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MONTANA FIRST JUDICIAL DISTRICT COURT,
COUNTY OF LEWIS AND CLARK

PLANNED PARENTHOOD OF MONTANA; ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; SAMUEL DICKMAN, M.D.; and HELEN WEEMS, APRN-FNP, on behalf of themselves and their patients Plaintiffs, vs. STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services Defendants.	)	Cause No.: C DV-25-2023-0000299-OC Judge: Presiding Judge: Hon. Kathy Seeley **VERIFIED COMPLAINT AND PETITION FOR DECLARATORY RELIEF, PERMANENT INJUNCTION, PRELIMINARY INJUNCTION, AND TEMPORARY RESTRAINING ORDER**

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Plaintiffs Planned Parenthood of Montana ("PPMT"); All Families Healthcare ("All Families"); Blue Mountain Clinic ("Blue Mountain"); Samuel Dickman, M.D.; and Helen Weems, APRN-FNP (collectively, "Plaintiffs") bring this Verified Complaint on behalf of themselves and their patients against the State of Montana; the Montana Department of Public Health and Human Services ("DPHHS"); and Charlie Brereton, in his official capacity as Director of DPHHS, and in support thereof state the following:

PRELIMINARY STATEMENT

1. Plaintiffs challenge a DPHHS rule amending Mont. Admin. R. 37.82.102 and 37.86.104, which was proposed at Montana Administrative Register ("MAR") Notice 37-1024 and adopted as proposed in the April 28, 2023, edition of the MAR ("the Rule"). *See* Notice of Public Hearing on a Proposed Amendment (attached hereto as Exhibit A); Notice of Amendment (attached hereto as Exhibit B).[1] The Rule has the purpose and effect of depriving low-income Montanans of access to abortion. This is in clear conflict with the Montana Constitution, legal precedent of this Court and the Montana Supreme Court, and the Montana Administrative Procedure Act ("MAPA"). *See Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (1st Jud. Dist., May 22, 1995) (Medicaid may not exclude coverage for medically necessary abortions); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (restrictions on abortion access trigger strict scrutiny, and ban on physician assistants providing abortions does not withstand strict scrutiny); *Weems v. State* ("*Weems I*"), 2019 MT 98, 395 Mont. 350, 440 P.3d 4 (physician and physician assistant-only law violates

[1] The Notice of Amendment, which was published in the MAR on April 28, 2023, provides that the Rule will be adopted as proposed and therefore does not include a new final version of the Rule. Thus, the proposed rule in Exhibit A is the final version of the Rule.

strict scrutiny); and Order — Mots. Sum. J., *Weems v. State* ("*Weems II*"), No. ADV-2018-73 (1st Jud. Dist., Feb. 25, 2022) ("*Weems II* Order") (same), *appeal pending* No. DA 22-0207 (entering permanent injunction).

2. Montana has a comprehensive health coverage scheme for its low-income residents. Through its medical assistance program, Montana Medicaid, the State funds all covered services. And for nearly twenty years, DPHHS has included medically necessary abortion services among those covered services, as required by *Jeannette R.*

3. The Rule imposes several onerous and unnecessary additional restrictions on this most vulnerable patient population. It bans Medicaid coverage for abortions provided by advanced practice clinicians ("APCs") such as physician assistants and nurse practitioners, even though APCs currently provide a majority of abortions in the state. This directly contravenes *Armstrong*, *Weems I*, and *Weems II*, which held that barring Montanans from accessing abortions from APCs violates the Montana Constitution.

