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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. ADV-2023-299 Hon. Mike Menahan **BRIEF IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION WITH RESPECT TO HOUSE BILLS 544 AND 862**

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INTRODUCTION

Plaintiffs believe that the issues presented in this brief are substantially similar to the issues to be addressed at the upcoming May 23 hearing on a motion for preliminary injunction with respect to the Montana Department of Public Health and Human Services ("DPHHS") administrative rule in *Planned Parenthood of Montana v. State*, Cause No. ADV-2023-299, and that it would be appropriate to address these issues in that forum.

Plaintiffs Planned Parenthood of Montana ("PPMT"); All Families Healthcare ("All Families"); Blue Mountain Clinic ("Blue Mountain"); Samuel Dickman, M.D.; and Helen Weems, APRN-FNP (collectively, "Plaintiffs"), on behalf of themselves and their patients, seek a preliminary injunction to prevent enforcement during the pendency of this litigation of two unconstitutional statutes restricting abortion access in Montana: House Bill 544, 2023 Leg. Reg. Sess. (Mont. 2023) (to be codified in Mont. Code Ann. tit. 53, ch. 6, pt. 1) ("HB 544") and House Bill 862, 2023 Leg. Reg. Sess. (Mont. 2023) (to be codified in Mont. Code Ann. tit. 17) ("HB 862"). HB 544 and HB 862 were signed by Governor Greg Gianforte on May 15 and 16, 2023, respectively, and will take effect on July 1, 2023. They both *directly* contravene controlling, on-point decisions by this Court and the Montana Supreme Court. Absent injunctive relief, HB 544 will prevent most Montanans on Medicaid[1] from accessing abortions, and HB 862 will effectively ban Medicaid coverage of any abortions at a time when abortion access in Montana—and indeed, throughout the nation—is under threat.

HB 544 imposes requirements similar to the DPHHS rule amending Mont. Admin. R. 37.82.102 and 37.86.104 ("the Rule"), the enforcement of which this Court has enjoined under a temporary restraining order until the preliminary injunction hearing scheduled for May 23, 2023.

[1] References to "Medicaid patients" or "Montanans on Medicaid" herein are intended to include all Montanans eligible for Medicaid, including not only Montanans currently enrolled in Medicaid but all low-income people who are eligible to enroll.

Like the Rule, HB 544 is designed to unlawfully eliminate or restrict access to abortion for Medicaid-eligible Montanans in at least three overlapping ways. First, it restricts Medicaid coverage of abortions to those provided by physicians only. Second, it includes an onerous prior authorization requirement—including a medically unnecessary in-person examination, which would ban Medicaid patients' access to direct-to-patient telehealth for medication abortions, require an extra visit to a health center, and impose a mandatory waiting period. And third, it creates a new, narrow definition of "medically necessary service" that applies only to abortions, but the statute's new definition is even narrower than the Rule's. Like the Rule, HB 544 violates precedents of this Court and the Montana Supreme Court. *See* Order — Mots. Sum. J., *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (1st Jud. Dist., May 22, 1995) ("*Jeannette R.*") (requiring DPHHS to cover medically necessary abortions); *Armstrong v. State*, 1999 MT 261, ¶ 48, 296 Mont. 361, 989 P.2d 364 (holding unconstitutional statute restricting abortions to physicians only); *Weems v. State* ("*Weems I*"), 2019 MT 98, 395 Mont. 350, 440 P.3d 4 (affirming preliminary injunction against statute that restricted provision of abortion to physicians and physician assistants only); *Weems v. State* ("*Weems II*"), 2023 MT 82, ___ Mont. ___, ___ P.3d ___, 2023 WL 3400808 (affirming permanent injunction against same statute); *Planned Parenthood of Mont. v. State by & through Knudsen* ("*PPMT v. State*"), 2022 MT 157, 409 Mont. 378, 515 P.3d 301 (affirming preliminary injunction against statute imposing de facto waiting period and banning telehealth).

