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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

PLANNED PARENTHOOD OF MONTANA; et al., Plaintiffs, v. STATE OF MONTANA; et al., Defendants.	Cause No.: CDV 23–299 Honorable Kathy Seeley **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER[1]**

INTRODUCTION

The Montana Legislature has adopted a new legal standard that applies to granting a temporary restraining order before a preliminary injunction hearing is held. To Defendants' knowledge, this case presents the first opportunity for a court to apply this new standard to a constitutional challenge of an administrative rule promulgated by a state agency—here, the

[1] This Brief responds only to Plaintiffs' request for the issuance of a temporary restraining order until a hearing on their request for a preliminary injunction and writ of prohibition can be held. Defendants intend to separately respond to the application for preliminary injunction and writ of prohibition and preserve all arguments with respect to those issues.

Montana Department of Public Health and Human Services ("DPHHS"). Plaintiffs are not entitled to a temporary restraining order enjoining the rule at issue, which amends Mont. Admin. R. 37.82.102 and 37.86.104, Montana Administrative Register ("MAR") Notice 37-1024, proposed in the December 23, 2022 MAR and adopted in the April 28, 2023, MAR ("the Rule"). Plaintiffs cannot meet the burden of proof imposed by the new standard. Therefore, the Court must deny Plaintiffs' request for a temporary restraining order.

FACTUAL AND PROCEDURAL BACKGROUND

DPHHS has an obligation to ensure that the Montana Medicaid Program ("Medicaid") only pays for or reimburses health care providers for services for which there is statutory authority. This obligation arises from the Governor's responsibility to "see that the laws are faithfully executed." Mont. Const. Art. VI, § 4(a). Under the Montana statutes authorizing Medicaid, DPHHS is required to provide necessary medical services to eligible persons ("Medicaid beneficiaries") who have need for medical assistance. In *Jeannette R. v. Ellery*, a district court case addressing an administrative rule limiting Medicaid coverage to situations where the federal Hyde Amendment would permit federal financial participation, the court concluded that DPHHS had a statutory obligation to pay for medically necessary abortions, regardless of whether they met the standards in the Hyde Amendment. *Jeannette R. v. Ellery*, BDV-94-811, 1995 Mont. Dist. LEXIS 795 (1st Jud. Dist., May 22, 1995). The district court made it clear, however, that its decision did not apply to elective abortions and that there is no statutory or constitutional obligation for Medicaid to paid for elective, nontherapeutic abortions: "It is clear that the state need not fund nontherapeutic elective abortions." *Id.* at *29.

The 2021 Montana Legislature directed DPHHS to review and report on the history, utilization data, policies, rules, and definitions for Medicaid-reimbursed abortions. During the September 2021 meetings of the applicable interim legislative committees, DPHHS presented its report, "Abortion Services and Montana Medicaid."[2] The interim committees requested that DPHHS conduct an in-depth review of abortion claims paid by Medicaid, as well as a legal review of the current state of the law concerning Medicaid-reimbursed abortions. DPHHS, using the services of a contractor, reviewed all Medicaid-reimbursed abortions for which DPHHS claimed

[2] The report revealed that if a claim was accompanied by a completed Medicaid Healthcare Programs Physician Certification for Abortion Services (MA–37), the claim would be paid, but that no substantive review or auditing of claims for abortions were conducted.

federal financial participation for the 10-year period, July 2011 through June 2021 (6 abortions), as well as 10% of the abortions paid for by Montana Medicaid, using only state funds, based on medical necessity for the 3-year period, July 2019 through June 2021 (79 claims for SFY 2019, 67 claims for SFY 2020, and 75 claims for SFY 2021).

In September 2022, DPHHS presented the results of this analysis to the Interim Budget Committee for Section B. The analysis concluded that the information submitted on or with the MA–37 form lacks sufficient information to verify medical necessity. With respect to medically necessary abortions, DPHHS's contractor reported that the MA–37 forms contained a brief narrative, but only 11.31% (25 claims, submitted by one provider), contained additional documentation. Such additional documentation typically correlated with the vague medical condition of "complications of unintended pregnancy," or an assessment of the situation, rather than documentation to support a medical complication or disease, other than the pregnancy itself. The four conditions routinely indicated on the MA–37 form were (1) pain and suffering (47.5%); (2) emotional stability (24.43%); (3) mental and physical health (9.05%); and (4) complications of unintended pregnancy (19.00%). Ninety claims reviewed related to medication/chemical abortions, but only 10 of such claims included documentation establishing that the requirements of the Physician-Related Services Manual for such abortions were met.