4. The Rule requires prior authorization from DPHHS before an abortion can be provided to Medicaid patients[2]—a process that, despite the time-sensitive nature of abortion, is not time-bound and imposes a de facto waiting period on access to care. It also requires Medicaid patients to undergo an in-person physical examination before getting an abortion. As a result, the Rule will eliminate access to abortion via telehealth for Medicaid-eligible Montanans and force patients who already face significant economic hardship to make an unnecessary in-person visit to a clinic. As

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

this Court recognized when it granted a preliminary injunction in *Planned Parenthood of Montana v. State by & through Knudsen*, No. DV-21-0999, 2021 WL 9038524 (13th Jud. Dist., Oct. 7, 2021), which was affirmed by the Montana Supreme Court in *Planned Parenthood of Montana v. State by & through Knudsen* ("*PPMT v. State*"), 2022 MT 157, 409 Mont. 378, 515 P.3d 301, laws that require patients to make an unnecessary in-person visit to receive a physical exam—thereby also imposing a ban on telehealth for abortion and a de facto waiting period—violate the Montana Constitution.

5. In contravention of *Jeannette R.*, the Rule imposes on abortions a new and narrow definition of "medically necessary service," singling out for differential treatment low-income Montanans seeking abortions and their providers.

6. Montanans impacted by the Rule are by definition low-income, and for most of them, the denial of coverage is tantamount to a ban. The Rule will thus force the most vulnerable in the state to continue their pregnancies and give birth, with all of the emotional, physical, and life-altering consequences this entails. Even those who manage to reach one of the few physicians whom Medicaid will continue to reimburse for abortions—and who also manage to go through the prior authorization process—will be able to do so only after facing significant logistical and financial challenges and delay, during which they will be forced to continue to experience the symptoms and risks of pregnancy.

7. At a time when abortion access in Montana and throughout the nation is in peril, the Rule singles out the poorest Montanans for denial of access to medically necessary abortions.

8. The Notice of Adoption of the Rule was published in the Montana Administrative Register on April 28, 2023, and the Rule will take effect on May 1, 2023. Ex. B at 430.

9. Undersigned counsel for Plaintiffs twice asked DPHHS to consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule to allow Plaintiffs time to seek judicial relief in an orderly, non-emergency fashion; both times, the agency refused. *See* Jan. 23, 2023 Letter to DPHHS (attached hereto as Exhibit C); Jan. 25, 2023 Email from Paula Stannard (attached hereto as Exhibit D); April 21, 2023 Letter to DPHHS (attached hereto as Exhibit E); April 26, 2023 Letter from Paula Stannard (attached hereto as Exhibit F).

PARTIES

10. Plaintiff PPMT is a not-for-profit corporation organized under the laws of Montana. It is headquartered in Billings and operates five health centers: two in Billings (Planned Parenthood Heights and Planned Parenthood West), one in Missoula, one in Great Falls, and one in Helena. Planned Parenthood Heights is temporarily closed because of flooding damage.

11. PPMT provides a wide array of clinical, educational, and counseling services. It is the largest provider of reproductive health care in Montana, serving more than 11,000 people annually. PPMT provides a wide array of medical services, including abortion. It provides medication abortions (both in person and via telehealth) through 11 weeks, as measured from the first day of the last menstrual period ("LMP"), and procedural abortions through 21 weeks and 6 days ("21.6 weeks") LMP.

12. Providing low-income Montanans with access to sexual and reproductive health services is a critical part of PPMT's mission, and a significant portion of PPMT's patient population is low-income. Of all abortions provided at PPMT in 2022, 45% were covered by Medicaid.

13. Plaintiff Samuel Dickman, M.D., is a Medicaid-enrolled physician licensed to practice medicine in Montana. At PPMT, Dr. Dickman provides medication abortions through 11 weeks LMP and procedural abortions through 21.6 weeks LMP.

14. Plaintiff All Families is a for-profit corporation and a sexual and reproductive health clinic in Whitefish that provides LGBTQ+ care and gender-affirming care for transgender people, gynecological exams, diagnosis and treatment of sexually transmitted infections, contraception, and abortion care. All Families has been serving the Flathead Valley and patients across Montana since it opened in 2018 and serves approximately 600 patients annually, accounting for nearly 2,000 patient visits. All Families provides medication abortions (in person and via telehealth) up to 11 weeks LMP and procedural abortions up to 12.6 weeks LMP. More than half of patients seeking abortions at All Families are insured through Medicaid.

