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MONTANA FIRST JUDICIAL DISTRICT COURT,
COUNTY OF LEWIS AND CLARK

PLANNED PARENTHOOD OF MONTANA; ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; SAMUEL DICKMAN, M.D.; and HELEN WEEMS, APRN-FNP, on behalf of themselves and their patients Plaintiffs, vs. STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services Defendants.	Cause No.: CDV-23-299 Hon. Mike Menahan **REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION AND WRIT OF PROHIBITION**

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INTRODUCTION

Nothing in Defendants' opposition to Plaintiffs' application for a preliminary injunction warrants a departure from controlling precedent holding that a prohibition on Medicaid coverage for abortion violates Plaintiffs' patients' constitutional rights. The State of Montana, the Montana Department of Public Health and Human Services ("DPHHS"), and DPHHS Director Charlie Brereton (collectively, "the State") attempt to cast this case as one seeking only financial remuneration, but the Court should reject the State's attempt to distinguish Medicaid recipients' right to access abortion from "the issue of whether Medicaid will pay for an abortion." Defs.' Resp. in Opp. to App'n for Prelim. Inj. ("PI Opp.") at 12. Under *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (1st Jud. Dist., May 22, 1995), and as demonstrated by the record in this case, regulations that prohibit Medicaid coverage for abortions—like the rule amending Mont. Admin. R. 37.82.102 and 37.86.104 ("the Rule")—will prevent Medicaid patients from obtaining an abortion, in violation of their fundamental rights. As the Montana Supreme Court reaffirmed just last week, laws reducing abortion access burden a fundamental right and are subject to strict scrutiny. *Weems v. State* ("*Weems II*"), 2023 MT 82, ¶ 42, ___ Mont. ___, ___ P.3d ___, 2023 WL 3400808 (expressly rejecting State's argument that "there are no fundamental rights at issue . . . because the decision to seek and obtain an abortion is not at issue"). The Rule's restrictions on abortion care fail strict scrutiny and should be enjoined.

In the face of controlling precedent on the merits, the State's principal defense is to argue that Plaintiffs do not have standing to challenge a rule that violates their patients' constitutional rights. Not so. It is well-established that "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." *Weems v. State* ("*Weems I*"), 2019 MT 98,

¶ 12, 395 Mont. 350, 440 P.3d 4 (quoting *Armstrong v. State*, 1999 MT 261, ¶¶ 8–13, 296 Mont. 361, 989 P.2d 364); PI Opp. at 8. (quoting the same). The State's varied citations to dissents in federal cases have no bearing on this clear principle of Montana law and offer the Court no reason to deviate from controlling precedent and deny Plaintiffs judicial review. And contrary to the State's argument, Plaintiffs do not assert a right to reimbursement for "[i]neligible, [n]oncovered [a]bortions," PI Opp. at 7, but rather challenge the Rule's violation of their patients' constitutional rights to equal protection and privacy, not their own right to reimbursement. *See* Pls.' Br. in Support of App'n for Temp. Restr. Order, Prelim. Inj., and Writ of Prohibition ("Br. in Support") at 8.

On the merits, Plaintiffs have established they are likely to succeed on their claims.[1] The Rule's provisions—the physician-only requirement; the onerous prior authorization requirement, including a medically unnecessary physical examination; and the narrow redefinition of medical necessity—infringe on Plaintiffs' Medicaid patients' fundamental right to abortion and are therefore subject to strict scrutiny. The State raises various justifications for these requirements, but it does not demonstrate a medically acknowledged, bona fide health reason for any of them. The Rule fails strict scrutiny and violates the Montana Constitution's guarantees of privacy and equal protection.