DPHHS's contractor recommended that Medicaid-funded abortion claims should be supported by documentation, including a brief history and physical examination with evidence of the medical diagnosis and/or condition necessitating abortion, an estimate of gestational age, and corroborating laboratory and imaging studies that support the medical diagnosis or patient condition, with such additional information being submitted on (or with) the MA–37 form. The results of the contractor-conducted review of Medicaid-reimbursed abortion claims caused DPHHS grave concern, especially with respect to medically necessary abortions, funded only by State funds: The consistent lack of documentation, coupled with the conditions routinely provided on the MA–37 forms as the basis for medical necessity, led DPHHS to reasonably believe that Medicaid is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions. This concern led DPHHS to adopt the Rule to ensure Medicaid program integrity, to protect the health and safety of Medicaid beneficiaries, and to ensure that Medicaid only pays for medically necessary abortions and not elective, nontherapeutic abortions.

ARGUMENT

"Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order." Mont. Code Ann. § 27-19-314; *see also Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 14, 400 Mont. 1, 462 P.3d 218. "A TRO and an injunction are not equivalent." *Mktg. Specialists v. Serv. Mktg.*, 214 Mont. 377, 388, 693 P.3d P.2d 540, 546 (1985). If issued, a temporary restraining order "generally precedes an injunction and is intended to last only until a hearing is held and a decision made on the injunction application." *Flying T Ranch, LLC*, ¶ 14 (citing *Mktg. Specialists*, 214 Mont. at 388, 693 P.2d at 546).

In 2023, the Montana State Legislature amended Mont. Code Ann. § 27-19-201, which governs the circumstances in which courts can grant injunctive relief. *See* Senate Bill ("SB") 191 (2023), attached as **Exhibit 1**. The Legislature adopted an entirely new legal standard for issuing preliminary injunctions and temporary restraining orders. *Id.* Under this new standard, a temporary restraining order may be granted when the applicant establishes that: a) the applicant is likely to succeed on the merits; b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; c) the balance of equities tips in the applicant's favor; and d) the order is in the public interest. *Id.* at § 1. The Legislature expressly stated its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Id.*; *see also Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (applying identical test adopted in SB 191) (citing *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982)). SB 191 became effective when Governor Gianforte signed it on March 2, 2023. *Id.* at § 5; *see also* https://tinyurl.com/3h8d6jbe.

This new legal standard changes the requirements for obtaining a temporary restraining order in at least the following significant ways:

- The burden of proof to obtain a temporary restraining order is now the same as to obtain a preliminary injunction.

- The former five-part disjunctive test to obtain a preliminary injunction is now a four-part conjunctive test that also applies to temporary restraining orders.

- Whether or not notice is provided, the applicant now bears the burden of proving all four elements are present to obtain a temporary restraining order.

Compare Mont. Code Ann. § 27-19-201 (2021) and Mont. Code Ann. § 27-19-315 (2021) with SB 191; *see also Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (it is not enough for a movant to show a likelihood of success on the merits; a movant must also establish the other three elements to obtain an injunction) (citing *Winter*, 555 U.S. at 20).

Here, Plaintiffs' application for a temporary restraining order should be denied because they cannot meet any of the four required elements. Plaintiffs cannot show a likelihood of success on the merits, a likelihood of suffering irreparable harm, that the balance of the equities tips in their favor, or that a temporary restraining order is in the public interest. Because the test is conjunctive, any one of these deficiencies is sufficient to defeat a temporary restraining order in Plaintiffs' favor.

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

In their application for a temporary restraining order and preliminary injunction, Plaintiffs only assert they are likely to succeed on the merits of their constitutional challenges based on privacy and equal protection (Claims One and Two of their Verified Complaint). (Doc. 10 at 8–15; Doc. 1 at ¶¶ 101–114.) They do not discuss the merits of their claims under Claims Three through Seven. (*Id.*) Therefore, Plaintiffs must show a likelihood of success on the merits as to Claims One and Two to obtain a temporary restraining order.

