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MONTANA FIRST JUDICIAL DISTRICT COURT, COUNTY OF LEWIS & CLARK

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. DV-23-592 Hon. Christopher Abbott **COMBINED BRIEF IN SUPPORT OF DEFENDANTS' MONT. R. CIV. P. 12(b)(6) MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

There is no basis in law or fact for Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. The State has the police power to regulate health, safety, and welfare of its citizens. Case law in Montana is well-established that this includes the regulation of medicine, medical providers, and medical procedures. Plaintiffs' case is unripe. They claim irreparable harm from a statute that is not self-effectuating and requires the promulgation of administrative rules to guide implementation. Plaintiffs do not, and cannot, show any threat of enforcement of a non-self-effectuating statute for which rules are still being promulgated. For the same reasons, Plaintiffs lack standing. Due to these threshold jurisdictional defects, the Court should deny Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and grant Defendants' Motion to Dismiss without prejudice.

BACKGROUND

House Bill 937 ("HB 937"/"the bill") was signed by the Governor on May 16, 2023 and has an effective date of October 1, 2023. The bill, codified within Title 50, places abortion clinics within the "Health and Safety" title of the Montana Code Annotated, and makes an abortion clinic a "health care facility," subject to licensing and regulation, like the many other "health care" facilities in the state. HB 937 §§ 6, 5 (amending § 50-5-101(26), MCA). The bill provides definitions, a structure for the licensure requirements and applications, a requirement for inspections, and, importantly, instructions for the Department of Public Health and Human Services ("DPHHS") to adopt rules on licensure and operation. Those rules have not yet been issued, nor will they be in place by October 1, 2023. (Aff. of Michelle Truax, ¶ 13 (Sept. 21, 2023), **attached as Exhibit A.**)

DPHHS is currently engaged in the rulemaking process, just as it was when Plaintiffs reached out to DPHHS in mid-August. (Doc. 9 at 1.) Without rules in place, no abortion clinic can be subject to them. Presently, DPHHS has only draft proposed rules that are undergoing internal review. (Ex. A at ¶ 12.) There has been no proposal notice, no submissions to the Secretary of State, no public hearing, no public comment, and no finalization or review of an adoption notice by DPHHS or submission of an adoption notice to the Secretary of State for publication. (*See id*. at ¶ 6–10.) Because of the statutorily required rulemaking process, the rules implementing HB 937 will not be finalized by October 1, 2023. (*Id*. at ¶ 13.)

APPLICABLE STANDARDS

I. STANDARD OF REVIEW FOR MOTION TO DISMISS UNDER MONT. R. CIV. P. 12(b)(6).

Justiciability is a threshold question in establishing whether a court has jurisdiction to hear a case. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont. 331, 142 P.3d 864. "Subject-matter jurisdiction is the power of a court to hear and adjudicate a particular type of controversy." *Harrington v. Energy West Inc.*, 2015 MT 233, ¶ 13, 380 Mont. 298, 356 P.3d 441. Montana courts have no power to adjudicate non-justiciable cases. *Broad Reach Power, LLC v. Mont. Dep't. of Pub. Serv. Regul., Pub. Serv. Comm'n*., 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301 ("Justiciability is a threshold issue—without it, this Court cannot adjudicate a dispute."). Courts are therefore required to dismiss cases that do not present a justiciable issue. Mont. R. Civ. P. 12(b)(6). If a plaintiff's complaint "fails to state facts that, if true, would vest the court with subject matter jurisdiction, a court may dismiss based on the complaint alone." *Harrington*, ¶ 9 (cleaned up).

A claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. Mont. R. Civ. P. 12(b)(6). The plaintiff carries the burden to

adequately plead a cause of action. *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. The complaint must "state a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. A court has no obligation to take as true legal conclusions that have no factual basis. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. A case should be dismissed under Mont. R. Civ. P. 12(b)(6) when, after viewing the facts in the light most favorable to the Plaintiff, "it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486 (citation omitted).

