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**Pro hac vice applications forthcoming*

**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 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. _____

Judge: _____

**AFFIDAVIT OF NICOLE K.
SMITH, PhD, MPH IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

I, Nicole K. Smith, PhD, MPH, being duly sworn, affirm as follows:

1. I submit this affidavit in support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction against enforcement of HB 937 (the "Act") related to the licensure of clinics that provide abortion services.

Background and Experience

2. I am the Executive Director of Blue Mountain Clinic ("Blue Mountain" or the "Clinic"), a family practice and primary health care clinic in Missoula, Montana. Blue Mountain is one of the plaintiffs in this case.

3. For the past 46 years, Blue Mountain has been providing patient-centered and evidence-based health care, education, and advocacy in Missoula County and beyond. Blue Mountain first opened in 1977 as the first and only abortion clinic in the State of Montana (the "State"). By 1991, the Clinic expanded its health services to include comprehensive family medical care to better serve its community.

4. I have been the Executive Director of Blue Mountain Clinic since August 2021. As Executive Director, I oversee all aspects of the Clinic's work, including the overall business operations of the Clinic, human resources and personnel management, fundraising, and budgeting, as well as day-to-day clinic operations. I supervise our two medical directors who, in turn, oversee clinical operations. As a result, I am familiar with all aspects of the Clinic's work and patient care.

5. I am a fourth-generation Montanan, and I have two decades of experience working on sexual and reproductive health in a variety of settings. Prior to joining Blue Mountain, I worked as a Research Scientist for the Center for Children, Families, and Workforce Development at the University of Montana College of Health. I have a PhD in Health Behavior from Indiana University's School of Public Health, a master's degree in Public Health from Portland State University, and a bachelor's degree in Psychology from Carroll College.

6. I reviewed HB 937, passed by the Montana legislature this past year and scheduled to take effect on October 1, 2023. From my reading, the Act requires “abortion clinic” licensure and requires the Department of Public Health and Human Services (“DPHHS”) to issue regulations setting out licensing requisites. To date, DPHHS has not proposed any regulations regarding abortion clinic licensure.

7. HB 937 is vague as to the new requirements that will go into effect on October 1. The Act is unclear regarding whether Blue Mountain will be required to become licensed as an “abortion clinic,” or whether Blue Mountain can continue to provide abortion care as a private clinician’s office, which is subject to the licensure, oversight and regulations that already apply. If new facility licensure is required, DPHHS has not made or publicized the process through which we may apply for licensure or any requirements for licensure. The uncertainty regarding licensure puts Blue Mountain, our patients, and me in an unstable and difficult situation.

8. Blue Mountain has attempted to remedy this emergency. I understand that ACLU of Montana contacted attorneys for the State on July 12, 2023, asking whether DPHHS planned to proposed regulations before the Act became effective on October 1. Attorneys for the State did not respond.

9. I also understand that ACLU of Montana followed up on August 16 with attorneys for the State, again asking whether DPHHS intended to engage in the rulemaking process in advance of the Act’s effective date and whether DPHHS understands HB 937 to require clinics that provide abortion care to become licensed or whether they could continue to operate as regulated under Title 37, without facility licensure. In addition, ACLU of Montana asked whether the State would consider agreeing not to enforce HB 937 and any regulations until 90 days after final regulations are published. On August 17, ACLU of Montana received a response from an

attorney for the State, indicating that the Montana Department of Justice was not involved in DPHHS's rulemaking but that they had passed on the request for information. The attorney for the State also stated that HB 937 will take effect on October 1.

10. On August 8, Helen Weems, one of the other plaintiffs in this case, also sent an email to DPHHS on behalf of Blue Mountain and All Families Healthcare, asking about the timeline for proposed regulations and whether HB 937 requires clinics like ours to obtain facility licensure. DPHHS responded on August 18, 2023, that so long as a facility meets the definition in HB 937 Section 1(a) and is not excluded in the criteria listed in (1)(b), then the facility will need to be licensed as an abortion clinic. DPHHS also said that it is engaged in the rulemaking process and that deadlines and variances will be reviewed internally among DPHHS agencies. This response did not remedy the uncertainty or timing concerns that threaten Blue Mountain's ability to provide abortion care.