Satisfaction of a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Franciso v. U.S.*, 944 F.3d 773, 789 (citing *Trump v. Hawai'i*, 138 S. Ct. 2392, 2423 (2018)). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citing *Trump v. Hawai'i*, 138 S. Ct. at 2423).

A. PLAINTIFFS LACK STANDING BECAUSE THEY HAVE NO FUNDAMENTAL OR CONSTITUTIONAL RIGHT TO TAXPAYER REIMBURSEMENT FOR PERFORMING ABORTIONS.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases and controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citing *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, ¶¶ 6–8, 355 Mont. 142, 226 P.3d 567); *see also* U.S. Const. art. III, § 2; Mont. Const.

art. VII, § 4. This language embodies the same limitations as are imposed on federal courts. *Plan Helena, Inc.*, ¶ 6 (citing *Olson v. Dept. of Revenue*, 223 Mont. 464, 469–70, 726 P.2d 1162, 1166 (1986); *Seubert v. Seubert*, 2000 MT 241, ¶ 17, 301 Mont. 382, 13 P.3d 265. Federal precedents are, therefore, persuasive authority for interpreting the justiciability requirements of Article VII, § 4(1) of the Montana Constitution. *Id.* (citing *Armstrong v. State*, 1999 MT 261, ¶¶ 6–13, 296 Mont. 361, 989 P.2d 364).

Standing is a threshold, jurisdictional requirement in every case. *Heffernan*, ¶ 29 (citing *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶19, 312 Mont. 257, 60 P.3d 381). "The parties cannot waive objections to standing . . .[.]" *Id.* (citing *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶48, 337 Mont. 1, 155 P.3d 1247). "The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Id.* at ¶ 30 (citing *Helena Parents Commn. v. Lewis and Clark Cnty. Commrs.*, 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996)). Standing is determined as of the time the action is brought. *Id.* (citing *Becker v. Fed. Election Commn.*, 230 F.3d 381, 386 n. 3 (1st Cir. 2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154–55 (10th Cir. 2005)).

There are two strands to standing: the case-or-controversy requirement imposed by the Constitution, and judicially self-imposed prudential limitations. *Id.* at ¶ 31 (citing *Olson*, 223 Mont. at 469–70, 726 P.2d at 1166 (1986); *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004). For reasons explained below, it is important to distinguish between these two strands. "'The irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)". *Id.* at ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103 (1998)). "Beyond these minimum constitutional requirements, the Supreme Court has adopted several prudential limits: the plaintiff generally must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law invoked." *Id.* (citing *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 12). These rules are "closely related to Art. III concerns but essentially matters of judicial self-governance." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)).

"Similarly, in Montana, to meet the constitutional case-or-controversy requirement, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right." *Id.* at ¶ 33 (citing *Olson*, 223 Mont. at 470, 726 P.2d at 1166; *Bd. of Trustees v. Cut Bank Pioneer Press*, 2007 MT 115, ¶15, 337 Mont. 229, 160 P.3d 482). Thus, standing often turns on the source of the plaintiff's claim, since the actual or threatened injury required by the Constitution might exist solely by virtue of statutes creating legal rights. *Id.* at ¶ 35 (citing *Warth*, 422 U.S. at 500). While discretionary limits on the exercise of judicial power "cannot be defined by hard and fast rules," a litigant may only assert her own constitutional rights or immunities. *Id.* at ¶ 33 (citing *Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Rev.*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997); *Jones*, ¶ 48; *In re B.F.*, 2004 MT 61, ¶ 16, 320 Mont. 261, 87 P.3d 427). "But in all events, the standing requirements imposed by the Constitution must always be met." *Id.* at ¶ 34 (citing *In re Vainio*, 284 Mont. 229, 235, 943 P.2d 1282, 1286 (1997) ("The mere fact that a person is entitled to bring an action under a given statute is insufficient to establish standing; the party must allege some past, present or threatened injury which would be alleviated by successfully maintaining the action."); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991)). "The alleged injury must be 'concrete' rather than 'abstract.'" *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 10, 389 Mont. 122, 126, 406 P.3d 427, 431 (citation omitted). "Allegations of possible future injury are not sufficient." *Meland v. Weber*, 2 F.4th 838, 844 (9th Cir. 2021) (citation omitted); *see also Advs. for School Trust Lands v. State*, 2022 MT 46, ¶ 26, 408 Mont. 39, 505 P.3d 825.