The State also fails to counter Plaintiffs' showings on the other three factors—irreparable harm, the balance of the equities, and the public interest—and mischaracterizes Plaintiffs' arguments as being about reimbursement. The State does not respond to Plaintiffs' showing that

[1] The State's contention that Plaintiffs have not shown that the Rule is arbitrary and capricious, PI Opp. at 10–11, misapprehends Plaintiffs' arguments in their motion for a preliminary injunction. Although Plaintiffs' Verified Complaint does include a claim that the Rule is arbitrary and capricious in violation of the Montana Administrative Procedure Act, Compl. at ¶ 120, Plaintiffs do not seek a preliminary injunction on that basis, *see generally* Br. in Support. Rather, their preliminary injunction request is based on their claims that the Rule violates their patients' constitutional rights.

beyond the constitutional violation, which by itself plainly constitutes irreparable harm, the Rule will have devastating consequences for low-income Montanans if a preliminary injunction is not granted. And the equities and the public interest weigh in favor of preserving the status quo and protecting Plaintiffs' patients' fundamental constitutional rights. The State suffers no injury from a preservation of the status quo.

ARGUMENT

I. Plaintiffs have standing to vindicate the constitutional rights of their patients.

Plaintiffs clearly have standing to assert harms to their patients. "[W]hen '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." *Weems I*, ¶ 12 (quoting *Armstrong*, ¶ 8–13). Indeed, just last week, the Montana Supreme Court reaffirmed the *Weems I* holding and ruled in favor of abortion providers asserting claims on behalf of their patients. *See Weems II*. Plaintiffs have established that although the Rule operates through restrictions placed on abortion providers, it targets their patients. The Rule infringes on Medicaid-eligible Montanans' right to abortion because it hinders their ability to access abortions, forcing them to forgo essentials to pay for an abortion, to delay care, or to carry a pregnancy to term against their will, Dickman Aff. ¶¶ 57–67. *See Jeannette R.*, 18 (restrictions on Medicaid coverage infringe on fundamental right to abortion because the State "may not weigh the options open to the pregnant woman by its allocation of public funds." (quoting *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981)). As abortion providers, Plaintiffs have standing to bring claims asserting their patients' constitutional rights.

The State argues that *Armstrong* and *Weems I* apply only "[w]hen the State directly interdicts the normal functioning of the physician patient relationship by criminalizing certain

procedures." PI Opp. at 8. It misreads the case law. *Armstrong* unequivocally "h[e]ld that the Plaintiff health care 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*, ¶ 13. In so holding, *Armstrong* cited *Singleton v. Wulff*, 428 U.S. 106 (1976), a case in which the United States Supreme Court held that abortion providers had standing to challenge the constitutionality of a state law restricting Medicaid coverage of abortions.

The State also contends that this Court should ignore the Montana Supreme Court's binding precedent on this question because of a purported "shifting legal landscape" in the federal courts. PI Opp. at 9. As an initial matter, this argument is inapposite: the ability for abortion providers to bring claims on behalf of their patients under Montana law is well established and was reaffirmed as recently as last week. Moreover, federal third party standing jurisprudence has not changed. In support of its assertion that federal law has changed, the State cites several dissenting opinions in U.S. Supreme Court cases, including *June Med. Servs. L. L. C. v. Russo*, 591 U.S. 1101 (2020), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But as the *majority* opinion in *June Medical* noted, the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *Id.* at 2118 (collecting cases). And the *Dobbs* majority opinion did not disturb the Court's third-party standing precedents regarding abortion providers. The State also cites *Alliance for Hippocratic Medicine v. Food & Drug Administration*, No. 23-10362, 2023 WL 2913725, at *4 n.4 (5th Cir. Apr. 12, 2023), a *sui generis* preliminary injunction decision regarding the Food and Drug Administration's approval of mifepristone that has been stayed by the Supreme Court and in which abortion providers' standing was not at

issue. The State has failed to establish that federal third-party standing law has changed, much less that this Court ought to follow any such change in federal jurisprudence that does not concern Montana law or the Montana Constitution.

Finally, the State asserts that Plaintiffs have not demonstrated that they have a "close relationship" to their Medicaid patients. The Montana Supreme Court in *Armstrong* adopted the holding in *Singleton* that "the special relationship between a physician and patient afford the former standing to litigate the constitutional rights of the latter." *Armstrong*, ¶ 9 (citing *Singleton*, 428 U.S. at 117–18). And as the United States Supreme Court explained in *Singleton*, "The closeness of the relationship is patent . . . . A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State." 428 U.S. at 117. Under *Armstrong*, abortion providers by definition have a close relationship with their patients. Even so, Plaintiffs *have* introduced evidence of their close relationships with patients. *See, e.g.*, Weems Aff. ¶ 21 ("I have developed trusting relationships with my patients who come to me seeking intimate care. For 5 years I have provided that care with respect and compassion, free of judgment. This has made All Families a staple in Whitefish, beloved by the community."); Smith Aff. ¶ 26 ("Some of our patients have longstanding relationships with a particular Blue Mountain Clinic provider, who they visit for care across their lifespan. Disrupting that patient-provider relationship by eliminating Medicaid patients' access to their chosen provider is cruel and unwarranted.").

II. The Rule violates patients' constitutional rights.

Nothing in the State's response warrants a departure from *Jeannette R.*'s holding that regulations restricting Medicaid coverage of abortions infringe on Medicaid patients' fundamental constitutional rights or *Armstrong*'s holding that the government has no place

interfering with a health care provider's medical judgment with respect to a Medicaid patient. Indeed, the record here reinforces that a lack of Medicaid coverage will prevent these patients from accessing care.

A. To justify an abortion restriction like the Rule, the State must clearly and convincingly demonstrate a medically acknowledged, bona fide health reason for it.

Article II, section 10 of the Montana Constitution protects a patient's right to "obtain[] a . . . pre-viability abortion . . . from a health care provider of her choosing." *Armstrong*, ¶ 2. To the extent that the State argues that the Rule does not violate the *Montana* Constitution because other states permit similar restrictions, PI Opp. at 10, its argument fails. The Montana Supreme Court recently reaffirmed that "when the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than the federal constitution." *Weems II*, ¶ 35; *see also Armstrong*, ¶ 34 ("Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States.").[2]

The State contends that "the issue is not the right to abortion" because the Rule deals only with whether Medicaid will cover particular abortions. *Jeannette R.* squarely forecloses this argument. In *Jeannette R.*, this Court recognized that the State violates Medicaid patients' right to privacy when it "inject[s] coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion." *Jeannette R.* at 18 (quoting *Moe*, 417 N.E.2d at 402). It reiterated that when the government chooses not to fund medically necessary abortions, the right at issue "is not an assurance of governmental funding of abortion," but rather "the right to privacy, which is the right to be left alone [and] protects the individual from undue governmental interference." *Id.* at 19.

[2] Courts in other states with strong privacy protections under their state constitutions have struck down restrictions on Medicaid funding of medically necessary abortions. *See, e.g.*, *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984 (Alaska 2019).

Jeannette R. predated *Armstrong*, which held unequivocally that the Constitution protects "the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." *Armstrong*, ¶ 39. *Jeannette R.* and *Armstrong* require Medicaid to pay for medically necessary abortions and reserve decisions regarding whether an abortion is medically necessary to a patient and their provider. And because restrictions on Medicaid coverage of abortions infringe on Medicaid patients' right to privacy, such restrictions must pass strict scrutiny, as articulated in *Armstrong*.

Under *Armstrong*, "except in the face of a medically-acknowledged, *bona fide* 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*, ¶ 62. The Montana Supreme Court's recent decision in *Weems II* reaffirms that statutes infringing on the fundamental right to abortion are to be evaluated using this articulation of the strict scrutiny test. *Weems II*, ¶ 37 ("*Armstrong* unequivocally established that a woman has a fundamental right of privacy to seek abortion care from a qualified health care provider of her choosing, absent clear demonstration by the State of a medically-acknowledged, bona fide health risk." (internal quotation marks and alteration omitted)).[3]

[3] In *Weems II*, the State raised a similar argument that because a restriction on APCs providing abortions "does not implicate the decision to seek and obtain an abortion but, instead, implicates the State's authority to protect public health and safety, rational basis review should be applied" *Weems II*, ¶ 42. The Montana Supreme Court "easily conclude[d] that ship has already sailed," *id.*, and that *Armstrong* controls. Yet similar arguments pervade the State's response here.

B. The Rule violates Plaintiffs' patients' right to privacy, and the State has not demonstrated that any of the Rule's restrictions address a medically acknowledged, bona fide health risk to Medicaid-eligible Montanans.

First, as to the Rule's physician-only requirement, the Montana Supreme Court held just last week "that abortion care is identical to the care [advanced practice registered nurses ("APRNs")] already lawfully provide in Montana; that abortion care is exceedingly safe; and that abortion care can safely be provided by APRNs," and therefore, "there is no medically acknowledged, bona fide health risk for the State to restrict the availability of abortion care by preventing APRNs from performing abortions." *Weems II*, ¶ 1. This is not new: *Armstrong* rejected the same argument with respect to physician assistants over twenty years ago, holding that there was no bona fide health reason to require that "abortions be performed only by a physician to the exclusion of a trained, experienced and medically competent physician assistant." *Armstrong*, ¶ 66. Nothing the State says warrants a different outcome than in *Weems II*; it is immaterial that the Rule operates by denying Medicaid coverage rather than directly banning care. The *Weems II* Court expressly rejected the argument that physician-only requirements can be justified by invoking health risks. It also rejected the argument that such requirements protect patients who need treatment for complications provided by advanced practice clinicians ("APCs"). *See Weems II*, ¶ 47 (explaining this argument "logically must fail" because "the protocols, procedures, and the attendant complications of abortion care are identical to miscarriage care," which can be provided by APCs); *see also* Dickman Aff. ¶ 19.[4]

[4] The State's declarant asserts that "[t]o ensure [*sic*] with federal regulations (42 CFR Part 441 (Subpart E—Abortions)), the Rule limits abortion services to those services rendered by a physician. Randol Aff. ¶ 43. The referenced federal regulation requires that, for federal funding to be provided under the Hyde Amendment's exception for pregnancies endangering the life of the pregnant person, a physician must provide a certification. 42 C.F.R. §§ 441.202, 441.203. The regulation does not impose any requirements for abortions funded solely by a state Medicaid program.

Second, with respect to the Rule's prior authorization requirement, nothing in the State's response undermines Plaintiffs' showing that the Rule will require an extra in-person visit to a health care provider, impose a waiting period, and ban medication abortion via direct-to-patient telehealth. The State fails to demonstrate that any of these restrictions addresses a medically acknowledged, bona fide health risk to Medicaid patients. To downplay the prior authorization requirement's harmful effects, the State asserts that an abortion patient can receive a physical examination and the required documentation "from another provider" and provide those results to the abortion provider, who would then submit the paperwork to DPHHS. It offers no evidentiary support for its puzzling suggestion that abortion patients on Medicaid would have access to a third-party health care provider who would provide them with all of the paperwork requirements associated with a request for prior authorization for an abortion. More importantly, even if patients could access such care from another provider, the prior authorization requirement would still require a medically unnecessary in-person visit to *a* health care provider, effectively banning direct-to-patient medication abortion for Medicaid-eligible Montanans, which is an especially important form of access for lower-income Montanans who live in rural areas or face barriers in getting to a health center, including because of disabilities, lack of access to a car, or an unsupportive partner or family member to whom the abortion would have to be disclosed in order for the patient to visit a clinic. Dickman Aff. ¶ 29. And the Rule would still impose a de facto waiting period.[5]

[5] The State argues that Plaintiffs "reject, due to risk and payment uncertainty, the option of a post-service prepayment review to determine medical necessity." PI Opp. at 15. As Plaintiffs have explained, the Rule states that "[p]hysician services for abortions *require* prior authorization." Amended Compl. Ex. A at 2354. Its provision that a post-service claim for payment may be made "[i]f prior authorization is not obtained, due to an emergency situation or otherwise," *id.*, is hardly an "option" of a post-service prepayment review.