15. Plaintiff Helen Weems is a Medicaid-enrolled certified nurse practitioner licensed to practice in Montana with over 20 years of clinical experience. She owns All Families and is its sole clinician. Ms. Weems is also the sole abortion provider in the Flathead Valley.

16. Plaintiff Blue Mountain is a not-for-profit family practice in Missoula. Blue Mountain Women's Clinic first opened in 1977 as the first and only abortion clinic in Montana. In 1991, Blue Mountain expanded its health services to include comprehensive family

medical care to better serve its community. Blue Mountain serves 3500 patients annually, accounting for 7000 visits. It provides care across the lifespan, from pediatric care to elder care, including wellness exams, contraception, abortion care, and gynecological care. Blue Mountain provides medication abortions (in person and via telehealth) up to 11 weeks LMP and procedural abortions up to 21.6 weeks LMP. Almost 40% of patients seeking abortion care at Blue Mountain are insured through Medicaid.

17. Plaintiffs participate in the Montana Medicaid program and receive reimbursement for medically necessary medication abortions using mifepristone up to 10 weeks LMP and medically necessary procedural abortions up to 21.6 weeks LMP that they provide to Montanans on Medicaid. Plaintiffs sue on their own behalf; on behalf of their current and future clinicians, servants, officers, and agents; and on behalf of their patients.

18. Defendant State of Montana is a governmental entity subject to suit for injuries to persons. Mont. Const. art. II, § 18.

19. Defendant DPHHS is a governmental entity subject to suit for injuries to persons. Mont. Const. art. II, § 18. DPHHS administers the Montana Medicaid program, including prior authorization and coverage for medical care. DPHHS promulgated and would enforce the Rule unless restrained by this Court.

20. Defendant Charlie Brereton is the Director of DPHHS. He oversees DPHHS's role in Montana Medicaid and will be responsible for enforcing the Rule unless restrained by this Court. Director Brereton is sued in his official capacity.

JURISDICTION AND VENUE

21. Jurisdiction is conferred on this Court by article VII, section 4 of the Montana Constitution and § 3-5-302, MCA.

22. Plaintiffs' claims for declaratory and injunctive relief are authorized by § 27-8-101 *et seq.*, MCA, as well as the general equitable powers of this Court.

23. Plaintiffs' claims for judicial review are authorized by MAPA, §§ 2-4-101 *et seq.*, MCA.

24. Venue is appropriate pursuant to §§ 25-2-126, 25-2-117, MCA, because the State of Montana is a Defendant and PPMT operates a health center in Helena, County of Lewis and Clark, that provides abortions to Montanans eligible for Medicaid.

STANDING

25. Plaintiffs have standing to bring the claims asserted in this Verified Complaint because the challenged laws infringe on the rights of Plaintiffs and their patients under the Montana Constitution and state law.

26. "[W]hen '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." *Weems I*, ¶ 12 (quoting *Armstrong*, ¶¶ 8–13).

27. Plaintiffs also have standing to bring their own claims because the challenged provisions directly infringe on Plaintiffs' rights under the Montana Constitution. *See id.* at ¶ 14 (holding that abortion provider plaintiffs who "are impacted by the statute" have standing to challenge it). But for the challenged provisions, Plaintiffs would provide abortion services to Medicaid-eligible Montanans and would make decisions regarding the medical necessity of those services according to their own medical

judgments, rather than DPHHS's, as they have properly done since 1995 in accordance with *Jeannette R*.

FACTUAL ALLEGATIONS

A. Abortion

28. Abortion, by medication or procedure, is safe and common.

29. Abortion is safer than carrying a pregnancy to term; the risk of death associated with childbirth is approximately 13 times higher than that associated with abortion. Pregnancy-related complications are also more common among people having a live birth than those who get an abortion.

30. Abortion is time-sensitive health care. It is safe throughout pregnancy, but the risk increases incrementally as a pregnancy progresses.