The Montana Supreme Court has carved out a special exception to this well-settled standing jurisprudence. When the State directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures, abortion providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong*, ¶¶ 12–13; *see also Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 250, 440 P.3d 4 ("when 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights.") (quoting *Armstrong*, ¶¶ 8–13).

In reliance on *Armstrong* and *Weems*, Plaintiffs bring their claims on behalf of themselves "and their patients." (Doc 1 at p. 1 and ¶¶ 25–27.) But the U.S. Supreme Court has "disavowed the theories of third-party standing that previously allowed doctors to raise patients' claims in

abortion cases." *Alliance for Hippocratic Med. v. FDA*, 2023 U.S. App. LEXIS 8898, n.4 (5th Cir. 2023) (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 and n.61 (2022) (comparing *Warth v. Seldin*, 422 U.S. 490, 499 (1975) and *Elk Grove Unif. Sch. Dist. v. Newdow* 542 U.S. 1, 15 (2004) with *June Medical*, 140 S. Ct. 2103 (Alito, J. dissenting), *id.* at (Gorsuch, J. dissenting) (collecting cases), and *Whole Woman's Health*, 579 U.S. at 632, n.1 (Thomas, J. dissenting)). In light of this shifting legal landscape, the Court should apply the federal test for third-party standing (also recognized by the Montana Supreme Court), which Plaintiffs cannot meet here.

As a general rule, a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (1975); *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145. The U.S. Supreme Court has recognized a "limited" exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004); *see also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *Baxter*, ¶ 15 (citing *Powers*, 499 U.S. at 410–11). Third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 9, 15, and n.7 (2004). Additionally, parties lack a sufficiently "close relationship" with as-yet unknown clients. *Kowalski*, 543 U.S. at 130–31 (attorneys did not have a close relationship with unknown clients); *see also Baxter*, ¶ 15. Even where enforcement of the challenged restriction *against the litigant* would indirectly violate third parties' rights, the plaintiffs must still establish "a close relationship" with the third party, which does not exist with hypothetical clients. *See id.* (emphasis in the original); *Baxter*, ¶ 15.

Plaintiffs have failed to demonstrate sufficient third-party standing in this case. They have neither pled nor argued that they have a "close relationship" to the Medicaid-qualified women for whom they perform abortions or a hindrance to these women's ability to bring suit. (*See generally* Doc. 1 and Doc. 10.) "A woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting) *abrogated by Dobbs*, 142 S. Ct. at 2275 and n.61. Moreover, "abortionists have a 'financial interest in avoiding burdensome regulations,' while women seeking abortions 'have an interest in the preservation of regulations that protect their health.'" *Id.* Finally, Plaintiffs

have no constitutional or fundamental rights to perform abortions or to have them reimbursed by taxpayer-funded programs like Medicaid. They cannot establish a concrete injury in fact sufficient to confer standing. Because they cannot clear this threshold jurisdictional issue, they are not likely to succeed on the merits of their claims, and a temporary restraining order should not issue.

B. THE RULE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PRIVACY OR EQUAL PROTECTION.

To obtain a temporary restraining order, Plaintiffs must establish a likelihood of success on the merits on their claims that the Rule violates the constitutional rights of privacy or equal protection. Here, Plaintiffs improperly conflate the availability of abortion and the right to terminate a pre-viability pregnancy (based on the constitutional right to individual privacy recognized in *Armstrong* and its progeny), with whether the State (DPHHS) will pay for such abortions through Medicaid for Medicaid beneficiaries.[3] Both Montana and the federal case law is clear that these are two distinct issues. For example, in holding that the Montana Medicaid statute requires Medicaid to pay for medically necessary abortions, the district court in *Jeannette R.* made clear that its decision did not apply to elective abortions and that there is no statutory or constitutional obligation for Medicaid to pay for elective, nontherapeutic abortions: "It is clear that the state need not fund nontherapeutic elective abortions." 1995 Mont. Dist. LEXIS 795, *29. *Cf., e.g., Beal v. Doe*, 432 U.S. 438 (1997) (no Social Security Act requirement that a State include funding of elective abortions in its Medicaid program); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding, against federal constitutional challenge, a state regulation that required prior authorization for state Medicaid benefits for medically necessary abortions).

1. Plaintiffs Fail to Establish that the Rule's Physician Requirement Violates the Constitutional Rights to Privacy or Equal Protection.