The State makes the conclusory assertion that the prior authorization requirement is "narrowly tailored to meet the[] important governmental purposes" of ensuring that Medicaid covers only medically necessary abortions. PI Opp. at 14.[6] This justification fails as a matter of law because the State does not argue that the requirement addresses a bona fide health risk. As explained *supra*, under *Armstrong* the State must "clearly and convincingly demonstrate[]" "a medically-acknowledged, *bona fide* health risk" in order to justify a law or regulation that infringes on the fundamental right to abortion. *Armstrong*, ¶ 62.

Finally, the State does not even address Plaintiffs' argument that the Rule's narrowing of the definition of medical necessity violates Plaintiffs' patients' right to privacy under *Jeannette R.* It asserts that the Rule's narrow definition "provide[s] clear guidance" on which abortions are medically necessary, but it does not argue that the previous definition was unclear,[7] and in any event, providing clarification does not amount to addressing a bona fide health risk.[8] The State concedes that when the DPHHS contractor reviewed the paperwork Plaintiffs submitted in connection with abortions covered by Medicaid, it found 100% compliance—there was no

[6] The State repeatedly cites *Maher v. Roe*, 432 U.S. 464 (1977), in which the U.S. Supreme Court held that the federal constitution does not require state Medicaid programs to pay for non-therapeutic abortions and upheld a prior authorization requirement. *Maher* was decided under the federal constitution, and as explained above, Montana courts have consistently held that the Montana Constitution affords greater protection of the right to abortion than the federal constitution. *See, e.g.*, *Armstrong*, ¶ 34. Plaintiffs have shown that the prior authorization requirement violates the right to privacy under the Montana Constitution that the Montana Supreme Court recognized in *Armstrong* and in *Planned Parenthood of Mont. v. State by & through Knudsen*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301.

[7] The definition of medical necessity has been in place, with minor wording changes, since 1980, including when *Jeannette R.* was decided in 1995. *See* MAR Notice No. 46-2-222 at 631–32 (Feb. 28, 1980), available at https://courts.mt.gov/external/mars/1980/1980%20Issue%20No.%204.pdf.

[8] The State notes that for conditions or ailments generally considered to be cosmetic, Medicaid coverage is limited to cases "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." PI Opp. at 14 n.3 (quoting Mont. Admin. R. 37.86.104(3)). In other words, DPHHS's medical necessity requirement for cosmetic procedures is less stringent than the Rule's requirements with respect to abortion, which is constitutionally protected and time-sensitive.

deviation from DPHHS's own requirements. PI Opp. at 15. This demonstrates the pretextual nature of the State's argument that the Rule is necessary to ensure compliance with its requirements with respect to medical necessity; there is no compliance issue. Far from increasing compliance with *Jeannette R.*, the Rule's redefinition of medical necessity will permit the government to evade *Jeannette R.*'s requirement that it cover all medically necessary abortions.

Turning to Plaintiffs' arguments with respect to abortions in cases involving lethal fetal conditions or diagnoses, the State asserts that Plaintiffs have not shown how such abortions are medically necessary. PI Opp. at 14. As Plaintiff Dr. Dickman explains in his declaration,

> [P]atients who learn that their fetus has been diagnosed with a severe or lethal anomaly, such as anencephaly (a severe neural tube defect associated with lack of brain development), may experience significant stress, anguish, and anxiety from carrying the pregnancy to term. For some patients, continuing a pregnancy only to give birth to a fetus that will suffer and die is too much to bear. Pregnant people and couples who learn that their pregnancy is abnormal may decide that termination of the pregnancy is the most humane option in a terrible situation.

Dickman Aff. ¶ 56. And DPHHS regulations define a "medically necessary service" as one "reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient which . . . cause suffering or pain." Mont. Admin. R. 37.82.102(18)(a)(ii).