11. Uncertainty as to whether Blue Mountain must obtain a facility license or can continue practicing as we have been for 46 years impacts our ability to schedule future appointments. It also causes needless worry and confusion for patients we will be counseling in September, as the October 1 deadline nears. If HB 937 requires Blue Mountain to be licensed as an "abortion clinic," in the short-term, Blue Mountain will have to cease providing abortion care entirely, at least until it can obtain a license. Should Blue Mountain be unable to obtain a license and therefore unable to provide abortion services, the long-term sustainability of our practice, more generally, would be threatened, thus impacting *all* our patients. Requiring "abortion clinic" licensure will, at minimum, result in a lapse in our ability to provide abortion care and will deny patients access to their chosen provider if that provider is Blue Mountain.

Access to Abortion in Montana

12. Montana is a large and mostly rural state, with total size measuring over 147,000 square miles and is the fourth largest state in the country. With just over one million residents, Montana ranks 44th in population size. However, the State's population grew by 11.5 percent between 2010 and 2021, due to an influx of new residents moving to the State. Montana is home to 13 federally recognized Tribes; seven sovereign Reservation communities are located in the State. Indigenous individuals comprise the State's largest minority racial group, representing 7 percent of Montana's population. Indian Health Services ("IHS"), a federal program, is subject to the restrictions of the Hyde Amendment and therefore abortion care is not available through IHS clinics located in Reservation communities. The State's largest population centers include Billings, Bozeman, Kalispell, Missoula, Helena, and Great Falls.

13. There are a handful of providers that regularly provide abortion care in Montana. All but one location is on the western side of the State. The majority of residents living in eastern Montana must travel several hundred miles and up to seven hours of driving time one-way, to reach a brick-and-mortar abortion provider. The eastern and western regions of Montana are separated by the Continental Divide of the Rocky Mountains. This means that for all seasons, except a short three-to-four months of summer, drivers will frequently encounter hazardous road conditions that add logistical and travel barriers to accessing health care in western Montana's more urban city centers.

14. Montana is a critical site of access to abortion for patients in the greater Northern Rockies and Plains regions. Abortion has never been as accessible in the region as it should be, but, since the U.S. Supreme Court overruled *Roe*, access has deteriorated exponentially. Montana's neighboring states—North Dakota, South Dakota, and Idaho—have passed draconian abortion bans, and abortion clinics do not provide care in those states. Wyoming, too, passed

abortion bans, but abortion remains available there because court orders are blocking the bans. Despite escalating legislative attacks, discussed below, Montana itself has retained a baseline for access to abortion.

Blue Mountain's Practice and Our Patients

15. Blue Mountain first opened in 1977 as the first and only abortion clinic in Montana. By 1991, Blue Mountain had expanded its services to offer primary care for the entire family, in addition to continuing to offer abortion services. On March 29, 1993, the Clinic was firebombed and completely destroyed by an anti-abortion arsonist. Over two years later, in September 1995, the Clinic reopened at its current location and has been providing services there ever since.

16. Today, Blue Mountain fully integrates family medicine, mental health counseling, reproductive and sexual health care, comprehensive gender-affirming care, and suboxone therapy into its medical practice. The Clinic has four full-time primary health care providers who are licensed to practice in Montana: two physicians and two physician assistants. We also have one licensed clinical social worker on staff who provides mental healthcare and counseling services.

17. Blue Mountain's practice is subject to oversight and regulation by numerous federal and State authorities, including the Montana Board of Medical Examiners and the Montana Board of Nursing, the U.S. Drug and Enforcement Authority ("DEA"), and the DPHHS, to the extent it implements and conducts inspections for the Clinical Laboratory Improvement Amendments ("CLIA"), as well as Montana's abortion-reporting laws. The Clinic is licensed as a limited-service/class IV pharmacy by the Montana Board of Pharmacy. Additionally, Blue Mountain provides abortion care consistent with the clinical standards set by the National Abortion Federation ("NAF", the professional association for abortion providers, and is inspected by NAF.

18. The Clinic serves approximately 3,500 patients per year, accounting for over 10,000 visits per year. For many of our patients, Blue Mountain is their medical home—they turn to us whenever they need health care.

19. About 25 percent of Blue Mountain’s patients travel more than 50 miles (which takes approximately one hour or longer one-way, given weather and road conditions) to access services at the Clinic. Some travel even further, for example, from Deer Lodge—which is about 85 miles and over an hour away. Others make use of the telehealth program for abortion care, and for other primary care and mental health services, and do not need to make this in-person trip.

20. Blue Mountain’s family medicine practice offers pediatric care to elder care, and includes wellness exams, internal medicine, preventative care, and mental health. The practice performs procedures such as miscarriage management, loop electrosurgical excisions (where abnormal cells are removed from the cervix to prevent cancer), colposcopies, Nexplanon and IUD insertions and removals, and removal of stitches.

21. Blue Mountain’s abortion care practice offers two options. Blue Mountain offers medication abortion up to 11 weeks, as measured from the first day of the patient’s last menstrual period (“LMP”) and procedural abortion up to 21 weeks and 6 days from the LMP. Procedural abortion involves dilation of the cervix followed by evacuation of the uterus, with suction aspiration, instruments, or both. Blue Mountain clinicians administer a local anesthetic to numb the cervix. Additionally, Blue Mountain offers moderate sedation to procedural abortion patients, during which they are awake but relaxed. The same moderate sedation is also offered to patients who come to Blue Mountain for IUD insertions and removals, and gynecological procedures such as miscarriage management, colposcopies, loop electrosurgical excision procedures (“LEEPs”).

22. There are multiple safe and effective regimens for medication abortion, including mifepristone and misoprostol, and misoprostol only. For over two decades, Blue Mountain has used the evidence-based mifepristone-misoprostol regimen. In 2022, Blue Mountain launched its direct-to-patient telehealth program for medication abortion. This enables patients to access abortion care without having to travel to the Clinic. Patients consult with a provider remotely, and after options counseling, a review of patient history, confirmation of the patient's eligibility for medication abortion, and obtaining informed consent, the provider writes a prescription for medication abortion and abortion pills are mailed to the patient in Montana.

23. Both physician assistants provide medication abortion in-person and via telehealth, four days a week. Blue Mountain physicians offer abortion care up to 21.6 weeks LMP.

24. In 2022, Blue Mountain provided about 400 abortions.

25. Our patients seek abortion care for a variety of health, family, economic, and personal reasons. Many are parents who have decided that they cannot parent another child at that time, and some are young people who do not feel ready to carry a pregnancy to term because they want to pursue school or work opportunities. Others face serious health issues that make it dangerous to continue a pregnancy; some are in abusive relationships; and some patients we care for are pregnant as a result of incest or rape.

26. The availability of abortion care enables patients not to forego educational and economic opportunities due to unplanned childbirth, to provide care to existing family members, to avoid raising children with an absent, unwilling, or abusive partner, and to prevent health harms, pain, and suffering that can arise from carrying pregnancies to term and giving birth. Over the years, our patients have raised all of these concerns as reasons why they have made the decision to end a pregnancy.

27. Blue Mountain’s patients, many of whom qualify for public insurance, are more likely to already have trouble making financial ends meet. Even if insurance covers the cost of their abortion care, it does not cover other associated costs—especially those that arise for an in-person visit—like transportation, childcare, or lost wages for taking time off work. And, for those without insurance coverage, patients will likely face decisions about whether to pay for basic needs—like rent or putting food on the table—or paying for health services.

The Impact of HB 937 on Blue Mountain and Our Patients

28. Blue Mountain now also must contend with threats to its ability to provide abortion services due to HB 937. Blue Mountain has been operating as a private clinicians’ office regulated under Title 37 of the Montana Code, and at the same physical location, for decades. It is unclear to me whether HB 937 would require Blue Mountain to obtain a facility license, or whether we can continue to operate under the regulations to which we are already subject. If Blue Mountain *must* become licensed as a facility, it is unclear to me how we can do that, as DPHHS has not yet even proposed regulations setting out requirements for licensure or the process by which we could apply for a facility license.

29. Mandating additional regulation through facility licensure simply because Blue Mountain provides abortion care is unnecessary and irrational. To take just one example, HB 937 would not apply to Blue Mountain at all if we ceased providing abortion care but continued to provide every other service we offer—including nearly identical miscarriage care—under existing laws and in the same physical facility. Mandating facility licensure solely because we provide abortion care also makes no sense when some patients will never come in person to Blue Mountain’s facility because they access abortion via telehealth.

30. Blue Mountain has been providing abortion care for 46 years, and almost 30 years at the same location. HB 937 identifies no problem with the abortion care Blue Mountain has

provided throughout that long history of serving its community. Yet, HB 937 threatens to disrupt the care Blue Mountain has been providing in Montana for decades and it threatens to destabilize its entire practice. That threat results from numerous angles, including the uncertainty as to whether Blue Mountain even has to seek facility licensure; the absence of any regulations outlining what Blue Mountain would have to do to become licensed if we are required to; and the lack of time to implement the unknown requirements, or whether any are forthcoming.

31. Although Blue Mountain has contacted DPHHS regarding the timing of any proposed new rules under HB 937, it has not provided any indication that proposed rules are forthcoming or will be made public before HB 937 takes effect on October 1, 2023.

32. Even if DPHHS is somehow able to propose, hold a public comment period, and finalize rules under HB 937 before October 1, 2023, HB 937 provides for numerous and various requirements for licensure, which will undoubtedly take time to assemble into an application, and it will take time for DPHHS to review and approve the same. Even under the most ideal of circumstances, assuming that there are no delays or issues with an application, there will necessarily be a period during which HB 937 means Blue Mountain Clinic cannot provide abortion care—and through no fault on the part of the Clinic.

33. The chaos and uncertainty HB 937 is causing is unnecessary, but not new. It is part and parcel of the disruption that Blue Mountain has had to endure simply because it provides abortion care. This year's State legislative session was one of the most heated on record. At one point in time, Blue Mountain was advocating against *thirteen* egregious bills which sought to significantly restrict abortion access, and another five bills which discriminated against LGBTQ+ Montanans. The bills also perpetuated lies and inflammatory language meant to shame and stigmatize. None of them improve health outcomes or increase access to healthcare for families.

Multiple proposed laws and policies included immediate or near-immediate effective dates, threatening to require Blue Mountain to immediately retool or fundamentally overhaul our practice. Fortunately, the laws that passed and about which we were most concerned have been blocked by court orders.

34. Abortion is time-sensitive health care, and Blue Mountain works to schedule appointments for patients seeking abortion care as soon as we are able to. We are the only clinic in Montana that provides abortion care five days every week, and our family medicine practice is also busy five days a week. The threat of ever-changing laws and policies disrupts and strains our clinicians, administrative staff, and confuses our diverse patient population, to the point where patients may believe abortion is no longer a legal option for them. Each of us needs to be able to plan, to know what our schedule will look like the next day or the next week (to the best we are able), and so any energy spent on emergencies is about emergent issues our patients bring to us. We should not additionally need to address emergencies foisted upon us by legislators.

35. Should HB 937 take effect and require facility licensure that Blue Mountain is unable to obtain before October 1, our patients will be delayed or unable to access abortion care from their chosen provider. Existing appointments will either have to be rescheduled, if possible, given the timing of obtaining the license, or patients will have to be referred elsewhere, including out of State. Some will not be able to meet the challenges of rescheduling or accessing care elsewhere and will be compelled to continue their pregnancies and to give birth against their will, bearing all the attendant health risks, burdens, and costs of carrying a pregnancy to term and unplanned parenthood.