HB 862 goes even further. It bans Medicaid coverage of abortions except in cases of rape or incest or if the abortion is necessary to save the pregnant person's life. Because it is extremely rare for abortions covered by Medicaid to fall into these categories, HB 862 would effectively function as a total ban on Medicaid coverage of abortions, with devastating consequences for

low-income pregnant people throughout Montana. HB 862 directly contravenes *Jeannette R.*, which requires Medicaid to cover medically necessary abortions. It also violates Medicaid patients' fundamental right to abortion, which the Montana Supreme Court first recognized in *Armstrong* and has repeatedly reaffirmed.

Both statutes violate the rights to privacy and equal protection under the Montana Constitution. The invasion of these constitutional rights constitutes irreparable harm. The public interest and the balance of the equities weigh in favor of granting Plaintiffs' requested preliminary relief. To preserve the status quo, this Court should, upon completion of a hearing and consideration of the merits of the instant application, grant Plaintiffs' request for a preliminary injunction.

FACTUAL BACKGROUND[2]

Access to safe, legal, and timely abortion is an important component of public health. Abortion is very common, extremely safe, and much safer than carrying a pregnancy to term; the risk of death associated with childbirth is approximately 13 times higher than that associated with abortion. Dickman Aff. ¶ 15. Plaintiffs PPMT, All Families, and Blue Mountain operate the only clinics that provide abortion in Montana, and a significant fraction of their patients are Medicaid patients. *See* Fuller Aff. ¶ 14; Weems Aff. ¶ 12; Smith Aff. ¶ 45.

Montana Medicaid, which provides medical assistance to low-income residents, covers medically necessary abortions using state funds pursuant to a 1995 holding by this Court that failure to do so violates Montanans' privacy and equal protection rights. *Jeannette R.* Currently, DPHHS regulations define a "medically necessary service" (applicable to all care covered by Medicaid) as

[2] The relevant facts are set forth in greater detail in Plaintiffs' brief in support of their motion for a temporary restraining order and preliminary injunction enjoining the Rule.

> a service or item reimbursable under the Montana Medicaid program, as provided in these rules . . . [w]hich is reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient which:
> (i) endanger life;
> (ii) cause suffering or pain;
> (iii) result in illness or infirmity;
> (iv) threaten to cause or aggravate a handicap; or
> (v) cause physical deformity or malfunction.

Mont. Admin. R. 37.82.102(18)(a).

HB 544 and HB 862 will take effect on July 1, 2023, and will deny abortion access to most Montanans on Medicaid. Like the Rule that this Court has already temporarily blocked, HB 544 categorically bars Medicaid coverage for abortions by advanced practice clinicians ("APCs"), including physician assistants and advanced practice registered nurses ("APRNs"), thereby eliminating access to most abortion providers for Medicaid-eligible Montanans. Plaintiffs rely heavily on APCs, who provide medication and aspiration abortions with the same safety and efficacy as their physician counterparts. Dickman Aff. ¶¶ 20, 21; Weems Aff. ¶ 17. At All Families, Ms. Weems, who is a nurse practitioner, is the sole clinician. Weems Aff. ¶ 20. All told, APCs currently provide a majority of abortions in Montana, Fuller Aff. ¶¶ 13–14; Smith Aff. ¶ 21, and their role is particularly crucial because of the limited number of physicians available for abortions in the state. Fuller Aff. ¶ 19; Smith Aff. ¶ 16 .