Ultimately, the Rule fails strict scrutiny because the State does not demonstrate a medically acknowledged, bona fide health reason to justify any of its requirements. But even if the State's asserted interest in covering only medically necessary abortions were a compelling interest that could justify an abortion restriction—and under *Armstrong*, it is not—none of the Rule's requirements is narrowly tailored to this interest. The Rule's physician-only requirement has nothing to do with whether an abortion is medically necessary, and the State does not argue that it does. The prior authorization requirement imposes a medically unnecessary in-person visit

and requires extensive supplemental documentation, including, *inter alia*, an extensive medical history, ultrasound images (if available), and "documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition." Amended Compl. Ex. A at 2355. The State provides no explanation for how these onerous requirements are narrowly tailored to its asserted interest. And finally, artificially narrowing the definition of "medically necessary"—thereby causing DPHHS to refuse to cover abortions that a health care provider has deemed medically necessary—is also not narrowly tailored to its interest in ensuring that it is covering only abortions that are medically necessary. That is a clinical judgment that *Armstrong* reserves to medical providers and their patients, not the government.

C. The Rule violates Plaintiffs' patients' right to equal protection.

Plaintiffs have established that the entire Rule violates equal protection because it creates a facial classification between Medicaid patients who choose to terminate their pregnancy and those who decide to carry their pregnancy to term. Br. in Support at 14–15. The State argues that the Rule does not "show[] some type of discriminatory animus against pregnant Medicaid beneficiaries who seek abortion." PI Opp. at 14. It misunderstands Plaintiffs' argument. Under Montana law, regardless of animus, a "law or policy that contains an apparently neutral classification" between similarly situated classes is subject to strict scrutiny if "a fundamental right is affected." *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445. And for the same reasons that the Rule does not satisfy strict scrutiny in connection with Plaintiffs' privacy claims, the Rule does not pass constitutional muster with respect to their equal protection claims.

The State does not engage with Plaintiffs' argument that the Rule's physician-only provision also violates equal protection because it impermissibly treats differentially Medicaid patients seeking an abortion from a physician and those seeking an abortion from an APC. Plaintiffs have established that because this burdens Medicaid patients' right to an abortion, this facial classification triggers strict scrutiny. Because there is no medically acknowledged, bona fide health rationale for the physician-only requirement, the requirement violates Plaintiffs' patients' equal protection rights. Br. in Support at 13–14.

III. Plaintiffs' patients will suffer irreparable harm in the absence of preliminary injunctive relief; the equities and the public interest both favor preservation of the status quo and the vindication of fundamental constitutional rights.[9]

As the State acknowledges, the loss of a constitutional right is itself irreparable injury and cannot be remedied through damages. *See* PI Opp. at 16. Plaintiffs have established that the Rule violates their patients' constitutional rights. They have also explained in detail the ways that the Rule will harm low-income Montanans. *See* Br. in Support at 15–17. As it pertains to irreparable injury, this ends the matter.

The State attempts to characterize Plaintiffs' arguments as being about monetary harm, arguing that "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." PI Opp. at 16–17. But as this Court explained in *Jeannette R.*,

[9] As the State notes, the new standard is intended to "mirror the federal preliminary injunction standard." PI Opp. at 2. The Ninth Circuit has "applied a 'sliding scale' to [the preliminary injunction] standard, allowing a stronger showing of one element to offset a weaker showing of another." *Doe v. Snyder*, 28 F.4th 103, 111 (9th Cir. 2022) (citation omitted). Under the sliding scale approach, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Similarly, "a stronger showing of irreparable harm to [the] plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.* at 1131.

when the State restricts coverage of medically necessary abortions, it is not a mere funding issue, but rather implicates Medicaid patients' fundamental rights. *Jeannette R.*, 18. Plaintiffs have established that lack of Medicaid coverage for abortions will make it extremely difficult, if not impossible, for their patients to access abortion: some may have to forgo paying for essentials including food or rent; many, if not most, will delay care, exposing them to additional and unnecessary medical risk; and some may be forced to carry their pregnancy to term against their will. Dickman Aff. ¶¶ 57–65. The Rule will impose these irreparable harms on the poorest Montanans. Contrary to the State's assertions, a future order requiring payment of claims for abortions that Plaintiffs provide to Medicaid patients will not make Plaintiffs' patients whole.