II. STANDARD OF REVIEW FOR PRELIMINARY INJUNCTION.

In 2023, the Montana Legislature amended Mont. Code Ann. § 27-19-201, which governs the circumstances in which courts can grant injunctive relief. The Legislature adopted a standard that mirrors the federal standard, which permits a preliminary injunction to be granted only 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) an injunction is in the public interest. This test is conjunctive; the applicant must satisfy not just one element, but *all* elements, of the test. *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (applying identical test) (citations omitted).

Plaintiffs "bear[] the burden of demonstrating the need for an injunction order." Mont. Code Ann. § 27-19-201(4). A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief; it is never awarded as of right. *Winter*, 555 U.S. at 22 (citation omitted). Lastly, if plaintiffs establish that a preliminary

injunction should issue, the injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

ARGUMENT

I. PLAINTIFFS' UNRIPE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH THE COURT CAN GRANT RELIEF.

Plaintiffs' Complaint should be dismissed because the Complaint fails to state a claim upon which relief can be granted. "[T]he judicial power of Montana courts is limited to justiciable controversies—in other words, a controversy that can be disposed of and resolved in the courts." *Gateway Opencut Mining Action Group v. Bd. of County Commn.*, 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133 (citing *Greater Missoula Area Fedn. of Early Childhood Ed. v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881). "A justiciable controversy is one that is 'definite and concrete, touching legal relations of parties having adverse legal interests' and 'admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.'" *McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405, 515 P.3d 777 (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)) (emphasis omitted). "The constitutional component of the justiciability limitation derives primarily from the Montana Constitution, which has been interpreted to, like its federal counterpart, limit the courts to deciding only cases and controversies." *Id*. (citing *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455).

"Ripeness is one of a number of specific doctrines applicable to the justiciability question. It is particularly concerned with whether the case presents an actual, present controversy." *McDonald*, ¶ 8 (citing *Reichert*, ¶ 54). "[C]ases are unripe when the parties point only to

hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id*. (quoting *Reichert*, ¶ 54). "To be justiciable, the parties must have existing and genuine (rather than theoretical) rights or interests, the questions must be presented in an adversary context, and the controversy must be one upon which a court's judgment will effectively and conclusively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical, or academic conclusion." *Reichert*, ¶ 53 (citations omitted). The "basic purpose" of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id*. at ¶ 54.

In this case, HB 937 has an effective date of October 1, 2023. However, DPHHS is still in the process of promulgating the rules to effectuate the statute. Without the rules, there can be no enforcement. "While the bill contains very specific provisions, administrative rulemaking is required pursuant to Section 3, and rules implementing HB 937 *will be necessary* to license abortion clinics." (Ex. A at ¶ 6.) (emphasis added). "Based upon the statutorily required rulemaking process, rules implementing HB 937 will not be effective by October 1, 2023," nor will they be in place until at least "thirty days after publication of a proposal notice." (*Id*. at ¶ 14.) This means the rules will not be finalized by the end of October:

> Administrative rules can generally only be adopted after a public hearing. Prior to publication of a notice of a public hearing on a set of proposed rules (proposal notice), there is significant work to prepare the proposed rules, including development and approval of the concept; initial notification of the bill sponsor, pursuant to § 2-4-302(2)(e)(i), MCA; preparation of draft rules; review of the draft rules by various DPHHS personnel; and submission to the Secretary of State's Office for review and publication. The public hearing on the proposed rules can occur no sooner than 20 days after publication of the proposal notice in the Montana Administrative Register (MAR), and DPHHS must take comment on the proposed rules for at least 28 days. Thereafter, DPHHS has to review the comments submitted on the proposed rules; determine whether, in light of the comments, any of the proposed rules should be revised or not adopted; and prepare the draft adoption notice, which is subject to internal review prior to submission [to the] Secretary of State's Office for publication of the adoption notice.

(*Id*. at ¶¶ 7–9.) It is not possible that rules will be in place and enforceable against Plaintiffs during the month of October. And Plaintiffs will have an opportunity to participate in the public comment period before any rules are adopted.[1] These facts lead to only one inescapable conclusion: Plaintiffs do not have an actual, present controversy. A controversy sometime *in the future*, maybe, but not now and not during October prior to the Court's current hearing date.

Moreover, while HB 937 makes it clear that abortion clinics will be required to become licensed, "[u]ntil the administrative rules are adopted, DPHHS and OIG are not able to enforce HB 937." (*Id*. at ¶ 15.) Further, neither Defendants, Plaintiffs, nor this Court can say with any certainty exactly what rules implementing HB 937 will be adopted. At this juncture, the draft proposed rules circulating internally are subject to change as they wind their way through the rulemaking process. Even after publication of the proposal notice, the proposed rules may change in light of public comment. Any adjudication now on how these rules may impact Plaintiffs would be purely hypothetical and speculative, thus entangling this Court in an abstract disagreement. Plaintiffs' claims are unripe and lack a factual basis. There are, thus, no set of facts that could provide support for their claims that would entitle them to relief. Accordingly, Plaintiffs fail to state a claim upon which relief can be granted.

II. INJUNCTIVE RELIEF MUST BE DENIED BECAUSE WITHOUT RULES IMPLEMENTING HB 937, THERE CAN BE NO HARM TO PLAINTIFFS.

Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be denied because they cannot meet any, much less *all,* of the four elements necessary to obtain a preliminary injunction. Plaintiffs cannot show a likelihood of success on the merits, irreparable

[1] Had Plaintiffs not filed this lawsuit, DPHHS's Office of Inspector General may have contacted them for input as part of its informal stakeholder outreach, conducted as part of the rulemaking process. (Ex. A at ¶ 11.)

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 Plaintiffs' Motion.

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

As stated above, Plaintiffs' Complaint fails to state a claim upon which relief can be granted because it is not ripe and therefore not justiciable. Plaintiffs therefore cannot succeed on the merits of their Complaint. Moreover, Montana courts presume that enacted laws are constitutional. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. Plaintiffs bear the burden to prove unconstitutionality beyond a reasonable doubt, and if any doubt exists, it must be resolved in favor of the constitutionality of HB 937. *Id.*; *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

1. Plaintiffs lack standing.

Montana courts may decide only justiciable cases—that is, "cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187; *see also Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. Justiciability is a threshold jurisdictional issue—"without it [courts] cannot adjudicate a dispute." *Broad Reach Power, LLC*, ¶ 10; *see also Bullock*, ¶ 28 (stating that "[s]tanding is a threshold jurisdictional requirement"); *cf. Larson*, ¶ 18, (explaining that "justiciability is a *mandatory prerequisite* to [a court's] initial and continued exercise of [the court's subject matter] jurisdiction"). It "limits

Montana courts to deciding only … actual, redressable controvers[ies]." *Bullock,* ¶ 28. To establish standing, a plaintiff must demonstrate a "past, present, or threatened injury to a property or civil right … that … would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. "The alleged injury must be concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock,* ¶ 31 (citations omitted).

Plaintiffs fail to allege they have suffered an actual or threatened injury. *Mont. Immigrant Justice*, ¶ 19; *Olson v. Dep't of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986) ("[T]he constitutional aspect of standing requires a plaintiff to show that he has personally been injured … by the alleged constitutional or statutory violation."). Plaintiffs cannot show a concrete or imminent injury because DPHHS has yet to promulgate rules to implement HB 937. Without such rules, HB 937 cannot be enforced, even after its effective date of October 1, 2023. (Ex. A at ¶ 15.) At best, Plaintiffs can claim a future injury, but without a date upon which rules will be promulgated and the knowledge of what the rules as ultimately adopted will require, the injury remains abstract and hypothetical. Plaintiffs' concerns are conjecture—fears of a sudden change occurring on October 1 are unfounded. Without rules in place, there can be no injury. HB 937, as it currently stands, is not self-effectuating. It requires licensure, inspections, and regulation of abortion clinics and provides guidance and direction to DPHHS on the elements of the rulemaking to establish such a licensure and regulatory regime. (*Id*. at ¶ 6.)

Plaintiffs fail to allege an injury as required by Article VII, § 4. Policing the boundaries of injury-in-fact is vital here, where Plaintiffs claim standing to challenge HB 937 based solely on

the threat of future injury.[2] *Mont. Immigration Justice*, ¶ 22. While a state can't diminish evidence of a credible threat of future injury simply by promising not to enforce the challenged statute, *see id.* ¶¶ 24–25, the "mere apprehension of prosecution [is] insufficient to confer standing," *see id.* ¶ 23 (citing *Gryczan v. State*, 283 Mont. 433, 441, 942 P.3d 112 (1997)). Plaintiffs' apprehension that HB 937 may lead to any infringement of constitutionally protected rights or to impermissible restrictions on clinics providing abortions is too tenuous to confer standing. Without standing, Plaintiffs cannot succeed on the merits.

2. HB 937 does not violate the right to privacy.

The right to privacy is bounded by the State's police power, which is properly used to protect and further public health and welfare, as HB 937 does in this case by requiring DPHHS to promulgate licensing regulations for abortion clinics to ensure their safety for Montanans. "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Billings Properties v. Yellowstone County*, 144 Mont. 25, 31, 394 P.2d 182 (1964). The "police power" of the State of Montana is contained in Article XV, § 9 of the Constitution which states only that "the police powers of the state shall never be abridged." *Id.* at 30.

Fundamental rights are not immune from state regulation. For example, while the Montana Constitution granted the fundamental right to pursue employment, it also subjected it to the State's police power to protect the public's health and welfare. *Wiser v. State*, 2006 MT 20, ¶ 24, 331

[2] Here, standing and ripeness intersect. Ripeness is a subset of justiciability that "is concerned with whether the case presents an 'actual, present' controversy." *Reichert*, ¶ 54, (quoting *Mont. Power Co. v. Mont. Pub. Serv. Comm'n*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91). The central concern of ripeness is "whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Id.* ¶ 55. In effect, ripeness "can be seen as the time dimension[] of standing." *Id.*

Mont. 28, 129 P.3d 133. And Plaintiffs have no fundamental right to operate abortion clinics free of state regulation. The Montana Supreme Court said, "Liberty is necessarily subordinate to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative-police power." *Id.* (quoting *State v. Safeway Stores*, 106 Mont. 182, 203, 76 P.2d 81, 86 (1938)). The court continued, "Accordingly, while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare." *Id.* The State's police power was recognized by the United States Supreme Court as early as 1837 when it stated that "state and local governments possess an inherent power to enact reasonable legislation for the health, safety, welfare or morals of the public." *State v. Skurdal*, 235 Mont. 291, 294 (1988), 767 P.2d 304, 1988 Mont. LEXIS 379 (citing *Charles River Bridge v. Warren Bridge Co.*, 11 Peters 496, 9 L. Ed. 773 *(*1837)). The Montana Supreme Court held, "That the states currently possess that police power is unquestioned." *Id.* (citing *Polk v. Oklahoma Alcoholic Beverage Control Board*, 420 P.2d 520 (Okla. 1966)). The Montana Supreme Court continued, "Montana recognizes that such police power exists even when the regulations are an infringement of individual rights." *Id.* (citing *State v. Rathbone*, 110 Mont. 225, 241, 100 P.2d 86, 92 (1940)).

Importantly, "the right of choice in making personal health care decisions and in exercising personal autonomy is not without limits. In narrowly defined instances the state, by clear and convincing evidence, may demonstrate 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, *bonafide* health risk." *Armstrong v. State*, 1999 MT 261, ¶ 59, 296 Mont. 361, 989 P.2d 364. The Montana Supreme Court concluded in *Armstrong* that the right to health care is a fundamental privacy right, but only to the extent that it protects an

individual's right to obtain a particular *lawful* medical procedure. "In *Wiser*, ¶ 15, this Court circumscribed its holding in *Armstrong* when we stated that 'it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right.'" *Mont. Cannabis Indus. Assn.*, ¶ 27 (internal citations omitted). The *Wiser* Court additionally determined that an individual does not have a fundamental right to obtain medical care free of regulation. *Id.* Regulations that are formulated within the State's police power will be presumed reasonable absent a clear showing to the contrary. *State v. Deitchler*, 201 Mont. 70, 72, 651 P.2d 1020, 1021 (1982) (citing *Bettey v. City of Sidney*, 79 Mont. 314, 319, 257 P.1007, 1009 (1927)).

HB 937 is a basic exercise of the State's police power requiring licensing and general regulations of abortion clinics to ensure patients' safety. Indeed, protecting health, safety, and welfare is the State's charge. Plaintiffs cannot show that regulations licensing abortion clinics and ensuring sanitation, safety, and staff qualifications are unreasonable or hurt patients. Far from singling out abortion clinics, as Plaintiffs claim, HB 937 in fact adds them to a larger category of health care entities—health care facilities—to ensure basic standards of sanitation and safety are met in abortion clinics. *See* HB 937, § 5, amending § 50-5-101(26)(a) ("Health care facility"… includes abortion clinics as defined in [section 1], chemical dependency facilities, critical access hospitals, eating disorder centers, end-stage renal dialysis facilities, home health agencies, home infusion therapy agencies, hospices, hospitals, infirmaries, long-term care facilities, intermediate care facilities for the developmentally disabled, medical assistance facilities, mental health centers, outpatient centers for primary care, outpatient centers for surgical services, rehabilitation facilities, residential care facilities, and residential treatment facilities.") The State is well within its police power to regulate abortion clinics and impose basic licensing requirements designed to ensure the

safety of the patients served. And Plaintiffs do not have a fundamental right to operate their clinics free of state regulation. Indeed, HB 937 recognizes the uniqueness of abortion and directs DPHHS to promulgate rules to protect patients from harms that may arise specifically in the context of abortion. *See, e.g.,* HB 937 § 3(2)(b)(x) ("The department shall adopt administrative rules for the licensure and operation of abortion clinics, including rules: …providing to patients a hotline telephone number to assist women who are coerced into an abortion or who are victims of sex trafficking.") As the court said in *Weems v. State*, "every restriction on medical care does not necessarily impermissibly infringe on the right to privacy." 2023 MT 82, ¶ 38, 412 Mont. 132, 529 P.3d 798. This is because the State possesses a general and inherent

> police power by which it can regulate for the health and safety of its citizens. To protect 'the health of its citizens,' the State may regulate and license health care professionals. Thus, Montanans do not possess an unqualified right to obtain medical care free of State regulation. The Montana Constitution does not encompass a 'fundamental right to seek medical care from unlicensed professionals.'

Id. (internal citations omitted). HB 937 and the authority it provides DPHHS to promulgate implementing rules establish commonsense state regulation for the safety of Montanans seeking abortions.

3. HB 937 does not violate the right to equal protection.

"The equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877. A "statute does not violate the right to equal protection simply because it benefits a particular class." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528. Plaintiffs must make some showing, beyond a bare assertion, that the chosen comparison groups are similarly situated. *Cf. Vision Net, Inc. v. State*, 2019 MT 205, ¶ 13, 397 Mont. 118, 447 P.3d 1034. Groups are similarly situated if "they

are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id*.

Plaintiffs make bare assertions concerning alleged comparison groups (or classes) and equal protection violations without any supporting evidence. Plaintiffs first argue that HB 937 creates a distinction between those women that seek abortion from Plaintiffs, who provide abortions in clinician's offices, and those who seek abortions from licensed facilities. (Doc. 7 at 14.) HB 937 does not bar access to abortions. It merely brings abortion clinics under the same regulatory environment in which many other healthcare facilities in the state are required to function. Under HB 937, abortion clinics are considered a "health care facility," like the many other facilities that "provide health services, medical treatment, or nursing, rehabilitative, or preventative care to an individual." HB 937 § 5(26)(a). Upon licensing, which can occur after DPHHS promulgates the rules, a woman seeking an abortion will be able to go to that chosen provider. Beyond the bare assertion, Plaintiffs fail to plead sufficient facts to establish how becoming a licensed and regulated health care facility would bar access to abortions. Rather than be treated the same as other health care facilities, Plaintiffs actually seek to be treated differently, with special privileges that permit them to dodge the regulatory environment within which other health care facilities are required to operate.

Plaintiffs next argue that HB 937 creates a distinction between women who want an abortion and those who need care for a miscarriage or care to continue a pregnancy and childbirth. (Doc. 7 at 14.) Plaintiffs offer nothing more to substantiate this and, in any event, their allegations do not hold up under examination. First, if a facility providing miscarriage care or ongoing pregnancy care falls under the definition of "health care facility," it is subject to the same licensing and regulation under Title 50 as abortion clinics. Second, the care provided in abortions,

miscarriages, and pregnancy are fundamentally different. Elective abortion "end[s] a pregnancy" through "medication" or an "in-clinic procedure."[3] A miscarriage is the "sudden loss of a pregnancy before the 20th week."[4] The mother did not make a choice to end the pregnancy; the pregnancy ended on its own. "Many miscarriages happen because the unborn baby does not develop properly."[5] Continuing care during a pregnancy, or prenatal care, is comprised of wellness checks for the baby and mother.[6] They consist of physical exams, weight checks, blood and urine tests, and imaging.[7] While all these procedures involve a mother and baby, abortion procedures are categorically different and not "equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Vision Net, Inc.*, ¶ 13.

Lastly, Plaintiffs claim that HB 937 distinguishes between clinicians who provide abortion care in their offices and other "clinicians who provide identical or more complex care in clinicians' offices" that are subject to regulation under Title 37. (Doc. 7 at 15.) How does the law draw such a distinction? What other clinicians are Plaintiffs referring to? What is the identical or more complex care? Title 37 provides for the licensing of specific occupations and professions, whereas Title 50, where HB 937 is codified, is about health and safety. (HB 937, § 6.) Plaintiffs allege a connection here but fail to show it. Plaintiffs provide nothing more than another bare assertion in search of a similarly situated class. In fact, Plaintiffs' allegations only highlight the need for the regulations contemplated by HB 937. Abortions, where provided at all, should be provided in a

[3] Planned Parenthood, "What facts about abortion do I need to know?", available at https://tinyurl.com/3ymf8mpr.
[4] Mayo Clinic, "Miscarriage," available at https://tinyurl.com/4krswwt9.
[5] *Id*.
[6] Eunice Kennedy Shriver National Institute of Child Health and Human Development, "What is prenatal care and why is it important?", available at https://tinyurl.com/yhnsafhz.
[7] *Id*.

safe, sanitary facility—not merely in the office of any doctor willing to provide one where the conditions under which this invasive procedure will be performed are unknown and unregulated.[8]

There is no differential treatment. Indeed, HB 937 brings abortion clinics in line with other regulated health care facilities. *See, e.g.,* Mont. Code Ann. §§ 50-5-201 to -247 (health care facility licensing); Admin. R. Mont. 37.106 (regulations governing the licensing of health care facilities). Because Plaintiffs fail to plead sufficient facts to establish similarly situated classes, they cannot establish a *prima facie* claim and "it is not necessary … to analyze the challenge further." *Vision Net, Inc.*, ¶ 16. Without a prima facie equal protection claim, Plaintiffs are unlikely to succeed on the merits.

4. HB 937 is not unconstitutionally vague.

Statutes are accorded a presumption of constitutionality; the burden of proof is upon the party challenging a statute's constitutionality. Any doubt is to be resolved in favor of the statute. *Monroe v. State*, 265 Mont. 1, 3, 873 P.2d 230, 231 (1994) (citing *GBN, Inc. v. Montana Dept. of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991)). A claim that a civil statute is unconstitutionally vague requires a showing that the rule is "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 238–39 (1925). But "uncertainty in [a] statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Exxon Corp. v. Busbee,* 644 F.2d 1030, 1033 (5th Cir. 1981). The Court's "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489,

[8] One such infamous facility run by Kermit Gosnell in Philadelphia was described as a "house of horrors" by the investigators who raided his facility, which specifically catered to poor women. The "deplorable conditions" of the facility included "broken equipment, bloodstained recovery chairs, and untrained staff giving anesthesia and other drugs." *See* Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures, New York Times (May 13, 2013), available at https://tinyurl.com/38dzkmxp.

494–95 (1982). If the statute does not, the challenge must fail unless the "enactment is impermissibly vague in all of its applications." *Id.* at 495.

Plaintiffs' vagueness challenge is premature. The statute is not self-effectuating. HB 937 charges DPHHS with promulgating rules to implement the statute, but no rules have yet been promulgated by DPHHS. Plaintiffs' challenge ignores these facts. But the U.S. Supreme Court notes that the Court's "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates,* 455 U.S. at 494–95. This analysis cannot be conducted here, where the Act lacks implementing rules.

DPHHS is still engaged in the rulemaking process to implement HB 937. Administrative rulemaking is required by HB 937 to license abortion clinics. (Ex. A at ¶ 6.) Such administrative rules can only be adopted after a public hearing. (*Id.* at ¶ 7.) Plaintiffs can participate in the hearing on the rules for HB 937. DPHHS has prepared draft rules which are undergoing internal review. (*Id.* at ¶ 12.) As required by law, DPHHS will give written notice of its intended action prior to any rule adoption. Without those rules, however, the statute cannot be implemented. Accordingly, HB 937 cannot be enforced against Plaintiffs until these rules are drafted, proceed through the rulemaking process, and are adopted—a process in which Plaintiffs may fully participate. *See* Section I, *supra*.

Plaintiffs lack the information to claim that HB 937 is unconstitutionally vague. Without the rules, it is not a self-effectuating statutory scheme. And without reviewing the future rules that DPHHS will promulgate to implement the statute, Plaintiffs cannot reasonably claim that they are vague. Plaintiffs face no threat of enforcement at this stage, and their claims are unripe. As such, Plaintiffs are not likely to succeed on the merits of this claim.

B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

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"). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

The only concern Plaintiffs raise is a *possible* threat of *future* harm; they cannot show that they currently are suffering or are likely to suffer any irreparable harm. There is nothing to enjoin without the rules as the statute is not self-effectuating. Plaintiffs' injury claims are mere speculation. DPHHS's Office of the Inspector General and its team of surveyors cannot enforce anything against Plaintiffs until the DPHHS rules are promulgated. (Ex. A at ¶ 15.) Plaintiffs, thus, cannot show that they will suffer any harm, much less irreparable harm, absent an injunction.

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

The balance of the equities and the public interest factors merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). 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. v. Natl. Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). "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." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). 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 v. Romero-Barcelo*, 456 U.S. 305, 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 equities weighs heavily in favor of the State. Plaintiffs bring this unripe challenge to HB 937 before DPHHS has promulgated implementing rules. Plaintiffs want this Court to issue an advisory opinion invalidating a statute that is not self-effectuating and requires implementing rules. Plaintiffs have no injury—in fact, they have no standing. They are not likely to succeed on the merits, and they cannot be harmed by rules that do not yet exist. This Court should afford DPHHS the time and opportunity to fulfill its statutory role of promulgating rules through the legal process (in which Plaintiffs can participate during the public comment period). The balance of the equities and public interest favor allowing DPHHS to complete the rulemaking process as contemplated by statute. Enjoining the rulemaking process before it even begins would be inequitable, unjust, and would undermine the will of the people enacted through their representatives. Plaintiffs' Motion for injunctive relief should be denied.

CONCLUSION

Plaintiffs ask this Court to enjoin rules that do not even exist based on hypothetical future injuries. Fatal justiciability defects mean that granting Plaintiffs' Motion would be akin to issuing an advisory opinion. HB 937 is a statute that directs DPHHS to promulgate rules to establish and implement the statutorily required licensing regime. It logically follows that until the rules are promulgated, the statutory scheme cannot be implemented. There is nothing now for this Court to enjoin. Plaintiffs' challenge is unripe, not justiciable, and prejudicial to the State's ability to implement rules as required by statute. This Court should deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction and dismiss Plaintiffs' Complaint without prejudice.

DATED this 22nd day of September, 2023.

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MONTANA FIRST JUDICIAL DISTRICT COURT, COUNTY OF LEWIS & CLARK

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. DV-23-592 Hon. Christopher Abbott **AFFIDAVIT OF MICHELLE TRUAX**

EXHIBIT A

STATE OF MONTANA)
:ss
County of Lewis & Clark)

Michelle Truax states under oath:

1. I, Michelle Truax, submit the following Affidavit in support of the Defendants' Brief in Support of Motion to Dismiss pursuant to Mont. R.Civ. P. 12(b)(6) and Response in Opposition to Plaintiff's Motion for Preliminary Injunction.