31. Medication abortion is typically provided via a two-drug regimen, which consists of one dose of mifepristone followed up to 72 hours later by one dose of misoprostol; it can also be provided using misoprostol alone. The medication causes the person to pass the pregnancy in a process similar to a miscarriage.

32. Aspiration abortion is the most common technique for early procedural abortions. A clinician dilates the patient's cervix, inserts a thin tube into the uterus, and evacuates the pregnancy. Aspiration abortion usually takes less than ten minutes to complete.

33. For procedural abortions beginning at approximately 15 weeks LMP, clinicians often perform a dilation and evacuation procedure, which involves dilation of the cervix, followed by removal of the pregnancy using a combination of aspiration and instruments, and typically takes less than 30 minutes.

34. Both types of procedural abortion take place in an outpatient setting and are comparable to other reproductive health care procedures, including insertion and removal of intrauterine devices (a long-acting, reversible method of birth control). In particular, miscarriage management is nearly identical to abortion care.

35. Plaintiffs also all provide medication abortion via telehealth. All three provide direct-to-patient telehealth medication abortion, in which a provider meets with a patient via a telehealth visit, confirms that the patient is eligible for medication abortion, and obtains informed consent. The medications are then mailed to the patient at a Montana address. In addition, PPMT provides "site-to-site" telehealth medication abortions, in which a patient at one health center connects via teleconference with an abortion provider at another PPMT health center.

B. Advanced Practice Clinicians

36. For years, APCs have provided safe and effective abortions in Montana, including for Montanans insured through Medicaid.

37. Plaintiffs rely heavily on APCs to provide abortions to their patients.

38. Helen Weems is a nurse practitioner, not a physician. She is the only clinician at All Families and provides all of the abortions sought by its patients. In 2022, more than half of All Families' abortion patients were insured through Medicaid.

39. Blue Mountain has one full-time physician and two physician assistants who provide abortion care. Blue Mountain also has one contract physician who provides abortion care infrequently. In 2022, the physician assistants at Blue Mountain provided approximately 24% of all the abortions covered by Medicaid, including 42% of the medication abortions covered by Medicaid.

40. In 2022, approximately 85% of abortions covered by Medicaid at PPMT were provided by APCs.

41. Montana courts have repeatedly held that restricting the provision of abortion to only physicians violates Montanans' individual right to access abortion from a chosen provider—including a chosen APC. *See Armstrong*, (holding unconstitutional statute that restricted provision of abortion to physicians only); *Weems I* (affirming preliminary injunction against statute that restricted provision of abortion to physicians and physician assistants only); *Weems II* Order (permanently enjoining same statute).

C. Medicaid in Montana

42. Montana provides medical assistance to low-income residents through Medicaid, which is jointly funded by the state and federal governments. Section 53-6-101 *et seq.*, MCA.

43. The Montana Medicaid program was "established for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." Section 53-6-101(1), MCA. When considering changes in Medicaid policy, DPHHS is required to consider the "funding principle" of "protecting those persons who are most vulnerable and most in need, as defined by a combination of economic, social, and medical circumstances." Section 53-6-101(2)(a), MCA.

44. Since the mid-1970s, Congress has adopted versions of the Hyde Amendment restricting federal funding for abortions. Today, federal Medicaid coverage is only available for abortions if the pregnancy results from rape or incest or if the abortion is

necessary to save the pregnant person's life. DPHHS receives federal Medicaid dollars for its coverage of such abortions.

45. Despite restrictions on the use of federal Medicaid funding for abortions, state Medicaid programs may use state funds to reimburse abortion care. Before 1995, Montana's Medicaid program did not cover abortions beyond those permitted by the Hyde Amendment.

46. In *Jeannette R.*, this Court held that the pre-1995 administrative restrictions on Medicaid's coverage of abortions, which were similar to the restrictions at issue here, violated the Montana Constitution's guarantees of privacy and equal protection. It also held that imposing such restrictions via regulation exceeded the agency's authority. As required by the holding in *Jeannette R.*, DPHHS currently reimburses Plaintiffs for medically necessary abortion services using only state funds.

