

No. DA 21-0521

**In the Supreme Court of the State of Montana**

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

*Plaintiffs-Appellees,*

v.

STATE OF MONTANA,

*Defendant-Appellant.*

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

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**Motion of Governor Gianforte for Supplemental Briefing and  
Leave to Participate as Amicus Curiae**

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## **Motion for Supplemental Briefing and Leave to File Amicus Brief**

Pursuant to M. R. App. P. 16 and 12(7), Proposed Amicus Governor Greg Gianforte respectfully moves this Court to permit supplemental briefing and grant him leave to file an amicus brief. In support of his motion, Governor Gianforte states as follows:

1. This case challenges the constitutionality of three abortion-related bills—House Bills 136, 140, and 171—under the Montana Constitution, in particular alleging violations of the rights to privacy, speech, and equal protection under Montana’s Bill of Rights. (Appellees’ Resp. Br. at 1.)
2. Briefing in this appeal concluded on April 15, 2022, with the case assigned to a five-judge panel on May 11, 2022. A fundamental issue preliminarily raised in that briefing was the merit of *Armstrong v. St.*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. (See, e.g., Appellants’ Opening Br. at 15-22; Appellees’ Resp. Br. at 35-43.) *Armstrong* relied on *Roe v. Wade*, 410 U.S. 113 (1973), to conclude that Montana’s constitutional right to privacy included the right to an abortion.
3. On June 24, 2022, the United States Supreme Court overruled *Roe v. Wade* and its progeny in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, returning the policy decision of regulating abortion to the state legislatures. *Id.* at 2243.

4. On June 27, 2022, counsel for the State of Montana advised this Court of that decision and “invite[d] the Court to order supplemental briefing that can fulsomely address *Dobbs*’ effect on the issues presented in this appeal.”

(Appellants’ Notice Supp. Auth. at 7.)

5. To date, the Court has not taken any action in this matter, including the invitation for supplemental briefing in this case.

6. Given the seismic shift in the legal landscape surrounding abortion jurisprudence nationally, and that preliminary briefing presented to this Court regarding the merit of *Armstrong* was uninformed by *Dobbs*, more robust supplemental briefing would meaningfully assist the Court in its task of impartially navigating this fundamental policy question under the Montana Constitution.

7. The Governor 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).

8. 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 matter.

9. 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 of *Dobbs*, the Court must necessarily revisit its decision in *Armstrong*. 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 Bill of Rights, and instead reserved to the Legislature. See *Armstrong*, ¶ 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). To protect preservation of the balance of powers as enshrined and intended in the Montana Constitution, the Governor respectfully requests to participate as an amicus curiae in support of the Defendant-Appellant State of Montana. To ensure no delay is caused on his account, the Governor attaches hereto his proposed amicus brief.

**10.** The Governor has conferred with counsel of record. Defendant-Appellant the State does not oppose this motion. Plaintiffs-Appellees were not able to be reached to secure their position prior to this filing.

**WHEREFORE**, Proposed Amicus Governor Gianforte respectfully moves that this Court grant his *Motion for Supplemental Briefing and Leave to Participate as Amicus Curiae*.

Date: August 2, 2022

Respectfully submitted,

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### **Certificate of Compliance**

Pursuant to Mont. R. App. P. 16(3), I certify that the foregoing document does not exceed 1,250 words.

/s/ Anita Y. Milanovich

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## Certificate of Service

I certify that a true and accurate copy of the foregoing document was served on each attorney of record by e-service on August 2, 2022:

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