2. I am the Inspector General and head of the Office of Inspector General (OIG) at the Department of Public Health and Human Services (DPHHS). My job duties include overseeing licensing of various health care facilities, now including abortion clinics. I am also involved with drafting or review of administrative rules to effectuate laws passed by the Montana Legislature. This affidavit is based on my personal knowledge, and I can competently testify to the matters set forth in this Affidavit.

3. During the 2023 Legislative Session, OIG staff analyzed and monitored bills which would impact OIG, including HB 937.

4. During the 2023 Legislative Session, DPHHS took no position on HB 937 regarding the licensing of abortion clinics, but I did appear and testify as an informational witness on behalf of DPHHS at hearings during which the bill was considered.

5. During the week of May 15, 2023, I became aware that HB 937 had been signed by the Governor, with an effective date of October 1, 2023.

6. While the bill contains very specific provisions, administrative rulemaking is required pursuant to Section 3, and rules implementing HB 937 will be necessary to license abortion clinics.

7. Administrative rules can generally only be adopted after a public hearing. Prior to publication of a notice of a public hearing on a set of proposed rules (proposal notice), there is significant work to prepare the proposed rules, including development and approval of the concept; initial notification of the bill sponsor, pursuant to Mont. Code Ann. § 2-4-302(2)(e)(i); outreach to stakeholders for input; preparation of draft rules; review of the draft rules by various DPHHS personnel; and submission to the Secretary of State's Office for review and publication.

8. The public hearing on the proposed rules can occur no sooner than 20 days after publication of the proposal notice in the Montana Administrative Register (MAR), and DPHHS must take comment on the proposed rules for at least 28 days.

9. Thereafter, DPHHS has to review the comments submitted on the proposed rules; determine whether, in light of the comments, any of the proposed rules should be revised or not adopted; and prepare the draft adoption notice, which is subject to internal review prior to submission Secretary of State's Office for publication of the adoption notice.

10. The steps involved in the process to develop and adopt administrative rules can be time consuming, and certain aspects of the rulemaking timeframes depend on the public comments received by DPHHS, and the deadlines for submission of rule notices established by the Secretary of State's Office. Rulemaking notices have to be submitted to the Secretary of State's Office ten days prior to the date on which they would be published in the MAR, which is generally published twice a month, pursuant to a schedule established by that Office in rule. *See* ARM § 1.2.419(1).

11. OIG staff has communicated with some of the interested parties to this rulemaking about status and timing of rulemaking. Additionally, OIG has conducted outreach as part of the initial rulemaking process to better understand the physical facilities of abortion

clinics, including patient rooms. An OIG construction consultant met with an abortion provider in September of 2023 to tour its facility and review the layout and facility requirements. But for the filing of the lawsuit, OIG may have reached out further to Plaintiffs and other abortion clinics for input as part of the informal stakeholder outreach conducted in the rulemaking to implement HB 937.

12. DPHHS has prepared draft rules to implement HB 937, which are still undergoing internal review.

13. Based upon the statutorily required rulemaking process, rules implementing HB 937 will not be effective by October 1, 2023, as a proposal notice has yet to be published.

14. Once the proposed rules are published in a proposal notice, the earliest date rules can generally be adopted (through publication of a subsequent adoption notice) is thirty days after publication of a proposal notice. However, the rulemaking process usually takes longer, especially if comments are received on the proposed rules.

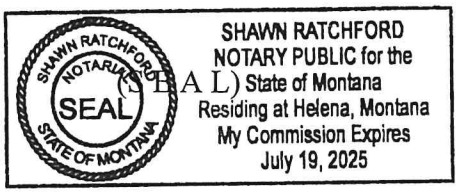
15. Until the administrative rules are adopted, DPHHS and OIG are not able to enforce HB 937. The abortion clinic licensure mechanism and the regulatory enforcement parameters will be established through the public rulemaking process consistent with the requirements in Section 3 of the bill.

16. I declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct, based on my personal knowledge.

DATED this 21st day of September, 2023.

Michelle Truax

Subscribed and sworn to before me, a Notary Public for the State of Montana, this 21st day of September, 2023:



Notary Public for the State of Montana

CERTIFICATE OF SERVICE

I, Alwyn T. Lansing, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 09-22-2023:

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Electronically signed by Deborah Bungay on behalf of Alwyn T. Lansing
Dated: 09-22-2023