47. DPHHS is authorized to "make rules, *consistent with state and federal law*, establishing the amount, scope, and duration of services to be provided to recipients of public assistance," § 53-2-201(2)(c), MCA (emphasis added), including rules governing the Medicaid program, *see* § 53-6-113, MCA.

48. DPHHS regulations define a "medically necessary service" as

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

(v) cause physical deformity or malfunction.

Mont. Admin. R. 37.82.102(18). This rule applies generally to all medical care covered by Medicaid.

49. Currently, for every abortion covered by Medicaid, the provider completes a certification known as the "MA-037" form, on which the provider indicates (1) if the abortion was necessary to save the patient's life, (2) if the pregnancy resulted from rape or incest, or (3) if the abortion was medically necessary but the patient's life was not in danger. If the third category is selected, the provider includes an explanation for why the abortion is medically necessary. DPHHS does not currently require any additional documentation of medical necessity for abortion or for any other gynecological care sought by Medicaid patients.

D. Procedural History of the Rule

50. DPHHS certified the proposed version of the Rule to the Secretary of State on December 13, 2022, and the proposed rule was published at MAR Notice 37-1024 on December 23, 2022.

51. On January 12, 2023, DPHHS held a public hearing on the Rule via teleconference. The only proponent of the Rule was a representative of the Montana Family Foundation. In contrast, over two dozen affected community members offered testimony in opposition, addressing the devastating consequences of erecting barriers to, and effectively banning, access to abortion for most Medicaid-eligible Montanans. Dr. Dickman, Ms. Weems, and Nicole Smith (Executive Director of Blue Mountain) spoke in opposition to the Rule on behalf of PPMT, All Families, and Blue Mountain, respectively.

52. On January 19, 2023, Martha Fuller (President and CEO of PPMT) and Dr. Dickman submitted joint written comments opposing the adoption of the Rule. On January 20, 2023, Ms. Weems and Ms. Smith submitted written comments on behalf of All Families and Blue Mountain, respectively.
53. DPHHS received dozens of written comments regarding the Rule. *See generally* Ex. B.
54. On January 23, 2023, undersigned counsel asked the agency to consider delaying the Rule's effective date to 90 days after publication of the adoption notice or stipulating to a stay of enforcement. *See* Ex. C. The agency refused. *See* Ex. D.
55. On April 18, 2023, DPHHS certified a Notice of Amendment to the Secretary of State. *See* Ex. B. Despite the numerous comments, DPHHS stated that the final version of the Rule amends Mont. Admin. R. 37.82.102 and 37.86.104 "as proposed." Pursuant to Mont. Admin. R. 1.2.419(1), the Rule was published in the April 28, 2023 edition of the MAR. Absent an injunction, the Rule will take effect on May 1, 2023. Ex. B at 430.
56. The Notice of Amendment also included DPHHS's responses to the comments it received regarding the Rule. *See generally id.*
57. On April 19, 2023, after learning that DPHHS had certified a final version of the Rule to the Secretary of State and submitted it for publication, undersigned counsel contacted Paula Stannard, Chief Legal Counsel for DPHHS, and requested a copy of the Rule, citing the Public Records Act, § 2-6-1002, MCA, and the Montana Constitution's guarantee of the right to observe agency deliberations, Mont. Const. art. II, § 18. *See* April 19, 2023 Letter to DPHHS (attached hereto as Exhibit G).

58. On April 20, 2023, Stannard responded, flatly refusing to provide a copy of the final version of the Rule and asserting that the publication of the Rule in the MAR one business day before it becomes effective "satisfies the constitutional and statutory public records/public information requirements." *See* April 20, 2023 Letter from DPHHS (attached hereto as Exhibit H).

59. On April 21, 2023, undersigned counsel contacted Stannard, explaining that the single business day between publication and the effective date of the Rule does not give abortion providers enough time to undertake the planning necessary to comply with the Rule, in particular any changes that could have been made to the Rule made since it was proposed. Counsel requested that DPHHS consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule pending a court ruling on Plaintiffs' request for relief. *See* Ex. E. Stannard refused. *See* Ex. F.