Also like the Rule, HB 544 imposes an arbitrary, onerous, and invasive prior authorization process, which mandates an additional in-person visit to a health center, thereby eliminating the option for providing medication abortion through direct-to-patient telehealth. The prior authorization requirement also builds in delay for a time-sensitive service by further requiring extensive supplemental documentation. And HB 544 also does not prescribe a period of time during which the agency must decide whether to approve or deny coverage for the

abortion and seemingly leaves this decision to the discretion of unknown individuals at DPHHS. In connection with the Rule, DPHHS stated that its contract with its Medicaid utilization review contractor requires completion of the prior authorization review "within three working days, considering the submission of timely and accurate documentation," Amended Compl. Ex. B at 5, but like the Rule, HB 544 itself contains no such requirement. Medicaid does not currently require prior authorization or a waiting period for abortions, contraception, ultrasounds, or any other gynecological services. Smith Aff. ¶ 35.

Finally, HB 544 narrows the definition of "medically necessary" solely for abortions, allowing coverage only when a physician certifies that the pregnant person "suffers from: (a) a physical condition that would be significantly aggravated by the pregnancy; or (b) a severe mental illness or intellectual disability that would be significantly aggravated by the pregnancy." Amended Compl. Ex. C at 1. This definition is even narrower than the new definition of "medically necessary" in the Rule—whereas the Rule permits coverage for "a psychological condition that would . . . be significantly aggravated by the pregnancy," Amended Compl. Ex. A at 2354, HB 544 permits coverage only upon "a *severe* mental illness or intellectual disability" (emphasis added). HB 544's definition of "medically necessary" impermissibly singles out abortions and will result in patients being denied or having to delay care, even if they are able to jump through the statute's myriad other hoops. Weems Aff. ¶ 25.

HB 862 goes further still. The State does away entirely with any pretense of covering abortions for low-income Montanans. HB 862 flat-out prohibits using public funds for abortions except if the pregnancy is the result of rape or incest or puts the pregnant person in danger of death. It is extraordinarily rare for abortions covered by Medicaid to fall into these categories. According to the State's declarant in connection with their opposition to Plaintiffs' application

for a preliminary injunction, during the 10-year period from July 2011 to June 2021, there were only six abortions that were reported as falling into these categories. Randol Aff. ¶ 15. If HB 862 were to go into effect, it would effectively function as an effective ban on Medicaid coverage of abortions.

LEGAL STANDARD

Pursuant to recent legislation (2023 Senate Bill 191 or "SB 191"), as of March 2, 2023, "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes 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." *See* SB 191, 2023 Leg. Reg. Sess. (Mont. 2023) (amending §27-19-201, MCA); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard," and "closely follow United States supreme court case law." SB 191, § 1. The new standard replaces Montana's statutory standards for preliminary injunctions and temporary restraining orders. The standard for issuing either now operates on the same four-part, federal-style test. *See* SB 191, §§ 1, 3.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Under *Jeannette R.*, *Armstrong*, *Weems I*, *Weems II*, and *PPMT v. State*, HB 544 and HB 862 violate Plaintiffs' patients' rights to privacy and equal protection under the Montana Constitution. Because they infringe on Medicaid-eligible Montanans' fundamental right to abortion, they are subject to strict scrutiny, which neither statute can withstand.

A. HB 544 violates Plaintiffs' patients' right to privacy.

HB 544's physician-only requirement, prior authorization requirement, and narrowed definition of medical necessity—like the analogous requirements in the Rule—separately and together violate Medicaid patients' right to privacy. As the Montana Supreme Court originally held in *Armstrong* and recently reaffirmed in *Weems II*, 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; *see also Weems II*, ¶ 36. For an abortion restriction to pass constitutional muster, the state must show "a compelling interest in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bona fide* health risk." *Armstrong*, ¶ 59. "Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state." *Id.* This applies with equal force to infringements on Medicaid patients' right to abortion because "once a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality." *Jeannette R.*, 17.

HB 544's physician-only requirement contravenes precedent of this Court and the Montana Supreme Court. *Armstrong*, *Weems I*, and *Weems II* hold that Montanans' right to privacy includes the right of every individual to obtain an abortion from a chosen health care provider, including APCs. *See Armstrong*, ¶ 62; *Weems I*, ¶ 1; *Weems II*, ¶ 36. The physician-only requirement unconstitutionally prevents Medicaid patients from accessing their chosen abortion provider. DPHHS claimed that the functionally identical physician-only requirement in the Rule does not bar APCs from providing abortion care. Amended Compl. Ex. B at 10. But

barring APCs from seeking reimbursement for services is effectively the same as barring APCs from providing those services to Medicaid-eligible Montanans. Separately, the State cannot justify the physician-only requirement because the provision of abortions by APCs does not create a medically acknowledged bona fide health risk. The physician-only provision serves no health-protective purpose: APCs have provided safe and effective abortions, including for Montana Medicaid patients, for years. *See Weems II*, ¶ 1 ("[T]here is no genuine dispute of fact that abortion care is identical to the care APRNs already lawfully provide in Montana; that abortion care is exceedingly safe; and that abortion care can safely be provided by APRNs.").

HB 544's prior authorization requirement, like the functionally identical requirement in the Rule, also violates Plaintiffs' patients' right to privacy. It bans the use of direct-to-patient telehealth for medication abortions, requires an additional in-person trip to a health center for an unnecessary physical exam, and imposes a de facto waiting period with no specified time limit. Even waiting periods of 24 hours have been found to violate strict scrutiny, *see, e.g.*, *PPMT v. State*, ¶ 51 (affirming preliminary injunction of 24-hour waiting period law), and HB 544 would impose waiting periods significantly longer than 24 hours. In connection with the Rule, DPHHS justified the prior authorization requirement by citing its intent to avoid covering abortions that are not medically necessary, analogizing to other care for which prior authorization is required, such as cosmetic procedures, *see* Mont. Admin. R. 37.86.104(3). Amended Compl. Ex. A. at 2359–61. But abortion care—in contrast with other types of medical care for which prior authorization is required—is constitutionally protected, *see Jeannette R.*, 20, and extremely time-sensitive. Medicaid does not require prior authorization for any other reproductive or sexual health care service, including contraception, pregnancy tests, miscarriage management, or other gynecological care. Further, the physical examination requirement in HB 544 fails constitutional

muster; it is not medically necessary and does not address a bona fide health risk. It functionally prohibits providing medication via direct-to-patient telehealth because it requires patients to make an in-person visit to a health center; there is no medical need for this requirement because medication abortion via telehealth is safe. Dickman Aff. ¶ 27.

HB 544 provides that "[i]f prior authorization is not obtained because of an emergency, a claim for payment must undergo post-service, prepayment review." Amended Compl. Ex. C at 1. The analogous provision in the Rule states that post-service, prepayment review is allowed "[i]f prior authorization is not obtained, due to an emergency situation or otherwise." Amended Compl. Ex. A at 2354. DPHHS pointed to this provision in response to a concern that the Rule would cause unnecessary delay, suggesting that prior authorization was not actually required because of the possibility of post-service review. But HB 544, unlike the Rule, does not contemplate post-service review in non-emergency situations.

Finally, HB 544's narrowing of the definition of medical necessity, which is even more restrictive than the analogous provision of the Rule, violates Plaintiffs' patients' right to privacy. The Montana Constitution requires the State to cover all medically necessary abortions for Medicaid patients. *Jeannette R.*, 20. It cannot circumvent this requirement by restricting the definition of medical necessity solely for abortions. In connection with the Rule, DPHHS cited a report from a contractor that conducted a review of abortion claims paid by Montana Medicaid. The contractor found 100% compliance with the requirement to certify that abortions covered by Medicaid are medically necessary and did not point to a single claim for an abortion that it did not believe was medically necessary. Nonetheless, DPHHS concluded that the forms certifying medical necessity "lack[ed] sufficient information" because certain medical conditions were "routinely indicated" and some forms included additional, non-required documentation.