With respect to the balance of equities and the public interest, the State asserts an interest in ensuring that the laws be faithfully executed, PI Opp. at 18, but it has no legitimate interest in enforcing an unconstitutional law, *see Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017). Rather, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted). Here again, the State mischaracterizes Plaintiffs' arguments as being about their financial interest in obtaining Medicaid reimbursements. This is inaccurate. Plaintiffs have demonstrated that the balance of the equities and the public interest weigh in favor of preserving the status quo and in ensuring low-income Montanans access to safe, constitutionally protected abortions while this case is pending. Medicaid has covered medically necessary abortions for decades, and the State's own study found no compliance issues. The State will suffer no injury if this Court maintains the status quo during the pendency of litigation.

IV. Alternatively, if the Court does not issue a preliminary injunction, it should issue a writ of prohibition.

In the alternative, if the Court does not issue a preliminary injunction in this case, the Court should protect Plaintiffs and their patients' fundamental constitutional rights by issuing a writ of prohibition.

While a writ of mandate compels the performance of non-discretionary or ministerial functions, its counterpart, the writ of prohibition, arrests the unlawful exercise of discretionary or "quasi-judicial" functions. Section 27-27-101, MCA. Its application is not limited to "judicial proceedings," as the State suggests, but rather may arrest the conduct of "any tribunal, corporation, board, or person" exercising discretionary functions in excess of their jurisdiction or authority. *Id.* "The writ may issue in all cases in which there is not a plain, speedy and adequate remedy in the ordinary course of law." *Allen v. Madison Cnty. Comm'n*, 211 Mont. 79, 85, 684 P.2d 1095 (Mont. 1984) (citations omitted).

The Department's enforcement of the Rule—which, as described above, burdens the fundamental constitutional rights of Plaintiffs' patients—is "an act involving discretionary determinations and is therefore a quasi-judicial rather than ministerial act." *Id.*, 211 Mont. at 87 (citations omitted). *See* § 2-15-102(10)(a), MCA (defining quasi-judicial function to include "interpreting, applying, and enforcing existing rules and laws"). Contrary to the State's arguments regarding the *promulgation* of the Rule, its unlawful *enforcement* against Plaintiffs and their patients is clearly a discretionary or quasi-judicial function susceptible to relief through the writ. Plaintiffs do not seek a writ to challenge the authority to issue the Rule: their argument that the Rule violates the Montana Administrative Procedure Act is not at issue in their application for a preliminary injunction. Rather, by requesting a writ, Plaintiffs seek to arrest the Rule's unlawful enforcement against them and their patients.

The State also argues, incorrectly, that Plaintiffs cannot seek a writ because they are simultaneously seeking an injunction. The Montana Supreme Court holds otherwise. In *Allen*, the Court concluded that the availability of relief through an injunction or under the Declaratory Judgment Act did not prevent a party from seeking and obtaining a writ of prohibition. 211 Mont. at 89 ("Even if injunction would lie in this case, which we do not decide, it would not preclude a writ of prohibition." (citation omitted)).

If the Court does not issue a preliminary injunction, it should protect Plaintiffs' and their patients' fundamental constitutional rights by arresting the unlawful enforcement of the Rule during the pendency of the litigation and grant Plaintiffs' motion for a writ of prohibition.

CONCLUSION

For the foregoing reasons and for the reasons stated in their opening brief and in the affidavits submitted in support thereof, Plaintiffs respectfully request that the Court preliminarily enjoin the Rule or, in the alternative, grant a writ of prohibition.

Respectfully submitted this 18th day of May, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 18th day of May, 2023, by electronic mail on the following:

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