36. The impact of changes mandated by HB 937 will inevitably ripple out and harm our family medicine patients—many of whom turn to Blue Mountain as their primary care

provider. HB 937 requires DPHHS to promulgate regulations across 15 categories. Although regulations are not yet known, I am concerned about the scope and breadth of the changes the regulations may require Blue Mountain to implement solely because we provide abortion care. The regulations may require extensive and time-consuming changes, forcing Blue Mountain to allocate time and resources that otherwise would have been spent with patients, to determining how to comply with HB 937's new regulations. Ultimately, HB 937 may force Blue Mountain to decide between continuing to provide abortion care subject to a separate, new regulatory scheme, or eliminating the abortion services we have provided since our founding so that the entire Clinic is not forced to overhaul our practice or physical facility. HB 937's yet-unknown regulations may require significant changes to Blue Mountain's practice or physical facility, given the fifteen categories across which HB 937 requires DPHHS to promulgate regulations. As a non-profit clinic, we do not have funding available for infrastructure remodels; we would have to fundraise if physical changes to our facility are required.

37. For the reasons described above, HB 937 will not improve patient health or care that Blue Mountain has provided for the past 46 years, it will only impede the necessary and protected right to abortion care in the State of Montana.

38. Under these circumstances, absent a temporary restraining order or preliminary injunction, Blue Mountain will have to cease providing necessary abortion care to Montanans and patients travelling from surrounding states. Since access to abortion care is time-sensitive, any disruption or delays in being able to provide such care will prevent some patients from getting abortion care at all.

HB 937's Provision for Annual Inspections and Additional Investigations Will Only
Interrupt and Restrict Safe Abortion Access

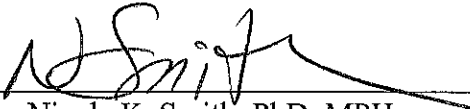
39. Though HB 937 contains few details regarding licensure requirements for “abortion clinics,” it does provide that DPHHS must inspect “abortion clinics” at least once each calendar year. An annual inspection will interrupt access and intimidate patients from receiving abortion care and will disrupt other care that Blue Mountain provides to its patients. There is no health or safety reason to require such annual inspections only for facilities that provide abortion care, but not miscarriage care, which is identical or comparable. HB 937 is meant to stigmatize abortion care by singling out one aspect of health care and scrutinizing it—with the intention of shutting off access to that care altogether.

40. Under HB 937, DPHHS may conduct additional investigations if it receives a complaint involving an abortion clinic. Because HB 937 does not limit or specify the degrees or types of complaints that would trigger additional investigation by the DPHHS, I am concerned about the possibility of overreach by the DPHHS. Anti-abortion organizers and protesters already target Blue Mountain, its providers and patients with harassment and threats. By providing a mechanism for anti-abortion organizers and protesters to complain to the DPHHS, HB 937 will encourage unnecessary and baseless investigations that will further disrupt and restrict Blue Mountain’s ability to provide medical services, including abortion care, to its patients.

41. Special licensure and oversight of abortion care by DPHHS is unnecessary. Abortion is safe and essential care that should be protected, and not restricted or taken away, especially at a time when abortion access is being restricted across the country.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 30 August 2023



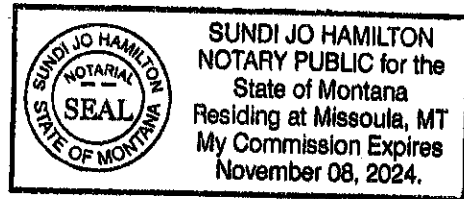
Nicole K. Smith, PhD. MPH


State of Montana)

)

County of Missoula)

Signed and affirmed to me this 30 day of 8/2023.





Notary Public

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit in Support to the following on 09-01-2023:

Austin Miles Knudsen (Govt Attorney)

215 N. Sanders

Helena MT 59620

Representing: Charlie Brereton, State of Montana, Department of Public Health and Human Services

Service Method: eService

Electronically signed by Krystel Pickens on behalf of Alexander H. Rate

Dated: 09-01-2023