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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA; et al., Plaintiffs, v. STATE OF MONTANA; et al, Defendants.	Cause No.: ADV 23–299 Honorable Mike Menahan **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs cannot meet the high burden necessary to obtain the extraordinary relief of a preliminary injunction. In 2023, the Montana State Legislature amended Mont. Code Ann. § 27-19-201, adopting an entirely new legal standard for issuing preliminary injunctions. *See* Senate Bill ("SB") 191 (2023). Under this new standard, a preliminary injunction may be granted only when the applicant establishes: (a) likelihood of success on the merits; (b) likelihood of suffering irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the

applicant's favor; and (d) the order is in the public interest. *Id.* at § 1. SB 191 became effective when Governor Gianforte signed it on March 2, 2023.

This new legal standard changes the requirements for obtaining a preliminary injunction in at least the following significant ways: First, the burden of proof no longer rests with the Defendants to show why an injunction should not issue. The burden of proof now rests squarely with the applicants to show why an injunction should issue. Second, the former five-part disjunctive test to obtain a preliminary injunction is now a four-part conjunctive test. Applicants for an injunction bear the burden of proving all four elements. The Legislature expressly stated its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Id.*

Plaintiffs' application for a preliminary injunction should be denied because they cannot meet any of the four required elements. Plaintiffs cannot show a likelihood of success on the merits, a likelihood of suffering irreparable harm, that the balance of the equities tips in their favor, or that a preliminary injunction is in the public interest. Because the test is conjunctive, any one of these deficiencies is sufficient to defeat a preliminary injunction in Plaintiffs' favor. Plaintiffs' application for a preliminary injunction should, therefore, be denied.

Plaintiffs also seek a writ of prohibition, which would require Defendants to "to show cause before the court or judge, at a specified time and place, why the party should not be absolutely restrained from any further proceedings in the action or matter." Mont. Code Ann. § 27-27-103. However, such a writ is not a proper remedy under the circumstances of this case because the Montana Department of Public Health and Human Services ("DPHHS") had the statutory authority to promulgate the Rule, acted in a classic executive agency (not judicial) function in doing so, and a writ of prohibition is not Plaintiffs' only available remedy.

FACTUAL AND PROCEDURAL BACKGROUND

Abortion services in Montana are regulated under Montana Code Annotated Title 50, Chapter 20. These statutes provide requirements for medical practitioners regarding reporting and informed consent. Pursuant to these statutes, DPHHS's Office of Vital Records maintains certain records concerning all abortions performed in Montana.

Since the 1970s, the federal Hyde Amendment has banned the use of federal funds for abortions in State Medicaid Programs except in certain, limited circumstances. (Aff. Michael

Randol, ¶ 2 (May 12, 2023).) Only abortion services provided because of rape, incest, or when the pregnancy endangers the life of the mother are eligible for federal financial participation ("FFP"). (*Id.*) Abortions for any other purpose are not eligible for FFP. (*Id.*) Montana Medicaid provides guidance to abortion providers through the Administrative Rules of Montana and the Physician-Related Services Manual, which addresses both abortion services eligible for FFP as well as those funded with state-only Medicaid funds (medically necessary abortions where the life of the mother is not endangered). (*Id.* at ¶ 3.) Following the decision in *Jeannette R. v. Ellery*, Cause No. BDV-94-811, 1995 Mont. Dist. LEXIS 795 (1st Jud. Dist. Court, May 22, 1995), Montana Medicaid has funded abortions where a physician has determined the procedure to be medically necessary. (*Id.* at ¶ 4.) The court emphasized that its decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions." *Id.* at *28; *see also id.* at *4 ("this case has nothing to do with indigent women who may seek an elective abortion. . . . Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.") (*Id.*) Indeed, the *Jeannette R.* court stated that "[i]t is clear that the state need not fund nontherapeutic elective abortion." *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, *29. (*Id.*)

The Physician-Related Services Manual ("Manual") provides guidance on when Montana Medicaid will cover abortions:

> Abortions (ARM 37.86.104)
> Abortions are covered when one of the following conditions is met:
> - The member's life would be endangered if the fetus is carried to term.
> - The pregnancy is the result of rape or incest.
> - The abortion is determined by the attending physician to be medically necessary, even if the member's life is not endangered if the fetus is carried to term.
>
> A completed Medicaid Healthcare Programs Physician Certification for Abortion Services (MA–37) form must be submitted with every abortion claim or payment will be denied. This form is the only form Medicaid accepts for abortion services. Complete only one section of this form.
>
> The form required for abortions can be found on the Provider Information website under Forms in the site index in the left menu of the Provider Website.
>
> When using mifepristone (Mifeprex or RU 486) to terminate a pregnancy, it must be administered within 49 days from the beginning of the last menstrual period by or under the supervision of a physician who:

- Can assess the duration of a pregnancy.
- Can diagnose ectopic pregnancies.
- Can provide surgical intervention in cases of incomplete abortion or severe bleeding, or can provide such care through other qualified physicians.
- Can assure access to medical facilities equipped to provide blood transfusion and resuscitation.
- Has read, understood, and explained to the member the prescribing information for mifepristone.[1]

(*Id.* at ¶ 5.)

The MA–37 form referenced in the Manual provides three options for certification by the physician performing the abortion to support Medicaid coverage: (1) the abortion is necessary to save the member's life; (2) the pregnancy resulted from rape or incest; or (3) the abortion is medically necessary, but the member's life is not endangered, with space to provide an optional explanation. (*Id.* at ¶ 7 and Ex. 1.) The form does not require the submission or attachment of additional documents for any of the three options for Medicaid coverage certification. (*Id.* at ¶ 8.) Prior to the adoption of the Rule that is the subject of this litigation, a provider was only required to submit the MA–37 form and a standard claim form (or its electronic equivalent) to obtain payment for abortions provided to an eligible Medicaid beneficiary. (*Id.* at ¶ 9.) The completed MA–37 form allows Montana Medicaid to assign the correct fund code. (*Id.* at ¶ 10.) When the form indicates rape, incest, or life of the mother, the abortion is eligible for FFP. (*Id.*) If the abortion is for any other medically necessary reason, the abortion is funded exclusively by the state general fund. (*Id.*)

The 2021 Montana Legislature directed DPHHS to review and report on the history, utilization data, policies, rules, and definitions for Medicaid-reimbursed abortions. (*Id.* at ¶ 11.) During the September 2021 meetings of the Interim Budget Committee for Section B and the Children, Families, and Health and Human Services Interim Committee, DPHHS presented a summary of current laws, rules, policies, procedures, and claims estimates associated with Medicaid reimbursed abortions. (*Id.* at ¶ 12 and Ex. 2.) The report indicated claims accompanied by an MA–37 form were automatically paid, without substantive review or auditing of abortion claims. (*Id.* at ¶ 13.) The Interim Committees requested that DPHHS conduct an in-depth review of Medicaid abortion claims, as well as a legal review of the current law concerning Medicaid-reimbursed abortions. (*Id.* at ¶ 14.) DPHHS, using a contractor, reviewed all Medicaid-reimbursed

[1] *See* https://medicaidprovider.mt.gov/manuals/physicianrelatedservicesmanual.

abortions for which DPHHS claimed FFP between July 2011 and June 2021 (6 abortions), as well as 10% of the abortions paid for by Montana Medicaid using only state funds based on medical necessity between July 2019 and June 2021 (79 claims for SFY 2019, 67 claims for SFY 2020, and 75 claims for SFY 2021). (*Id.* at ¶ 15.)

In September 2022, DPHHS presented the results of this analysis—concluding that the information submitted on the MA–37 form lacks sufficient information to verify medical necessity—to the Interim Budget Committee for Section B. (*Id.* at ¶ 16.) With respect to medically necessary abortions, DPHHS's contractor reported that the MA–37 forms contained a brief narrative, but only 11.31% (25 claims, submitted by one provider), contained additional documentation. (*Id.* at ¶ 17.) Such additional documentation typically correlated with the vague medical condition of "complications of unintended pregnancy," or an assessment of the situation, rather than documentation to support a medical complication or disease other than the pregnancy itself. (*Id.* at ¶ 18.) The four conditions routinely indicated on the MA–37 form were: (1) pain and suffering (47.5%); (2) emotional stability (24.43%); (3) mental and physical health (9.05%); and (4) complications of unintended pregnancy (19.00%). (*Id.* at ¶ 19.) Ninety claims related to medication/chemical abortions, but only 10 such claims included documentation establishing that the Manual's requirements for medication/chemical abortions were met. (*Id.* at ¶ 20.)

The results of the in-depth, contractor-conducted review of Medicaid abortion claims caused DPHHS grave concern, especially with respect to medically necessary abortions funded only by state funds. (*Id.* at ¶ 21.) The consistent lack of documentation, coupled with the conditions routinely provided on the MA–37 forms as the basis for medical necessity, led DPHHS to reasonably believe that Medicaid is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions. (*Id.*)

If Medicaid abortion claims were audited, by the federal government or otherwise, DPHHS was also concerned that it would not have sufficient documentation to support that the abortions meet the criteria for payment by the Medicaid program, regardless of whether FFP is available. (*Id.* at ¶ 22.) For example, if state-funds-only abortions were audited, DPHHS would not have sufficient documentation to establish that they were medically necessary. (*Id.*) Similarly, if the federal government were to audit abortions for which FFP was claimed, DPHHS may not have sufficient documentation to establish that the abortions met the requirements of the Hyde Amendment. (*Id.*) DPHHS's contractor recommended that Medicaid abortion claims should be

supported by documentation, including a brief history and physical examination with evidence of the medical diagnosis and/or condition necessitating abortion, an estimate of gestational age, and corroborating laboratory and imaging studies that support the medical diagnosis or patient condition, with such additional information being submitted on (or with) the MA–37 form. (*Id.* at ¶ 23.) These concerns led DPHHS to adopt the Rule that is the subject of this litigation. (*Id.* at ¶ 24.)

The purpose of the Rule's requirements—the definition of medical necessity, prior authorization/prepayment review, documentation requirements, etc.—is to ensure that the abortions Medicaid pays for are medically necessary (not elective and nontherapeutic), consistent with the Montana Medicaid statute's limitation on payment for medical services, and meet appropriate clinical requirements to ensure the health and safety of the Medicaid beneficiary. (*Id.* at ¶ 25.) Faithfulness to the scope of the Medicaid program, as established by the Legislature, and to Montana taxpayers and state funds justifies DPHHS's decision to require documentation supporting Medicaid payment for abortion services and to provide greater specificity as to what constitutes medically necessary services and the documentation needed to support such abortion payment claims. (*Id.* at ¶ 26.) Such requirements are not uncommon and are applied to other Medicaid-reimbursed services to ensure program integrity. (*Id.*) The Rule is reasonably necessary to ensure Medicaid program integrity, to protect the health and safety of Medicaid beneficiaries, and to ensure that Medicaid only pays for medically necessary abortions and not elective, nontherapeutic abortions. (*Id.* at ¶ 27.)

ARGUMENT

I. INJUNCTIVE RELIEF IS INAPPROPRIATE IN THIS CASE.

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). A preliminary injunction is "never awarded as of right." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).; *see also Harrisonville v. W.S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 337–338 (1933) (injunction is not a remedy which issues as of course); *Yakus v. United States*, 321 U.S. 414, 440 (1944). A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Furthermore, in each case, courts must balance the competing claims of injury and must consider

the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24 (citing *Amoco Prod. Co. v. Gambell*, 480 U.S., at 542 (1987)); *see also Hooks for and Behalf of Natl. Labor Relations Bd. v. Nexstar Broadcasting Inc.*, 54. F.4th 1101, 1114 (9th Cir. 2022) (injunctive relief must be evaluated on a case-by-case according to traditional equitable principles and without the aid of presumptions or a "thumb on the scale" in favor of issuing such relief). The basis for injunctive relief in the federal courts has always been the inadequacy of legal remedies coupled with irreparable injury. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506–507. With SB 191's clear legislative intent that the new standard for issuance of preliminary injunctions mirror the federal preliminary injunction standard, and that interpretation and application of this standard closely follow United States supreme court case law, it is evident that Plaintiffs have not met the high burden needed for this extraordinary remedy.

A. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Following the federal standard involves applying a four-part conjunctive test requiring the application to show that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest. *Winter*, 555 U.S. 7 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008); *Amoco Prod. Co.*, 480 U.S. at 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982)). The first prong requires that a party seeking a preliminary injunction demonstrate "a likelihood of success on the merits." *Munaf*, 553 U.S. at 690 (citing *Mazurek*, 520 U.S. at 972 (1997). While satisfaction of this prong has been approached on a case-by-case basis, federal courts have held that showing of a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco v. U.S.*, 944 F.3d 773, 789 (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted).

1. Plaintiffs Lack Standing Because They Have No Right To Taxpayer Reimbursement For Ineligible, Noncovered Abortions.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases and controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citation omitted); *see also* U.S. Const. Art. III, § 2; Mont.

Const. Art. VII, § 4. Standing is a threshold, jurisdictional requirement in every case. *Id.* at ¶ 29 (citation omitted). Parties cannot waive objections to standing. *Id.* (citation omitted). Standing is determined as of the time the action is brought. *Id.* at ¶ 30 (citations omitted).

"'The irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Id.* at ¶ 32 (citations omitted). "Beyond these minimum constitutional requirements, the Supreme Court has adopted several prudential limits: the plaintiff generally must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law invoked." *Id.* (citing *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 12). These rules are "closely related to Art. III concerns but essentially matters of judicial self-governance." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)).

The Montana Supreme Court has carved out a special exception to this well-settled standing jurisprudence. When the State directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures, abortion providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong*, ¶¶ 12–13; *see also Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 250, 440 P.3d 4 ("when 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights.") (quoting *Armstrong*, ¶¶ 8–13).

In reliance on *Armstrong* and *Weems*, Plaintiffs bring their claims on behalf of themselves "and their patients." (Doc 1 at p. 1 and ¶¶ 25–27.) But, as explained below, the Rule at issue does not impact the constitutional rights of women patients—it merely ensures that elective, nontherapeutic abortions are not paid for by Montana Medicaid in violation of the law. Additionally, the U.S. Supreme Court has "disavowed the theories of third-party standing that previously allowed doctors to raise patients' claims in abortion cases." *Alliance for Hippocratic Med. v. FDA*, 2023 U.S. App. LEXIS 8898, n.4 (5th Cir. 2023) (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 and n.61 (2022) (comparing *Warth*, 422 U.S. at 499 and *Elk*

Grove Unif. Sch. Dist., 542 U.S. at 15 (2004) with *June Med. Servs. L.L.C. v. Rosso*, 140 S. Ct. 2103 (Alito, J. dissenting), *id.* at (Gorsuch, J. dissenting) (collecting cases), and *Whole Woman's Health*, 579 U.S. at 632, n.1 (Thomas, J. dissenting)). Because the Rule does not impact the constitutional rights of women patients and considering the shifting legal landscape, the Court should apply the federal test for third-party standing (also recognized by the Montana Supreme Court), which Plaintiffs cannot meet here.

Generally, a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (1975); *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145. The U.S. Supreme Court has recognized a "limited" exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004); *see also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *Baxter*, ¶ 15 (citing *Powers*, 499 U.S. at 410–11). Third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 9, 15, and n.7 (2004). Additionally, parties lack a sufficiently "close relationship" with as-yet unknown clients. *Kowalski*, 543 U.S. at 130–31 (attorneys did not have a close relationship with unknown clients); *see also Baxter*, ¶ 15. Even where enforcement of the challenged restriction *against the litigant* would indirectly violate third parties' rights, the plaintiffs must still establish "a close relationship" with the third party, which does not exist with hypothetical clients. *See id.* (emphasis in the original); *Baxter*, ¶ 15.

Plaintiffs have failed to demonstrate sufficient third-party standing in this case. They have neither pled nor argued that they have a "close relationship" to the Medicaid-qualified women for whom they perform abortions or a hindrance to these women's ability to bring suit. (*See generally* Doc. 1 and Doc. 10.) "A woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *June Med. Servs.*, 140 S. Ct. at 2168 (2020) (Alito, J., dissenting), *abrogated by Dobbs*, 142 S. Ct. at 2275 and n.61. Moreover, "abortionists have a 'financial interest in avoiding burdensome regulations,' while women seeking abortions 'have an interest in the preservation of regulations that protect their health.'" *Id.* Finally, Plaintiffs have no constitutional or fundamental rights to perform abortions or to have them reimbursed by taxpayer-funded programs like Medicaid. They cannot establish a concrete injury in fact sufficient

to confer standing. Because they cannot clear this threshold jurisdictional issue, they are not likely to succeed on the merits of their claims, and a preliminary injunction should not issue.

2. The Rule Is Not Arbitrary And Capricious.

The court in *City & County of San Francisco* in examining whether the plaintiff was likely to succeed on the merits assessed whether the challenged administrative rule was "arbitrary or capricious, or contrary to law." 944 F.3d at 789. Here, Plaintiffs allege in their Verified Complaint that the Rule is arbitrary and capricious "because it violates the legislature's stated intention to provide medically necessary care to Medicaid-eligible Montanans and to provide care that is cost effective." (Doc. 1 at ¶ 120.) However, Plaintiffs' allegation ignores both the standard for "arbitrary and capricious" (without reasonable basis) as well as the stated intention of the Rule. *See Silva v. City of Columbia Falls,* 258 Mont. 329, 335*,* 852 P.2d 671, 675 (1993). The Rule's purpose has several reasonable and rational bases. The Rule seeks to ensure that the abortions Medicaid pays for are medically necessary (not elective and nontherapeutic), consistent with the Montana Medicaid statute's limitation on payment for medical services and meet appropriate clinical requirements to ensure the health and safety of the Medicaid beneficiary receiving the abortion. (Aff. Randol at ¶ 25.) The Rule also seeks to ensure Medicaid program integrity, and faithfulness to Montana taxpayers and state funds. (*Id* at ¶¶ 26–27.) The Rule cannot in good faith be called "arbitrary or capricious."

Plaintiffs' allegations also ignore the litany of other states that adhere to the same or similar standards involving Medicaid-funded abortions. Thirty-three states and the District of Columbia follow the federal standard and cover abortions only in cases of life endangerment, rape and incest. Guttmacher Institute, *State Funding of Abortion Under Medicaid*, available at https://tinyurl.com/mwr4ab5z. Only four states also provide state funds for abortions in cases of fetal impairment. *Id.* Similarly, only four states also provide state funds for abortions that are necessary to prevent grave, long-lasting damage to the person's physical health. *Id.* Sixteen states have a policy that directs Medicaid to pay for all or most medically necessary abortions. *Id.* Of these sixteen, seven provide such funds voluntarily while nine—including Montana—do so pursuant to a court order. *Id.* Compared to a majority of other states, the Rule is moderate and certainly not arbitrary or capricious.

Finally, the Rule's requirement for prior authorization on abortion services ensures conformity with the Hyde Amendment (where the pregnancy endangers the life of the mother or

the pregnancy results from rape or incest) and ensures abortions are medically necessary and the appropriate funds are used. (Aff. Randol at ¶ 28.) This type of prior authorization requirement for Medicaid coverage is well recognized and not unusual for certain services, including but not limited to wheelchairs, hearing aids, breast augmentation and even out-of-state inpatient hospital stays. (*Id* at ¶ 31.) Prior authorization is also required for other health services where there can be a medically necessary purpose for the service, but also a nontherapeutic purpose—and there is a question whether the service is medically necessary. (*Id.* at ¶ 32.) As such, Plaintiffs have failed to show the Rule is arbitrary or capricious.

3. The Rule Does Not Violate The Right To Privacy.

Plaintiffs improperly conflate the availability of abortion and the right to terminate a pre-viability pregnancy (based on the constitutional right to individual privacy recognized in *Armstrong* and its progeny), with whether the State (DPHHS) will pay for such abortions through Medicaid. In an effort to improperly shift the burden to Defendants, Plaintiffs contend that the Rule fails because the measures adopted are not designed to address medically acknowledged *bona fide* health risks, citing *Armstrong*. (*See, e.g.*, Doc 10 at 8, 10.) This statement represents the Supreme Court's framing of the strict scrutiny test for the context in which *Armstrong* arose. Because there is no fundamental right to a Medicaid-funded abortion, strict scrutiny does not apply—and Defendants prevail on the likelihood of success on the merits because the Rule easily meet the rational basis test. *See Mont. Cannabis Indus. Assn. v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161 (citations omitted).

Here, the issue is not the right to abortion (or the legality of certain abortion proscriptions), but whether the State is required to pay for certain abortions through Medicaid and the conditions that it can impose to ensure that payment is consistent with the purposes of the Medicaid program. Both Montana and the federal case law are clear that these are two distinct issues. For example, in holding that the Montana Medicaid statute requires Medicaid to pay for medically necessary abortions, the district court in *Jeannette R.* made clear that its decision did not apply to elective abortions and that there is no statutory or constitutional obligation for Medicaid to pay for elective, nontherapeutic abortions: "It is clear that the state need not fund nontherapeutic elective abortions." 1995 Mont. Dist. LEXIS 795, *29. *Cf., e.g., Beal v. Doe*, 432 U.S. 438 (1977) (no Social Security Act requirement that a State include funding of elective abortions in its Medicaid program); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding, against federal constitutional challenge,

a state regulation that required prior authorization for state Medicaid benefits for medically necessary abortions).

The clearest indication of Plaintiffs' conflation of the right to abortion and the issue of whether Medicaid will pay for an abortion is their arguments that the Rule's "physician requirement" violates a woman's right to personal autonomy over her decision on whether to obtain an abortion and her equal protection rights. Unless a health insurer like Medicaid blanketly pays all claims without regard to waste, fraud, or abuse—or without regard to whether a service is medically necessary—it necessarily has to interact with a patient and his or her health care provider. (Aff. Randol at ¶ 35.) Unlike the abortion provider, who does not have a continuing relationship with a pregnant woman, Medicaid has ongoing relationship with—and responsibility to—Medicaid beneficiaries, including those pregnant women who choose an abortion. (*Id.* at ¶ 36.) While Medicaid cannot cover abortions that are not medically necessary, if an abortion is medically necessary because of a physical or mental health condition, Medicaid could be responsible for covering the necessary treatment to address the condition. (*Id.*) If the pregnant Medicaid beneficiary experiences adverse effects from a surgical or medication/chemical abortion, whether the adverse effects are physical or psychological and whether they occur immediately or do not manifest themselves for some time after the abortion, Medicaid is responsible for providing coverage for the necessary physical and/or mental health services to treat or mitigate those adverse effects, for as long as the woman remains eligible for such Medicaid services. (*Id.* at ¶ 45.)

Medicaid, thus, has an interest in ensuring that its pregnant Medicaid beneficiaries receive abortion-related care directly from health care professionals who have the skills necessary to provide the high level of care—to comply with federal and state law, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries. (*See id.* at ¶ 46; Doc.1 at Ex. A at pp. 2358–2361; Doc. 1 at Ex. B, Response Nos. 4, 8, 9, 11, 20, 34.) Plaintiffs have failed to establish a likelihood of success on the merits with respect to their claims that the "physician requirement" violates a woman's rights to privacy and equal protection.

Plaintiffs' argument that the Rule's prior authorization or prepayment review requirement (and the related documentation requirements) violate the constitutional right to privacy also presumes that the only way to implement the requirements is an in-person physical examination and then a waiting period while prior authorization is obtained. They, thus, conflate a decision invalidating a 24-hour waiting period on a woman's right to obtain an abortion with a Medicaid

payment requirement for prior authorization or post-service prepayment review to establish medical necessity for Medicaid payment to be permissible. But the requirement for a physical examination and the related lab test results/imaging/diagnosis requirements (and documentation thereof) does not mean that the abortion provider has to conduct that examination and do the lab tests/imaging/diagnosis themselves. The patient can obtain this documentation from another provider and provide access to the results of the examination, tests/imaging/diagnoses to the abortion provider. Plaintiffs make no sufficient showing of any real hardship imposed by this requirement. Moreover, courts have upheld such state prior authorization requirements, as against both statutory and constitutional objections. *See, e.g., Maher*, 432 U.S. at 479–480 ("[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure [sic] that its money is being spent only for authorized purposes"); *see also* United States Government Accountability Office, *Medicaid, CMS Action Needed to Ensure Compliance with Abortion Coverage Requirements*, 18, Table 3 (showing that seven states require approval of the abortion by the state Medicaid agency before the procedure is performed) (January 2019), available at https://www.gao.gov/assets/gao-19-159.pdf.

That Medicaid does not require prior authorization or prepayment review for other reproductive health services does not establish that such a requirement for abortion is an impermissible attempt to interfere with a woman's right to obtain an abortion. Rather, recognizing, as the court did in *Jeannette R.,* that—unlike other reproductive health services—abortion may be medically necessary, or that it may be a noncovered elective, nontherapeutic service, DPHHS determined that the statutory and regulatory framework established by federal and state law requires Montana Medicaid to establish a robust process to obtain the documentation it needs to ensure that a Medicaid-paid abortion is truly medically necessary and, thus, covered under the Montana statutes governing the Medicaid program.[2] The Rule does not violate a woman's privacy or her right to an abortion, and Plaintiffs are therefore unlikely to succeed on the merits of their privacy claims.

4. The Rule Does Not Violate The Right To Equal Protection.

Citing *Jeannette R.*, Plaintiffs contend that the fact that the Rule only imposes requirements on pregnant Medicaid beneficiaries who seek abortion (through the requirements imposed on

[2] Plaintiffs dismiss one basis for the level of documentation required by the Rule as a non sequitur, ignoring all the other bases for requiring such documentation set forth in the proposal and adoption notices. *See also supra*.

abortion providers that seek Medicaid payment for their abortion services), and not on other pregnant Medicaid beneficiaries means that Medicaid impermissibly discriminates against them, in violation of the Equal Protection Clause. This argument misconstrues *Jeannette R.* and defies common sense. *Jeannette R.* addressed whether Medicaid is required to cover medically necessary abortions that did not meet the Hyde Amendment requirements. While it found that Medicaid is required to cover such services, the decision is clear that the state need not fund nontherapeutic elective abortions. *Jeannette R.*, 1995 Mont. Dist. LEXIS 795 at *29.

As explained in the proposal notice (Doc. 1 at Ex. A at 2359–61), it is DPHHS's practice to require prior authorization especially where there may be questions as to whether the service is medically necessary, e.g., when the service is elective or therapeutic in nature, and it is not unusual for DPHHS to require providers to submit additional documentation, clinical or otherwise, to support their claim that particular services are covered by Medicaid and that the particular claim should be paid. (Aff. Randol at ¶¶ 31–32.) It is, thus, inaccurate to suggest that a prior authorization/prepayment review requirement shows some type of discriminatory animus against pregnant Medicaid beneficiaries who seek abortion. It is merely a recognition that some abortions may be medically necessary and therapeutically appropriate, but other abortions may not be medically necessary and, in fact, may be elective and nontherapeutic—and that Medicaid needs a documentary process to establish which abortions are eligible for coverage.

These requirements in the Rule are narrowly tailored to meet these important governmental purposes. *See, e.g., Maher v. Roe*, 432 U.S. 464 (1977). With respect to this equal protection issue, the only specific aspect of the Rule that Plaintiffs complain about is that it provides a definition of medical necessity specific to abortion which leaves out many medically necessary abortions that would otherwise have been covered. However, the only example Plaintiffs provide is that it would exclude abortions for lethal fetal conditions or diagnoses—with no explanation of how such abortions would be covered by the general definition of medical necessity.[3] Plaintiffs fail to meet their burden to establish that the Rule discriminates against pregnant Medicaid beneficiaries in violation of the Equal Protection Clause.

[3] And abortion is not the only Medicaid-covered service where coverage is narrower than the general definition of "medically necessary service" (Admin. R. Mont. 37.82.102) would suggest: Physician services for conditions considered cosmetic in nature are generally not covered by Medicaid—which only provides coverage "where it can be demonstrated that the physical and psycho-social wellbeing of the recipient is severely affected in a detrimental manner by the condition or ailment." *See* Admin. R. Mont. 37.86.104(3).

Plaintiffs complain that the Rule impliedly requires an additional, unnecessary in-person examination, followed by a waiting period while prior authorization is obtained, but also reject, due to risk and payment uncertainty, the option of a post-service prepayment review to determine medical necessity. Given Medicaid's obligation to only pay for medically necessary services—and Medicaid's recent determination based on its contractor's utilization review that the documentation that it has been receiving is insufficient to confirm providers' medical necessity claims—it must have a mechanism for getting the necessary documentation. (*Id.* at ¶ 47.) Requiring documentation contemporaneous to the abortion service ensures that the abortion provider has a fair opportunity to obtain or generate the required documentation. (*Id.* at ¶ 48.) And, assuming that the abortion provider is accurately assessing and documenting medical necessity, the risk that an abortion claim would be rejected in post-service prepayment review is no greater than the risk that Medicaid (or any other insurer) would determine that a service is unnecessary or otherwise not covered and, thus, deny payment. (*Id.* at ¶ 49.)

Just as other insurers do, DPHHS provides a specific definition of what constitutes medically necessary (or therapeutic) abortions,[4] to also provide clear guidance on what constitutes elective nontherapeutic abortion—and, thus, in what circumstances abortions are and are not covered by Medicaid. (Doc. 1 at Ex. A at 2359.) Plaintiffs' argument that Defendants lack justification for this definition (and the documentation requirements) misconstrues the conclusions of the DPHHS contractor's review of paid abortion claims. While the contractor found "100% compliance" with the requirement to complete and sign the simple MA–37 form,[5] the contention that the contractor "did not point to a single claim for an abortion that it did not believe was medically necessary" seriously misconstrues its conclusion: As noted in the proposal notice (Doc. 1 at Ex. A at 2357), the contractor's analysis concluded that the information submitted on or with the MA–37 form lacks sufficient information to support medical necessity and recommended that Medicaid-funded abortion claims should be supported by documentation of clinical information being submitted on or with the MA–37. (Aff. Randol at ¶ 23.) Plaintiffs have not established a likelihood of success on the merits of their equal protection claim.

[4] As noted above, abortion is not the only Medicaid-covered service for which coverage is narrower than suggested by the general definition of "medically necessary service."
[5] Medicaid denied any abortion claim not accompanied by a signed MA–37 form.

B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM.

Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("Wright & Miller") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); Wright & Miller at 154–155 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted); *see also Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) (an injunction is not a remedy to restrain an act the injurious consequences of which are merely trifling).

Typically, monetary harm does not constitute irreparable harm. *L.A. Memorial Coliseum Commn. v. Natl. Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *see also Sampson v. Murray*, 415 U.S. 61, 90, (1974) (temporary loss of income does not usually constitute irreparable injury and the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") Constitutional violations, however, "cannot be adequately remedied through damages." *Stormans, Inc. v. Seleky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted). But because the Rule does not violate the constitutional rights of Plaintiffs or their patients, they cannot show likelihood of irreparable injury in the absence of a preliminary injunction.

The Rule addresses when Medicaid will pay for abortion services, consistent with the statutory requirement to cover medically necessary services, which has been interpreted to include the requirement to cover medically necessary abortion services—but not elective, nontherapeutic abortions. (Aff. Randol at ¶ 4.) Unlike the restrictions at issue in *Armstrong*, *Weems*, and *Planned Parenthood of Mont.*, DV 21–0999, 2021 WL 9038524 (13th Jud. Dist. 2021), nothing in the Rule precludes plaintiffs from continuing to provide abortion services to Medicaid beneficiaries as they

have in the past, to the extent that such services are otherwise legally permissible. The only issue is whether *Medicaid* will pay for those services. But this is not unique to Plaintiffs—all Medicaid providers run the risk that Medicaid, based on review of a claim by its utilization review contractor, will determine that a service is not medically necessary and either deny payment of the claim or seek recoupment of a previously paid claim. (*Id.* at ¶ 50.) If Plaintiffs ultimately succeed on the merits of their claims, an order requiring the payment of their claims for abortion services provided to Medicaid beneficiaries will make them whole. This, thus, is a situation where the availability of damages at a later stage of the litigation precludes a determination of irreparable harm in the absence of a preliminary injunction.

C. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR DEFENDANTS.

A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20). In assessing whether the plaintiffs have met this burden, courts have a "duty . . . to balance the interests of all parties and weigh the damage to each." See *L.A. Memorial Coliseum Commn.*, 634 F.2d at 1203.

Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman*, 822 F.3d at 1023 (quoting *Stormans, Inc.*, 586 F.3d at 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quotation omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* (citation omitted). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger*, 456 U.S. at 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

The balance of the equities and the public interest favor Defendants. The State and DPHHS as Defendants have several interests and equities which outweigh the interests of Plaintiffs and

Medicaid beneficiaries with respect to the Rule. Defendants have the constitutional concern that the laws be faithfully executed. Mont. Const. Art. VI, § 4(1). Here, that interest is to ensure Medicaid program integrity by ensuring that Medicaid only pays for health care services that are medically necessary (as required by statute) and, thus, that it does not pay for elective nontherapeutic abortions. (Aff. Randol at ¶¶ 26–27.) Defendants also have an interest in protecting the health, safety, and well-being of Medicaid beneficiaries by imposing conditions on payment of Medicaid services, including medically necessary abortions, to help ensure that the services are high quality and performed by the appropriate level of health care professional. (*Id* at ¶ 25.)

Plaintiffs' interests (as distinct from those of their potential patients) amount to their interest in obtaining Medicaid coverage for the abortion services provided to Medicaid beneficiaries—abortions which may or may not meet the reasonable standard for medical necessity set forth in the Rule (or any reasonable standard for therapeutic abortions) and may, in fact, constitute elective abortions. Abortion providers have no legitimate interest in having Medicaid pay them for abortions for Medicaid beneficiaries which are not medically (therapeutically) necessary and do not meet the reasonable health and safety requirements that Medicaid, acting in the best interests of its beneficiaries, has imposed as a condition for payment.

Moreover (and without conceding the standing arguments), any right Medicaid beneficiaries as individuals have to obtain an abortion does not extend to the right to have Medicaid pay for any and all abortions without regard to whether they are medically necessary or are performed consistent with conditions designed to ensure their health and safety. Montana taxpayers also have an interest here—that their tax dollars only be spent for services that the legislature has authorized, especially in light of the highly charged nature of abortion, the fact that abortion results in the taking of the life of a human being, and the fact that only state funds can be used for most Medicaid-covered abortions. The balance of the equities and the public interest in these circumstances favor Defendants.

II. A WRIT OF PROHIBITION IS INAPPROPRIATE IN THIS CASE.

A writ of prohibition is an extreme remedy only appropriate in certain narrow and limited circumstances. *Bitterroot River Prot. Assn. v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 22, 309 Mont. 207, 45 P.3d 24. The writ of prohibition is the counterpart of the writ of mandate; it arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions

when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Mont. Code Ann. § 27-27-101. A writ of prohibition is "justified only by extreme necessity, when the grievance cannot be redressed by ordinary proceeding at law, or in equity, or by appeal." *Bitterroot River Prot. Assn.*, ¶ 22; *see also* Mont. Code Ann. § 27-27-102. The Montana Supreme Court has recognized that:

> "The writ of prohibition is not favored by the courts. Necessity alone justifies it. Although authorized by statute, it is not issued as a matter of right, but only in the exercise of sound judicial discretion when there is no other remedy. [. . .] It is justified only by extreme necessity, when the grievance cannot be redressed by ordinary proceedings at law, or in equity, or by appeal."

State ex rel. Morse v. Justice Ct., 192 Mont 95, 97, 626 P.2d 836, 837 (1981) (cleaned up) (citing *State ex rel. Brown v. Booher*, 43 Mont. 569, 118 P.2d 271 (1911)). The existence of another remedy, even if indirect and inconvenient, prevents a party from seeking a writ of prohibition. *Bitterroot River Prot. Assn.*, ¶ 22 (citation omitted); *see also Brown*, 43 Mont. 569, 118 P.2d 271. Likewise, where judicial review of agency action is available, a writ of prohibition is not appropriate. *Id.* Courts will not grant a writ of prohibition unless the party seeking the writ demonstrates that the proceedings are clearly unlawful. *Id.* at ¶ 9 (citing *Kimble Properties v. Mont. Dept. of State Lands*, 231 Mont. 54, 56, 750 P.2d 1095, 1096 (1988); *State ex rel. Lee v. Mont. Livestock Sanitary Bd.*, 135 Mont. 202, 209, 339 P.2d 487, 491 (1959). In *Bitterroot River Prot. Assn.*, the Court declined to issue a writ of prohibition because Bitterroot Conservation District did not clearly act outside its authority in determining whether Mitchell Slough was a stream. *Id.*

The same is true here. Plaintiffs cannot show that DPHHS exercised a judicial function, acted outside its statutory authority in promulgating and adopting the Rule, or that they lack any other speedy and adequate remedy. Plaintiffs' Brief makes no argument that DPHHS acted outside of its authority in promulgating and adopting the Rule. DPHHS acted pursuant to its statutory rulemaking authority. It was not exercising a judicial function in promulgating an administrative rule—rulemaking is a classic function of executive agencies. Plaintiff only asserts that because the Rule is clearly unlawful, a writ should be issued. But whether the Rule passes constitutional muster is not the same as whether DPHHS has the authority to promulgate it in the first place. DPHHS clearly has the authority to "adopt rules necessary for the administration of the Montana Medicaid Program" (§ 53-6-113) and it was exercising that authority in adopting the Rule. Further,

Plaintiffs simultaneously filed an application for injunctive relief, and successfully obtained a temporary restraining order. They have likewise sought a preliminary injunction, and a hearing on that request is set in this Court for May 23, 2023. They, therefore, cannot demonstrate that no remedy other than a writ of prohibition is available. Plaintiff's Application for Writ of Prohibition must be denied.

CONCLUSION

Whether Medicaid beneficiaries have a right to obtain an abortion is wholly separate from whether they have a right to have Medicaid pay for their abortion. The law is clear that Medicaid need only fund medically necessary abortions. Currently, Medicaid does not receive enough information from abortion providers to determine whether Medicaid-funded abortions are medically necessary. The Rule at issue is a moderate measure that corrects this gap. Plaintiffs have failed to meet the high burden necessary to obtain the extraordinary remedy of injunctive relief. In fact, their arguments fail on all four prongs of the test for injunctive relief. Because defeat on any one prong is sufficient to deny a preliminary injunction, the Court must do so. For these reasons, Defendants respectfully request that the Court deny Plaintiffs' Application for a Preliminary Injunction.

DATED this 12th day of May, 2023.

Austin Knudsen
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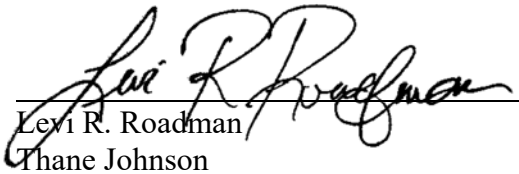

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