

LEGAL REVIEW NOTE

Bill No.: HB 721

LC#: LC 3239 To Legal Review Copy, as of
February 17, 2023

Short Title: Restrict unborn child from
dismemberment abortion

Attorney Reviewer: Todd Everts/Julie Johnson

Date: February 21, 2023

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

As drafted, Section 6(2) of HB 721 provides: "The right of individual privacy as referenced in the Montana constitution, the Montana Code Annotated, or the Administrative Rules of Montana does not create, and may not be construed as creating or recognizing, a right to abortion or to governmental funding of abortion."

In addition, Section 3 of HB 721 prohibits the performance of a dismemberment abortion procedure except in a medical emergency, which is narrowly defined as a condition endangering

the life or health of the woman that necessitates a separation procedure performed prior to the ability of the unborn human being to survive outside the womb. Therefore, despite the reference to medical necessity, it appears that HB 721 prohibits dismemberment abortion procedures at all stages of pregnancy in non-emergency and emergency situations.

Article II, section 10, of the Montana Constitution provides that "[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". Montana's constitutional right to privacy is one of the most stringent protections of the right to privacy in the United States. *See Armstrong v. St.*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364. The Montana Supreme Court has held that Article II, section 10, of the Montana Constitution protects a woman's right of procreative autonomy, including the woman's right to obtain a pre-viability abortion from a health care provider of her choice. *Armstrong*, ¶ 75 (internal quotations omitted).

Given Montana's broad right to privacy and the foregoing precedent, HB 721 may raise a constitutional conformity issue to the extent that: (1) HB 721's prohibition on dismemberment abortion procedures infringes upon a woman's right to seek and obtain a pre-viability abortion; and (2) to the extent that Section 6 conflicts with the foregoing precedent.

Requester Comments: