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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; and HELEN WEEMS, MSN, APRN-FNP, on behalf of themselves, their employees, and their patients,

Plaintiffs,

v.

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.: DDV-2023-592

**TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE**

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1 Plaintiffs All Families Healthcare, Blue Mountain Clinic, and
2 Helen Weems (collectively, Providers), represented by Alex Rate, Jacqueline
3 Harrington, Nina S. Riegelsberger, Tabitha Crosier, Hartley West, Iricel Payano,
4 and Hillary Schneller move for a temporary restraining order enjoining
5 enforcement of House Bill 937, 2023 Mont. Laws 492, pending a hearing on their
6 motion for a preliminary injunction. Defendants the State of Montana, the
7 Montana Department of Public Health and Human Services, and Charlie Brereton
8 (collectively, the State), represented by Alwyn T. Lansing, Michael Noonan, and
9 Emily Jones, oppose the motion. For the reasons that follow, the motion for a
10 temporary restraining order will be granted.

11 DISCUSSION

12 A temporary restraining order with notice and a preliminary
13 injunction are both governed by the following standards:

14
15 (1) A preliminary injunction order or temporary restraining order may
be granted when the applicant establishes that:

- 16 (a) the applicant is likely to succeed on the merits;
- 17 (b) the applicant is likely to suffer irreparable harm in the
absence of preliminary relief;
- 18 (c) the balance of equities tips in the applicant's favor; and
- 19 (d) the order is in the public interest.

20 Mont. Code Ann. § 27-19-201(1) (2023). This standard is intended to mirror the
21 preliminary injunction standard established in *Winter v. Natural Res. Defense*
22 *Council, Inc.*, 555 U.S. 7 (2008) and its progeny. *See id.* § 27-19-201(4). A
23 temporary restraining order differs from a preliminary injunction in that it has a
24 much shorter duration: whereas the latter generally applies for the whole length
25 of the litigation the former is applied for a shorter duration meant to apply only

1 until all parties can be heard. *See* Mont. Code Ann. § 27-19-314; *Innovation Law*
2 *Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156 (D. Or. 2018). In either case, the
3 burden is on the applicant to demonstrate the need for the relief sought. Mont.
4 Code Ann. § 27-19-201(3). Thus, the Court examines below Providers’ motion in
5 light of each of the four preliminary injunction requirements.

6 **1. Likelihood of Success on the Merits**

7 The only matter before the Court today is the Providers’ request
8 for a temporary restraining order. On this procedural posture, the Court’s primary
9 concern is not the various constitutional challenges to the notion of licensure of
10 abortion clinics. Rather, the Court’s concern is what will happen to Providers and
11 their patients on October 1, 2023, when HB 937 takes effect. Thus, the Court’s
12 Section 2(1) of House Bill 937 plainly and unambiguously prohibits abortion
13 clinics from operating without a license: “A person may not operate or advertise
14 the operation of an abortion clinic unless the person is licensed by the
15 department.” Statutes are construed “to implement the objectives the legislature
16 sought to achieve, and if the legislative intent can be determined from the plain
17 language of the statute, the plain language controls.” *In re Estate of Engellant*,
18 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218. Here, the plain language says
19 that as of the effective date of HB 937, Providers cannot operate or advertise their
20 services unless they are licensed by the Department of Public Health and Human
21 Services (the Department).

22 The problem is that Providers are *not* licensed by the Department,
23 and everyone agrees they cannot get a license by October 1. Before licenses can
24 be issued, the Department must first promulgate rules. The Department, however,
25 has neither adopted nor even publicly proposed temporary or final rules to

1 implement HB 937, nor has it otherwise given Providers guidance on how they
2 can avoid violations of Section 2(1) in the interim. (*See* Truax Aff. ¶¶ 7–15, Dkt.
3 46 at 3–4; Weems Aff., ¶¶ 7–11, Dkt. 13 at 3–4.) Thus, on October 1, 2023, if
4 Providers are “abortion clinics” within the meaning of HB 937, then they will be
5 operating without a license in violation of the plain meaning of Section 2(1).

6 HB 937 does not itself specify any penalties, but it incorporates
7 abortion clinics into the definition of healthcare facilities, *see* HB 937 § 5
8 (amending) Mont. Code Ann. § 50-5-101(26)(a)), which are required to be
9 licensed under Mont. Code Ann. § 50-5-201(2). Operating a healthcare facility
10 without a license violates Mont. Code Ann. § 50-5-111(1), and a facility that so
11 operates can incur civil or criminal penalties or an injunction barring the facility
12 from operating without a license. *See* Mont. Code Ann. §§ 50-5-112, 50-5-
13 113(1)(a), 50-5-108.

14 Moreover, it is well-established in Montana that laws significantly
15 inhibiting abortion access are presumptively unconstitutional and can only be
16 enforced if they withstand strict scrutiny. *Armstrong v. State*, 1999 MT 261,
17 ¶¶ 34, 41, 296 Mont. 361, 989 P.2d 364; *Weems v. State*, 2023 MT 82, ¶¶ 36–38,
18 412 Mont. 132, 529 P.3d 798 (reaffirming *Armstrong*’s holding). *Armstrong* held
19 that regulations “which dictate how and by whom a specific medical procedure is
20 to be performed” invade the right to privacy and can be justified only by “a
21 compelling interest in” protecting patients or the public “from a medically
22 acknowledged, *bona fide* health risk.” *Armstrong*, ¶¶ 58–59 (emphasis in
23 original). Thus, in *Armstrong*, the Court enjoined a statute prohibiting physician
24 assistants from performing abortions. *Armstrong*, ¶ 66. This year, the Supreme
25 Court enjoined the State from prohibiting nurse practitioners from performing

1 abortions. *Weems*, ¶¶ 46–49. In so holding, *Weems* highlighted the concern that
2 “limiting the pool of qualified abortion providers would significantly interfere
3 with a patient’s right of privacy because of significant cost and travel required to
4 access a provider.” *Weems*, ¶ 50. These decisions are controlling authority that
5 remains good law and binds this, Court.

6 Section 2(1) prohibits Providers who qualify as “abortion clinics”
7 from continuing to operate as of October 1, 2023, and in doing so it exposes them
8 to civil and criminal penalties and injunctions if they continue to operate. Under
9 the above-cited cases, “remov[ing] qualified [providers] from the pool of health
10 care providers from which women may choose to obtain lawful medical
11 procedures” implicates “a patient’s fundamental right of privacy.” *See Weems*,
12 ¶ 34. While there may or may not prove to be a compelling state interest in
13 licensing abortion clinics—a question for another day—there is no compelling
14 interest in imposing a mandatory licensure regime while issuing no licenses. Nor
15 can the Court avoid the constitutional problems with Section 2(1) as written by
16 engrafting onto it an implied impossibility defense, because that would require
17 the Court to “insert what has been omitted.” Mont. Code Ann. § 1-2-101.¹

18 To be sure, that a law is on the books does not necessarily mean it
19 will be enforced. Indeed, the State contends that this action is unripe because it
20 contends enforcement is impossible until administrative rules are promulgated.
21 (*See Truax Aff.* ¶ 15, Dkt. 46 at 4.)

22 ////

23
24 ¹ The Court could more easily find legislative intent not to enforce Section 2(1) prior to promulgation of rules had
25 the bill contained a transition clause, as is often the case with bills creating new regulatory structures. But instead,
the legislature simply allowed the Act to take effect October 1, which notably gave the Department authority to
promulgate temporary rules in advance of the effective date and is somewhat suggestive of a legislative
contemplation that rules would be in force by the effective date of the Act. *See* Mont. Code Ann. § 2-4-303(2).

1 The judicial power of the courts is limited to cases and
2 controversies, a requirement which requires the plaintiff to “clearly allege a past,
3 present, or threatened injury to a property or civil right” that “would be alleviated
4 by successfully maintaining the action.” *Reichert v. State*, 2012 MT 111, ¶ 55,
5 365 Mont. 92, 278 P.3d 455. When the claim involves a threatened injury, the
6 plaintiff must show “a genuine need to resolve a real dispute” that is an “actual,
7 concrete conflict,” as opposed to a “hypothetical, speculative, or illusory”
8 dispute. *Reichert*, ¶ 54. In a pre-enforcement challenge of a statute carrying
9 criminal penalties, the plaintiff “need not first expose himself to actual arrest or
10 prosecution to be entitled to challenge the statute” unless the fear of prosecution
11 is “imaginary or wholly speculative.” *Gryczan v. State*, 283 Mont. 433, 445, 942
12 P.2d 112, 119 (1997) (quoting *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 302
13 (1979). In other words, there must be a “legitimate and realistic fear” of
14 prosecution. *Id.* at 446, 942 P.2d at 120. This can be shown by, among other
15 things, the recent enactment, amendment, or refusal to repeal the challenged
16 statute. *See Gryczan*, 283 Mont. at 443–444, 942 P.2d at 118–119. Also, relevant
17 (though not dispositive) is a disavowal of enforcement by the State. *Id.* at 445,
18 942 P.2d at 120; *but see Mont. Immigrant Justice All. v. Bullock [MJIA]*, 2016
19 MT 104, ¶¶ 24–25, 383 Mont. 318, 371 P.3d 430 (upholding standing for the pre-
20 enforcement challenge of an immigration referendum even though the sitting
21 Attorney General had “foresworn” enforcement of the referendum).

22 HB 937—and the prohibition on operating unlicensed abortion
23 clinics—is a brand-new law enacted just months ago. Prior to this action, the
24 State declined to clearly state it did not intend to enforce Section 2(1) against
25 Providers in response to inquiries. On August 8, 2023, Plaintiff Helen Weems

1 emailed Tara Wooten, the Department’s Healthcare Facility Program Manager
2 for the Licensure Bureau, about impending rulemaking. Wooten responded that
3 rulemaking was in process, and that “[d]eadlines, and variances from then if
4 needed, will be reviewed and discussed internally among DPHHS agencies.” (*See*
5 *Mem. of Law in Supp. of Pls.’ App. for Temp. Restraining Or. & Prelim. Inj., Ex.*
6 *1, Dkt. 9.*) Similarly, counsel for Providers emailed multiple attorneys with the
7 Attorney General’s Office on August 16 to ask whether “clinics that provide
8 abortion care [may] continue to do so without facility licensure,” citing concerns
9 about the impending October 1 effective date and absence of proposed rules. In
10 the email, Providers asked, “Would the State consider agreeing not to enforce HB
11 937 and any regulations until ninety days after final regulations are published?”
12 (*See id. Ex. 2, Dkt. 8.*) Counsel for the State responded:

13
14 DOJ is not involved in DPHHS’s rulemaking process, nor have we
15 been in communication with DPHHS regarding any rulemaking on
16 HB 937, other than to pass along your request for information.
17 Additionally, HB 937 will go into effect October 1 as the Legislature
18 intended.

19 (*Id.*) Neither communication gave Providers any assurance that they could safely
20 continue to operate after October 1.

21 Now that litigation has commenced, the Department has
22 acknowledged difficulties with enforcing HB 937 in the absence of rulemaking,
23 stating that “DPHHS and OIG are not able to enforce HB 937.” (*Truax Aff.* ¶ 15,
24 *Dkt. 46 at 4.*) Given the totality of the foregoing, however, this is insufficient to
25 defeat the Providers’ claim of legitimate and reasonable fear of enforcement,
 particularly in light of the holding in *MJIA* that an even more direct disavowal

1 did not render that case unripe. *See MJIA*, ¶ 25 (“[I]f the State’s disavowal was
2 enough to deprive MJIA of standing in this case, the invocation of disavowal. . .
3 would enable the State in any case to negate a claim of standing premised on the
4 threat of future injury.”). Here, there is not an express disavowal of
5 enforcement—at best, the State has acknowledged only the difficulty of
6 enforcement—and the Department’s position does not, in any event, prevent
7 local county attorneys from attempting to charge Providers under Mont. Code
8 Ann. § 40-5-113(1)(a) should they continue to operate between October 1 and the
9 establishment of licensure rules. *See MJIA*, ¶ 24. Thus, the claim with which the
10 Court is today concerned—the effect of Section 2(1) prior to the enactment of
11 licensing rules—appears to present a ripe dispute.

12 The State also argues that the action is unripe because rules have
13 not yet been promulgated. *Cf.* Mont. Code Ann. § 27-19-103(9) (2023)
14 (prohibiting injunctions preventing the Secretary of State from issuing rules).
15 However, the Court does not understand Providers as seeking such an injunction;
16 rather, Providers challenge and seek to enjoin the statute itself, including the
17 statutory prohibition on operating without a license. Moreover, Providers’
18 overarching challenge is to the very notion of a mandatory licensure system
19 containing the elements set forth in Sections 2(2), 2(3), and 3(2) of HB 937.

20 The Court need not delve into the merits of Providers’ objections
21 to HB 937 to find that they nevertheless appear to present an actual, concrete,
22 non-hypothetical controversy. Likewise, in finding Providers likely to succeed in
23 establishing the narrow proposition that Section 2(1) HB 937 violates the right to
24 individual privacy in the absence of a means of obtaining a license, the Court
25 deems it unnecessary to offer any prediction of whether HB 937’s licensure

1 requirement is otherwise unconstitutional on any of the grounds advanced by
2 Providers. *See State v. Tome*, 2021 MT 229, ¶ 31, 405 Mont. 292, 495 P.3d 54
3 (“The ‘cardinal principle of judicial restraint’ is that ‘if it is not necessary to
4 decide more, it is necessary not to decide more.’” (quoting *Morse v. Frederick*,
5 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part))).
6 Those questions need not be confronted until, at a minimum, the parties can be
7 heard on the request for a preliminary injunction.

8 **2. Irreparable Injury**

9 Plaintiffs have shown irreparable injury if Section 2(1) of House
10 Bill 937 is not temporarily enjoined pending a hearing. Constitutional
11 infringement is itself a form of irreparable injury in most cases. *See de Jesus*
12 *Ortega Melendras v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *Planned Parenthood*
13 *of Mont. v. State*, 2022 MT 57, ¶ 60, 409 Mont. 378, 515 P.3d 301. Additionally,
14 unless Section 2(1) is enjoined, on October 1, 2023, Providers will be putting
15 themselves at legal and financial risk by continuing to operate in the absence of a
16 license. Abortion services are necessarily time-sensitive in nature, particularly as
17 abortions become more invasive as the pregnancy progresses. A chill on abortion
18 services because of legal uncertainty over the effect of HB 937 causes the clinics
19 and their patient's irreparable injury for preliminary injunction purposes. *See*
20 *Planned Parenthood* ¶ 60 (various bills limiting abortion access constituted
21 irreparable injury).

22 **3. Balancing of Equities**

23 A narrow injunction that prohibits the enforcement of Section 2(1)
24 for now while a licensure process is developed is justified by a balancing of the
25 equities. Balancing the equities requires the Court to “balance the competing

1 claims of injury and. . . consider the effect on each party of the granting or
2 withholding of the requested relief.” *Winter v. Natural Res. Defense Council,*
3 *Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480
4 U.S. 531, 542 (1987)). In weighing the equities, the Court also remains mindful
5 that because preliminary injunctions are extraordinary remedies, they should be
6 no broader than necessary to minimize harm to provide necessary relief.
7 *Gearhart Indus. v. Smith Int’l*, 741 F.2d 707, 715 (5th Cir. 1984); *see also*
8 *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (equitable remedies
9 should be tailored “to fit the nature and extent of the constitutional violation”).

10 Here, the prohibition established by Section 2(1) and the fear of
11 enforcement outlined above stand to have a significant detrimental impact on
12 Providers’ operations and on their patients’ access to services should it force
13 Providers to curtail or close their operations. By contrast, a narrow temporary
14 restraining order merely “preserves the regulatory status quo” pending further
15 action by the Court. *See Commodity Futures Trading Comm’n v. British Am.*
16 *Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in
17 chambers); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1985) (“The purpose
18 of a preliminary injunction is merely to preserve the relative positions of the
19 parties until a trial on the merits can be held.”). Such a restraint does not inhibit
20 the Department from proceeding with rulemaking, nor does it meaningfully
21 impact its execution of the public policy goals of the legislature before the parties
22 can be fully heard in this litigation, for the Department concedes the enforcement
23 difficulties in the absence of administrative rules. It would, however, give
24 Providers sufficient assurance that they can continue operations while the
25 Department effectuates the legislature’s command that they develop a licensure

1 process. Accordingly, the balance of the equity tips is in the Providers’ favor.

2 **4. Public Interest**

3 In a public law action brought against the State, the balance of
4 equities and public interest elements merge. *Porretti v. Dzurenda*, 11 F. 4th 1037,
5 1050 (9th Cir. 2021). Indeed, “it is always in the public interest to prevent the
6 violation of a party’s constitutional rights.” *Riley’s Am. Heritage Famrs v.*
7 *Elsasser*, 32 F. 4th 707, 731 (9th Cir. 2022). Because the Court concludes that
8 Providers have shown a likelihood of success on the merits, irreparable injury
9 and that the balance of equities tips in their favor, they have also established that
10 a narrow temporary restraining order is in the public interest.

11 **5. Breadth**

12 As noted above, injunctions should be no broader than necessary to
13 afford a party complete relief. The Court is not considering today a preliminary
14 injunction that will endure throughout the litigation, but a temporary restraining
15 order aimed at protecting the parties’ positions until a hearing can be held. Given
16 these considerations, the Court concludes that for now, it is necessary only to
17 temporarily enjoin Section 2(1) of HB 937 and to enjoin the State and its agents
18 from bringing any enforcement or other adverse actions against Providers for the
19 continued operation of abortion clinics after October 1.

20 Accordingly,

21 **IT IS ORDERED:**

22 1. Until further order of the Court, the State and its officers,
23 employees, agents, successors, and assigns are **TEMPORARILY**
24 **RESTRAINED** and **ENJOINED** from enforcing Section 2(1) of HB 937 against
25 Providers. Neither the State, its officers, employees, agents, successors, or

1 assigns, or any other public official empowered to act in the name of the State
2 may take any adverse action against Providers, including but not limited to
3 enforcement measures under Mont. Code Ann. §§ 50-5-108 through -114, for
4 operating or advertising an “abortion clinic” within the meaning of HB 937
5 without possessing a license issued by the Department pursuant to HB 937.

6 2. Pursuant to this Court’s previous order, on **October 30,**
7 **2023, at 9:00 a.m.,** Providers will appear and show cause, if any, why a
8 preliminary injunction should be issued. Four hours are reserved for the hearing,
9 to be divided equally among the adverse parties.

10 3. A written undertaking is waived in the interests of justice.

11
12
13 /s/ Christopher D. Abbott
14 CHRISTOPHER D. ABBOTT
15 District Court Judge

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Temporary Restraining Order and Order to Show Cause – page 12
DDV-2023-592

Electronically Signed By:
Hon. Judge Christopher D. Abbott
Wed, Sep 27 2023 10:27:19 AM