The clearest indication of Plaintiffs' conflation of a woman's right to abortion and the issue of whether Medicaid will pay for an abortion is their arguments that the Rule's "physician requirement" violates a woman's right to personal autonomy over her decision on whether to

[3] In an effort to improperly shift the burden to Defendants, Plaintiffs' brief contends that the Rule fails because the measures adopted are not designed to address medically acknowledged bona fide health risks, citing *Armstrong*. (*See, e.g.*, Doc 10 at 8, 10.) This statement represents the Supreme Court's framing of the strict scrutiny test for the context in which *Armstrong* arose. But that does not mean that the Supreme Court would use that formulation of the strict scrutiny test where, as here, the issue is not the right to abortion (or the legality of certain abortion proscriptions), but whether the State is required to pay for certain abortions through Medicaid and the conditions that it can impose to ensure that payment is consistent with the purposes of Medicaid.

obtain an abortion and her equal protection rights. Unless a health insurer, such as Medicaid, blanketly pays all claims without regard to waste, fraud or abuse—or without regard to whether a health care or related service is medically necessary—it necessarily has to interact with a patient and his or her health care provider. Unlike the abortion provider, who does not have a continuing relationship with a pregnant woman, Medicaid has ongoing relationship with—and responsibility to—Medicaid beneficiaries, including those pregnant women who choose an abortion. While Medicaid cannot cover abortions that are not medically necessary, if an abortion is medically necessary because of a physical or mental health condition, Medicaid could be responsible for covering the necessary treatment to address the condition. If the pregnant Medicaid beneficiary experiences adverse effects of a surgical or medication/chemical abortion, whether the adverse effects are physical or psychology and whether they occur immediately or do not manifest themselves for some time after the abortion, Medicaid would be responsible for providing coverage for the necessary physical and/or mental health services to treat or mitigate those adverse effects, for as long as the woman remains eligible for such Medicaid services.

Medicaid, thus, has an interest in ensuring that its pregnant Medicaid beneficiaries receive abortion-related care directly from highly skilled health care professionals who have the skills necessary to provide the high level of care—to comply with federal and state law, to protect the integrity of the Medicaid program and to protect the health and safety of Medicaid beneficiaries. (*See* Doc.1 at Ex. A at pp. 2358–2361; Doc. 1 at Ex. B, Response Nos. 4, 8, 9, 11, 20, 34.) For these reasons—and the related reasons set forth in this brief, Plaintiffs have failed to establish a likelihood of success on the merits with respect to their claims that the "physician requirement" violates the pregnant woman's rights to privacy and to equal protection.

2. Plaintiffs Fail to Establish that the Rule's Prior Authorization Requirements Violates the Constitutional Right to Privacy.

Plaintiffs' argument that the Rule's prior authorization or prepayment review requirement (and the related documentation requirements) violate the constitutional right to privacy also inappropriately conflates the right to access a pre-viability abortion with the issue of whether Medicaid is required to pay for such abortion for a Medicaid beneficiary. It also presumes that the only way to implement the requirements is an in-person physical examination and then a waiting period while prior authorization is obtained. It, thus, attempts to conflate a decision invalidating a 24-hour waiting period on a woman's right to obtain an abortion with a Medicaid payment

requirement for prior authorization or post-service prepayment review to establish medical necessity for Medicaid payment to be permissible. But courts have upheld such state prior authorization requirements, as against both statutory and constitutional objections. *See, e.g., Maher v. Roe*, 432 U.S. 464, 479-480 (upholding, against constitutional challenge, state regulation requiring prior authorization for state Medicaid abortion benefits, noting that "[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure [sic] that its money is being spent only for authorized purposes"). That Medicaid does not require prior authorization or prepayment review for other reproductive health services does not establish that such a requirement for abortion is an impermissible attempt to interfere with a woman's right to obtain an abortion. Rather, recognizing, as the court did in *Jeannette R.,* that—unlike those other reproductive health services—abortion may be medically necessary, or that it may be an elective, nontherapeutic service, DPHHS determined that the statutory and regulatory framework established by federal and state law requires Medicaid to establish a robust process to obtain the documentation it needs to ensure that a Medicaid-paid abortion is truly medically necessary.[4]

Plaintiffs complain that the Rule impliedly requires an additional, unnecessary in-person examination, followed by a waiting period while prior authorization is obtained—but also rejects, due to risk and payment uncertainty, the option of a post-service prepayment review to determine medical necessity. Given Medicaid's statutory obligation and responsibility to only pay for medically necessary services—and Medicaid's recent determination, based on its contractor's utilization review that the documentation that it has been receiving is insufficient to confirm providers' medical necessity claims—it must have a mechanism for getting the necessary documentation. Requiring documentation contemporaneous to the abortion service ensures that the abortion provider has a fair opportunity to obtain or generate the required documentation. And, assuming that the abortion provider is accurately assessing and documenting medical necessity, the risk that an abortion claim would be rejected in post-service prepayment review is no greater than the risk that Medicaid (or any other insurer) would determine that a service is unnecessary or otherwise not covered and, thus, deny payment. Accordingly, Plaintiffs' arguments fail to establish their likelihood of success on the merits on this claim.

[4] Plaintiffs dismiss one basis for the level of documentation required by the Rule as a non sequitur, ignoring all the other bases for requiring such documentation set forth in the proposal and adoption notices. *See also supra*.

3. Plaintiffs Fail to Establish that the Rule's Definition of Medical Necessity Violates the Constitutional Right to Privacy.

Just as other insurers do, in the Rule, DPHHS provides a specific definition of what constitutes medically necessary (or therapeutic) abortions, to also provide clear guidance on what constitutes elective nontherapeutic abortion—and, thus, in what circumstances abortions are and are not covered by Medicaid. (Doc. 1 at Ex. A at 2359.) Plaintiffs' argument that Defendants lack justification for this definition (and the documentation requirements) misconstrues the conclusions of the DPHHS contractor's review of paid abortion claims. While the contractor found "100% compliance" with the requirement to complete and sign the simple MA–37 form,[5] the contention that the contractor "did not point to a single claim for an abortion that it did not believe was medically necessary" seriously misconstrues its conclusion: As noted in the proposal notice (Doc. 1 at Ex. A at 2357), the contractor's analysis concluded that the information submitted on or with the MA–37 form lacks sufficient information to support medical necessity and recommended that Medicaid-funded abortion claims should be supported by documentation of clinical information being submitted on or with the MA–37. Plaintiffs have not established a likelihood of success on the merits of this claim.

4. Plaintiffs Fail to Establish that the Rule Impermissibly Discriminates Against Pregnant Medicaid Beneficiaries Who Seek Abortion.

Citing *Jeannette R.*, Plaintiffs contend that the fact that the Rule only imposes requirements on pregnant Medicaid beneficiaries who seek abortion, and not on other pregnant Medicaid beneficiaries—through the requirements imposed on abortion providers that seek Medicaid payment for their services–means that Medicaid impermissibly discriminates against them, in violation of the Equal Protection Clause. This argument misconstrues *Jeannette R.* and defies common sense.

Jeannette R. addressed whether Medicaid is required to cover medically necessary abortions that did not meet the Hyde Amendment requirements. While it found that Medicaid is required to cover such services, the decision is clear that the state need not fund nontherapeutic elective abortions. *Jeannette R.*, 1995 Mont. Dist. LEXIS 795 at *29. The purpose of the requirements in the Rule—the definition of medical necessity, prior authorization/prepayment

[5] As DPHHS explained to the interim committees, Medicaid denied any abortion claim not accompanied by a signed MA–37 form.

review, documentation requirements, etc.[6]—is to ensure that the abortions Medicaid pays for are medically necessary (not elective and nontherapeutic), consistent with the Montana Medicaid statute's limitation on payment for medical services and meet appropriate clinical requirements to ensure the health and safety of the Medicaid beneficiary receiving the abortion. These requirements are narrowly tailored to meet these important governmental purposes.[7] With respect to this equal protection issue, the only specific aspect of the Rule that Plaintiffs complain about is that it provides a definition of medical necessity specific to abortion which leaves out many medically necessary abortions that would otherwise have been covered. However, the only example Plaintiffs provide is that it would exclude abortions for lethal fetal conditions or diagnoses—with no explanation of how such abortions would be covered by the general definition of medical necessity. Plaintiffs fail to meet their burden to establish that the Rule discriminates against pregnant Medicaid beneficiaries in violation of the Equal Protection Clause.

II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM BEFORE THE COURT RULES ON THE APPLICATION FOR PRELIMINARY 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, Arther 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"). Issuing a temporary

[6] As explained in the proposal notice (Doc. 1 at Ex. A at 2359–61), it is DPHHS's practice to require prior authorization especially where there may be questions as to whether the service is medically necessary, e.g., when the service elective or therapeutic in nature, and that it is not unusual for DPHHS to require providers to submit additional documentation, clinical or otherwise, to support their claim that particular services are covered by Medicaid and that the particular claim should be paid. It is, thus, inaccurate to suggest that a prior authorization/prepayment review requirement shows some type of discriminatory animus against pregnant Medicaid beneficiaries who seek abortion. It is merely a recognition that abortion is a type of service that, in one situation, may be medically necessary and therapeutically appropriate, but may not be medically unnecessary, therapeutically inappropriate and an elective service in another situation—and that Medicaid needs a documentary process to establish which one it is.

[7] *See, e.g., Maher v. Roe*, 432 U.S. 464 (1977) (upholding against constitutional challenges a state regulation requiring prior authorization of abortion and provision of certain documentation to support medical necessity).

restraining order or preliminary injunction based only on a possibility of irreparable harm is inconsistent with the U.S. Supreme Court's characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Winter* 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citing *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

Typically, monetary harm does not constitute irreparable harm. *L.A. Memorial Coliseum Commn. v. Natl. Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *see also Sampson v. Murray*, 415 U.S. 61, 90, (1974) (temporary loss of income does not usually constitute irreparable injury and the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") Constitutional violations, however, "cannot be adequately remedied through damages." *Stormans, Inc. v. Seleky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citing *Nelson v. Natl. Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). But because the Rule does not violate the constitutional rights of Plaintiffs or their patients, they cannot show likelihood of irreparable injury in the absence of a temporary restraining order.

The Rule addresses when Medicaid will pay for abortion services, consistent with the statutory requirement to cover medically necessary services, which has been interpreted to include the requirement to cover medically necessary abortion services—but not elective, nontherapeutic abortions. Unlike the restrictions at issue in *Armstrong*, *Weems*, and *Planned Parenthood of Mont.*, DV 21–0999, 2021 WL 9038524 (13th Jud. Dist. 2021), nothing in the Rule precludes plaintiffs from continuing to provide abortion services to Medicaid beneficiaries as they have in the past, to the extent that such services are otherwise legally permissible. The only issue is whether *Medicaid* will pay for those services.[8] If Plaintiffs end up being correct about the merits of their claims—which Defendants deny—an order requiring the payment of their claims for abortion services

[8] That is not unique to Plaintiffs—for example, all Medicaid providers run the risk that Medicaid, based on review of a claim by its utilization review contractor, will determine that a service is not medically necessary and either deny payment of the claim or seek recoupment of a previously paid claim.

provided to Medicaid beneficiaries will make them whole. This, thus, is a situation where the availability of damages at a later stage of the litigation precludes a determination of irreparable harm in the absence of a temporary restraining order.[9]

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR DEFENDANTS.

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.*, 634 F.2d at 1203.

Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman*, 822 F.3d at 1023 (quoting *Stormans, Inc.*, 586 F.3d at 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quoting *Bernhardt v. L.A. County*, 339 F.3d 920, 931 (9th Cir. 2003)). "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." *Id.* (citation omitted). 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 mertis, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger*, 456 U.S. at 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).

Here, the balance of the equities and the public interest favors Defendants. The State and DPHHS as Defendants have a number of interests and equities which outweigh the interests of Plaintiffs and Medicaid beneficiaries with respect to the Rule. Defendants have the constitutional concern that the laws be faithfully executed. Here, that interest is to ensure Medicaid program integrity by ensuring that Medicaid only pays for health care services that are medically necessary

[9] Defendants also note that Medicaid has issued a provider notice, exercising enforcement discretion, to delay the required compliance with the Rule for one week, or until May 8, 2023.

(as required by statute) and, thus, that it does not pay for elective nontherapeutic abortions. Defendants also have an interest in protecting the health, safety, and well-being of Medicaid beneficiaries by imposing conditions on payment of Medicaid services, including medically necessary abortions, to help ensure that the services are high quality and performed by the appropriate level of health care professional.

Plaintiffs' interests (as distinct from those of their potential patients) amount to their interest in obtaining Medicaid coverage for the abortions they perform on Medicaid beneficiaries—abortions which may or may not meet the reasonable standard for medical necessity set forth in the Rule (or any reasonable standard for therapeutic abortions) and may, in fact, constitute elective abortions. Plaintiffs have no legitimate interest in having Medicaid pay them for abortions for Medicaid beneficiaries which are not medically (therapeutically) necessary and do not meet the reasonable health and safety requirements that Medicaid, acting in the best interests of its beneficiaries, has imposed as a condition for payment.

Assuming (without conceding) that Plaintiffs have standing to assert the interests of potential future patients (including Medicaid beneficiaries), Medicaid beneficiaries as individuals have an interest in the constitutional right to access to abortion. But that right does not extend to the right to have Medicaid pay for any and all abortions, regardless of whether they are medically necessary or are, in fact, elective, nontherapeutic abortions or are (or are not) performed consistent with conditions designed to ensure their health and safety. Montana taxpayers also have an interest here—that their tax dollars only be spent for services that the legislature has authorized, especially in light of the highly charged nature of abortion, the fact that abortion results in the taking of the life of a human being, and the fact that only state funds can be used for most Medicaid-covered abortions. The balance of the equities and the public interest in these circumstances favor Defendants.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' Application for a Temporary Restraining Order.

DATED this 1st day of May, 2023.

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EXHIBIT 1

AN ACT REVISING PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER LAWS; INCORPORATING THE FEDERAL STANDARD FOR A PRELIMINARY INJUNCTION INTO MONTANA LAW AS THE GENERAL STANDARD FOR A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER; REQUIRING THE APPLICANT FOR A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER TO SHOW WHY AN INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED; PROVIDING A DECLARATION OF LEGISLATIVE INTENT; AMENDING SECTIONS 27-19-201, 27-19-301, AND 27-19-315, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-19-201, MCA, is amended to read:

"**27-19-201. When preliminary injunction may be granted -- legislative intent.** ~~An injunction order may be granted in the following cases:~~

~~(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;~~

~~(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;~~

~~(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;~~

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

(a) the applicant is likely to succeed on the merits;

(b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;

(c) the balance of equities tips in the applicant's favor; and

(d) the order is in the public interest.

(2) An injunction order may be granted in either of the following cases between persons, not including a person being sued in that person's official capacity:

~~(4)~~(a) when it appears that the adverse party, ~~during the pendency of~~ while the action is pending, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, in which case an injunction order may be granted to restrain the removal or disposition; or

~~(5)~~(b) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

(3) The applicant for an injunction provided for in this section bears the burden of demonstrating the need for an injunction order.

(4) It is the intent of the legislature that the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law."

Section 2. Section 27-19-301, MCA, is amended to read:

"**27-19-301. Notice of application -- hearing.** (1) No preliminary injunction order may be issued without reasonable notice to the adverse party of the time and place ~~of the making of the application therefor~~ that application for the injunction order was made.

(2) Before granting an injunction order, the court or judge shall make an order requiring cause to be shown, at a specified time and place, why the injunction should ~~not~~ be granted, and the adverse party may in the meantime be restrained as provided in 27-19-314."

Section 3. Section 27-19-315, MCA, is amended to read:

"**27-19-315. When restraining order may be granted without notice.** A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if:

(1) ~~it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay~~

~~would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition~~ the applicant or the applicant's attorney makes a showing that the requirements of 27-19-201(1) are met; ~~and~~ and

(2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant's claim that notice should not be required."

Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 5. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,

SB 191, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____day

of_____, 2023.

_____

Speaker of the House

Signed this _____day

of_____, 2023.

SENATE BILL NO. 191

INTRODUCED BY S. FITZPATRICK

AN ACT REVISING PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER LAWS; INCORPORATING THE FEDERAL STANDARD FOR A PRELIMINARY INJUNCTION INTO MONTANA LAW AS THE GENERAL STANDARD FOR A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER; REQUIRING THE APPLICANT FOR A PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER TO SHOW WHY AN INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED; PROVIDING A DECLARATION OF LEGISLATIVE INTENT; AND AMENDING SECTIONS 27-19-201, 27-19-301, AND 27-19-315, AND 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

CERTIFICATE OF SERVICE

I, Emily Jones, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 05-01-2023:

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