Amended Compl. Ex. A at 2357. To the extent the State relies on this explanation to justify HB 544's narrow definition of medical necessity, it must fail. The State does not point to a bona fide health risk. And even if the State's interest in ensuring they are covering only medically necessary abortions were compelling, restricting the category of abortions that Medicaid covers is not narrowly tailored to this interest.

B. HB 862 violates Plaintiffs' patients' right to privacy.

HB 862 prohibits Medicaid coverage of abortions unless either: (1) "the pregnancy is the result of an act of rape or incest," or (2) "a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." Amended Compl. Ex. D at 1. It is extraordinarily rare for abortions to fall into these categories. *See* Randol Aff. ¶ 15. HB 862 will effectively prevent low-income Montanans from accessing medical care that is necessary for their health and wellbeing.

HB 862 blatantly violates this Court's opinion in *Jeannette R.*, which held that a regulation with precisely the same effect as HB 862 violated the right to privacy. In *Jeannette R.*, this Court declared unconstitutional a regulation that barred Medicaid coverage of medically necessary abortions unless the pregnant person faced a risk of death, holding that the State cannot allow Medicaid to cover medically necessary care for those who carry their pregnancies to term and not for those who terminate their pregnancies. *Jeannette R.* at 21–22. This Court explained that once the State "enter[s] an area that is covered by the zone of privacy, the state must be neutral" and cannot adopt a policy that "has the purpose of discouraging abortion" unless it shows a compelling interest that justifies doing so. *Id.* at 18, 20.

Like the regulation in *Jeannette R.*, HB 862 cannot withstand that scrutiny. The text of HB 862 asserts no State interest whatsoever, let alone a compelling one. In any event, as the Montana Supreme Court explained in *Armstrong*, the only compelling interest that may allow the State to interfere with the right to abortion is a "medically-acknowledged, bona fide health risk." *Armstrong*, ¶ 62. The State cannot assert in good faith that preventing low-income Montanans from accessing medically necessary health care addresses a bona fide health risk. *See Jeannette R.*, 19 ("It is obvious that the regulation does nothing to further the state's interest in maternal health.").

C. HB 544 and HB 862 violate Plaintiffs' patients' right to equal protection.

HB 544 and HB 862 also violate Montana's Equal Protection guarantee, which provides that "[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." Montana Const. art. II, § 4. When considering an equal protection challenge, Montana courts first "identify the classes involved and determine whether they are similarly situated." *Henry v. State Comp. Ins. Fund,* 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456. "A law or policy that contains an apparently neutral classification may violate equal protection if in reality it constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445 (internal quotation marks and alterations omitted). Second, they determine the appropriate level of scrutiny to apply. *Id.* If a suspect class or fundamental right is affected, courts employ strict scrutiny, meaning that "the legislation [at issue] must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶ 34.

HB 544 and HB 862 create a clear delineation between Medicaid patients who decide to terminate their pregnancy and those who decide to carry their pregnancy to term. Only the former group is subject to the statutes' restrictions. In other words, the State has "taken the class of indigent pregnant Medicaid eligible women and divided them. One class, who needs medically necessary treatment (an abortion) are not entitled to help from the state. However, another class (those women for whom childbirth is a medically necessary treatment) are entitled to state financial help." *Jeannette R.*, 22. By treating similarly situated individuals differently based on how they choose to exercise their right to reproductive autonomy, the classification affects the fundamental right to privacy and triggers strict scrutiny. *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1003 (Alaska 2019) ("Disparate restrictions on government funding for women based on their choice of either abortion or childbirth deter the exercise of a fundamental right because pregnant women in that position are locked in a binary dilemma: the rejection of one option inevitably entails the embrace of the other.").

As in *Jeannette R.*, pregnant Medicaid patients who decide to continue their pregnancies will have that care covered by Medicaid—but those who decide to end their pregnancies will face significant hurdles to obtaining that care, if they can access it at all. The statutes will compel Medicaid-eligible Montanans to endure the heightened health risks of continuing their pregnancies and childbirth. HB 544 and HB 862 cannot withstand strict scrutiny.

Further, HB 544's physician-only provision violates equal protection because it creates two similarly situated classes: pregnant Medicaid patients seeking an abortion from a physician and pregnant Medicaid patients seeking an abortion from an APC. The physician-only provision permits the former group—but not the latter—to exercise their fundamental right to abortion. This classification thus affects a fundamental right and triggers strict scrutiny. *Cf. Jeannette R.*,

21. The State cannot meet its heavy burden under strict scrutiny to show that this discrimination is narrowly tailored to serve a compelling interest. There is no health-protective—or any other—rationale for Medicaid to cover abortion (in the limited circumstances allowed under HB 544) when patients seek that care from one class of licensed clinicians but not another. HB 544 will endanger Montanans' health—forcing some to delay abortions and to try to travel to the limited number of physicians (where they ultimately may be denied care because abortion does not fit the narrow definition of "medically necessary") and compelling those who cannot get to a physician to stay pregnant, give birth, and endure the attendant physical risks and lifelong effects of pregnancy, childbirth, and parenthood. Such differential treatment simply cannot be squared with the equal protection guarantee. *See Jeannette R.*, 22.

II. THE REMAINING FACTORS WEIGH IN FAVOR OF IMMEDIATE RELIEF.

A. If enforced, HB 544 and HB 862 will cause Plaintiffs and their patients irreparable injury.

Absent a preliminary injunction blocking HB 544 and HB 862, Plaintiffs and their patients will be irreparably harmed. The statutes infringe on Medicaid patients' right to an abortion under Montana's guarantees of privacy and equal protection. These constitutional violations themselves constitute irreparable harm and justify preliminary relief. *See PPMT v. State*, ¶ 6 ("For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." (citation omitted)).

Beyond the constitutional harm, HB 544 and HB 862 will have devastating consequences for low-income Montanans seeking abortions. The irreparable harm HB 544 will cause is very similar to the harm that this Court concluded the Rule would cause in granting Plaintiffs' request for a temporary restraining order. First, the statute's physician-only requirement will irreparably harm Plaintiffs and their patients. Few *physicians* provide abortions in the state, at few locations,

separated by great distances, so the physician-only requirement will drastically reduce the availability of abortions at all of Montana's abortion providers and end Medicaid patients' access to abortion in vast swaths of the state. *See* Fuller Aff. ¶ 19; Weems Aff. ¶ 20.

HB 544's prior authorization requirement will also cause irreparable harm to Plaintiffs and their patients. It forces patients to delay care by effectively imposing a requirement of an additional trip and a waiting period. Waiting periods and additional-trip requirements have been shown to have devastating effects on access to abortion, including preventing some patients from accessing care entirely.[3] This will be especially burdensome for those who have limited access to transportation, inflexible work schedules, other caretaking responsibilities, or who suffer from intimate partner violence. Dickman Aff. ¶ 29; Weems Aff. ¶¶ 24–25; Smith Aff. ¶¶ 29–30, 39–40, 46. The prior authorization would also prevent Medicaid patients from accessing medication abortion via direct-to-patient telehealth, which improves access for rural patients, patients with disabilities, and patients with limited access to transportation. Fuller Aff. ¶¶ 10, 24–25. Dickman Aff. ¶¶ 31, 35. Weems Aff. ¶¶ 29–30. Smith Aff. ¶¶ 28–30. Telehealth accounts for a significant proportion of the medication abortions Plaintiffs provide, Fuller Aff. ¶ 15; Weems Aff. ¶ 14, and banning it will be especially burdensome for Medicaid patients given the limited locations where physicians are available.

In connection with the Rule, DPHHS stated that its contract with its Medicaid utilization review contractor requires completion of the prior authorization review "within three working days, considering the submission of timely and accurate documentation," and characterizes this delay as "add[ing] only minimal time to the process." Amended Compl. Ex. B at 4–5. But HB

[3] *See* Caitlin Myers, *Cooling off or Burdened? The Effects of Mandatory Waiting Periods on Abortions and Births*, Institute of Labor Economics (IZA), 14434 IZA Discussion Papers 1 (2021); Jason M. Lindo & Mayra Pineda-Torres, *New Evidence on the Effects of Mandatory Waiting Periods for Abortion*, 80 J. of Health & Econ. 1 (2021).

544 itself contains no such requirement. Three working days could stretch to five or more calendar days when there is an intervening weekend or long weekend, which, because of the time-sensitive nature of abortion, is a significant delay. Dickman Aff. ¶ 36. And if DPHHS denies a patient's prior authorization request, the appeal process would further exacerbate the delay. In any event, if the entire prior authorization process—including approval or denial—is not completed in one day (or even if it is, but not leaving enough time to provide an abortion that day), the physical examination requirement adds an extra visit for Medicaid patients seeking abortions. *Id.* These delays may force some patients to forgo care altogether. Smith Aff. ¶ 38.

Finally, HB 544's restriction of the definition of medical necessity will cause irreparable injury. Low-income pregnant people whose abortions would be covered under the definition of medical necessity applicable to all other medical care will be forced to draw on limited financial resources that they need for food, rent, clothing, and other essentials to pay for an abortion. Dickman Aff. ¶ 59. Many will have to delay the abortion to raise money, needlessly subjecting them to increased medical risk as a result. Because Medicaid patients already face significant economic hardship, many will be unable to take on these additional financial and logistical burdens. Weems Aff. ¶ 24–26. Therefore, HB 544 will force some Medicaid patients to carry a pregnancy to term, even though an abortion was medically necessary in the judgment of their health care provider.

HB 862 would be even more devastating to Medicaid patients seeking abortions. It would effectively ban Medicaid coverage for abortions in Montana. Medicaid patients would thus be forced either to attempt to raise the money for an abortion, delaying their care, or they may be forced to carry a pregnancy to term against their will. This outright denial of access to a

constitutionally protected right is an archetypal example of irreparable harm, and Plaintiffs are entitled to preliminary relief.

B. The balance of the equities and the public interest weigh in favor of Plaintiffs.

The remaining factors—the balance of the equities and the public interest—"merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). Plaintiffs and their patients face immediate irreparable harm absent preliminary relief, whereas the State will not be harmed by the issuance of an injunction that preserves the status quo. As an initial matter, Defendants have no legitimate interest in enforcing unconstitutional laws. *See Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) ("The government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." (citation and internal quotation marks omitted)). The status quo protects the ability of Plaintiffs and their Medicaid-eligible patients to make evidence-based medical decisions free from unwarranted government intervention, consistent with the values of privacy, bodily autonomy, and individual dignity secured by the Montana Constitution's Declaration of Fundamental Rights. *Armstrong*, ¶ 56 ("[T]he right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is 'deeply rooted in this Nation's history and tradition.'") (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)). The State, by contrast, loses nothing by way of immediate relief preserving the status quo, given that the Montana Constitution requires it to cover abortions for Medicaid-eligible Montanans.

The public interest in preserving the status quo and in ensuring access to safe, constitutionally protected health care services while this case proceeds is strong. "It 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, granting a preliminary injunction will serve the public interest by ensuring that Medicaid-eligible Montanans continue to have access to constitutionally protected abortions and safe, effective medical care.

CONCLUSION

For the foregoing reasons, Plaintiffs move this Court, upon completion of a hearing and consideration of the merits of the instant application for a preliminary injunction, to issue preliminary injunctive relief prohibiting Defendants the State of Montana, DPHHS, and Charlie Brereton in his official capacity as Director of DPHHS, and their agents, employees, appointees, and successors from enforcing, threatening to enforce, or otherwise applying House Bills 544 and 862.

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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