit arose challenging those

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[4] Ch. IV, § 41, Criminal Practices Act, Statutes of the Montana First Territorial Assembly, 1864.

[5] *See e.g.*, § 41, p. 184, Bannack Stat. 1864; § 42, 4th Div. Rev. Stat. 1879; § 42, 4th Div. Comp. Stat 1887; §§ 480-481, Pen. C. 1895; § 8351-8352, Rev. C. 1907; §§ 11023-11024, R.C.M. 1921; §§ 11023-11023, R.C.M. 1935.

abortion laws under any provision of the Montana Constitution. No legislation was brought forward to repeal or revise those abortion laws for the purpose of bringing them in line with the Montana Constitution. And no attorney general opinion—which holds the force of law until a court holds otherwise, Mont. Code Ann. § 2-15-501(7)—opined that those abortion restrictions were unlawful under any provision of the Montana Constitution.

It was not the ratification of the 1972 Montana Constitution that prompted consideration of abortion laws by the Montana legislature in 1973 and 1974. Legislative history indisputably establishes that the Montana Legislature began considering the authorization of abortion in 1973 solely as a result of the January 1973 *Roe* decision. The 1973 legislature failed to enact any legislation, and prohibitions on abortion remained on the books. *See* HB 463 (1973); §§ 94-401 and 94-402, R.C.M. 1947.[6]

Similarly, eight months after the Montana Constitution was ratified, the attorney general issued an opinion addressing the lawfulness of Montana's abortion laws. His opinion's analysis and proposed statutory revisions rested upon *Roe* and were entirely unimpacted by Montana constitutional considerations. 35 Op. Att'y Gen. 9 (1973).

[6] §§ 94-401 and 94-402 (R.C.M. 1947) were recodified as MCA §§ 94-5-611 and 94-5-612 by the 1973 Legislature.

A year after the Montana Constitution was ratified, a federal court struck down Montana's abortion laws under *Roe*. *Doe v. Woodahl*, 360 F. Supp. 20 (D. Mont. 1973).[7] Following that decision, and a year and a half after the Montana Constitution was ratified, the 1974 legislature adopted the Montana Abortion Control Act, the purpose of which was to revise abortion laws in Montana consistent with *Roe*. MCA § 50-20-101 *et seq*. Indeed, for over 25 years after the Montana Constitution was ratified, not one person took action because they thought Montana's abortion laws, either pre- or post-*Roe*, were unconstitutional under the Montana Constitution.[8] Such is not the behavior of people pioneering a new, more-protective abortion right under the Montana Constitution.[9]

This inaction begs the question: if Montana's Constitution is more protective than *Roe*, *Armstrong*, ¶ 41, why were all legislative efforts during the

[7] Pursuant to 28 U.S.C. § 1367, federal courts have supplemental jurisdiction over related state claims if asserted in federal court. No supplemental state constitutional claim was asserted in that case.

[8] The legislative history of the Montana Abortion Control Act shows subsequent pre-1999 revisions to the Act were almost exclusively made to bring it in line with federal decisions post-*Roe* and never because of implications of the Montana Constitution.

[9] Several delegates, including Bill of Right Committee members Chet Baylock and Dorothy Eck (a former president of the League of Women Voters), subsequently became legislators. None attempted to amend abortion law because they understood the Montana Constitution to impact it.

1973 and 1974 legislative sessions directed at compliance with *Roe* and its interpretation of the federal constitution?[10] Why were no legal challenges under the Montana Constitution initiated until 1999? Why resort to federal law to resolve the issue when something more protective existed in state?

That a federal lawsuit was promptly filed post-*Roe* negates any notion that interested parties were somehow ignorant of the law or slow on the uptake. So the answer must be not only that no one understood the Montana Constitution to be more protective than *Roe*, but that, because the Constitution became law before *Roe* was even decided, no one thought the Constitution had any bearing *at all* on the issue of abortion. And that in turn can only be because everyone took the delegates at their word and understood what the Montana Constitution meant from its inception: the Montana Declaration of Rights does not recognize a constitutional right to an abortion.

[10] During the 1973 and 1974 legislative sessions, all written comments and oral testimony submitted in support of or in opposition to the abortion bills under consideration focused on compliance with *Roe*. Not a single sponsor, proponent, or opponent suggested that the 1972 Montana Constitution created a right to abortion. *See, e.g.*, the legislative history of HB 463 (1973) and SB 715 (1974).

Conclusion

What was true in *Dobbs* is true here: "Nothing in the Constitution or in legal traditions authorizes the Court to adopt [a] 'theory of life.'" *Dobbs,* 142 S. Ct. at 2261. The Montana Constitution and the Constitutional Convention that adopted it left that policy question to the legislature, where it resided during Montana's status as a territory and since statehood. With the overturning of *Roe,* which formed a basis for the *Armstrong* decision, this Court must honor such context. Failure to do so would be to reprise the failings of *Roe* in an unconstitutional[11] "exercise of raw judicial power" and perpetuate on Montanans the same judicial harm that resulted nationally from *Roe* and its progeny for half a century. *See Dobbs,* 142 S. Ct. at 2260.

Amicus Governor Gianforte respectfully urges this Court to reconsider *Armstrong* in light of *Dobbs* and return the policy question of abortion to the legislature.

[11] "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1. The check on the legislature's policy making role is not the judiciary, but the executive, who is constitutionally authorized to veto legislation. Mont. Const. art. VI, § 10.

Date: August 2, 2022

Respectfully submitted,

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Certificate of Compliance

Pursuant to Mont. R. App. P. 11(4), I certify that the foregoing document is proportionally spaced in 14-point Times New Roman font and contains 3,352 words.

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Certificate of Service

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