E. The Rule's Requirements

60. The Rule provides that abortions reimbursed by Medicaid "must be performed by a physician as defined in 37-3-102, MCA," Ex. A at 2355, which defines physician, in relevant part, as "a person who holds a degree as a doctor of medicine . . . and who has a valid license to practice medicine . . . in this state," Section 37-3-102(12), MCA. The Rule therefore categorically bars Medicaid coverage for abortions provided by APCs, including physician assistants, nurse practitioners, and nurse midwives.

61. The Rule also requires Medicaid-eligible Montanans seeking abortions to get prior authorization from DPHHS. If an abortion is either necessary to prevent

endangerment to the life of the pregnant person or is medically necessary, the Rule requires the provider to submit extensive supplemental documentation, including highly personal information such as, *inter alia*, an extensive medical history, the results of a physical exam, images of ultrasounds, and "documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition." Ex. A at 2354–55.

62. The Rule provides no limitation on the amount of time that DPHHS may take to decide whether Medicaid will approve or deny coverage for an abortion.

63. The Rule narrows the generally applicable definition of "medically necessary service" in Mont. Admin. R. 37.82.102(18)(a) for abortions but for no other services. It provides:

> Abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when:
>
> (a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or
>
> (b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from:
>
>> (i) a physical condition that would, as certified by a physician, be significantly aggravated by the pregnancy; or
>>
>> (ii) a psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy.

Ex. A at 2354.

64. This redefinition applies only to abortion, meaning that Medicaid-eligible Montanans whose care is medically necessary under the general definition of the term could be denied coverage solely because they are seeking an abortion and not another type of medical care.

65. To justify these restrictions, the Rule states that, at the request of the Montana Legislature, DPHHS hired a contractor to conduct a review of abortion claims paid by Montana Medicaid. The contractor found 100% compliance with the requirement to certify that abortions covered by Medicaid are medically necessary. The contractor did not find any claims for abortions that it did not believe were medically necessary.

66. Nonetheless, DPHHS concluded that the MA-037 forms used to certify the medical necessity of abortion care covered by Medicaid "lack[ed] sufficient information to support medical necessity" because certain medical conditions were "routinely indicated." Ex. A at 2357. DPHHS noted that some MA-037 forms included additional documentation beyond the form's required "brief narrative." *Id.* Counterintuitively, on this basis, DPHHS concluded that compliant forms that did *not* include additional, non-required information could be inaccurate. In other words, despite perfect compliance with its own requirements, DPHHS used the fact that some forms had provided additional information to conclude that more regulatory burdens were necessary.

F. The Impacts of the Proposed Medicaid Abortion Restrictions

67. The Rule will deny access to abortion for Medicaid-eligible Montanans, who make up a large share of Plaintiffs' abortion patients. In 2022, 45% of abortions at PPMT were covered by Medicaid. That same year, over 50% of patients for whom All Families

provided abortion care were insured through Medicaid. And approximately 40% of the abortion care provided at Blue Mountain was for Medicaid patients.

68. Denying access to abortion has severe consequences for pregnant Medicaid patients. In addition to the cost of the care itself, many Montanans travel significant distances to obtain abortions, particularly procedural abortions, thus incurring additional costs for transportation and sometimes lodging. At PPMT, for example, it is not unusual for patients to drive upwards of five hours to access care.

69. Absent state assistance, low-income pregnant people face great difficulty paying for abortions and related expenses and will be forced to draw on limited financial resources that they need for food, rent, clothing, and other essentials to pay for an abortion. Many will have to delay the abortion to raise the money.

1. Impact of the Physician-Only Requirement

70. Access to safe and timely abortions from a qualified provider of the patient's choosing is an important component of public health and is a fundamental right under the Montana Constitution. *Armstrong*, ¶ 66.

71. The Rule severely limits the providers available to Medicaid-eligible Montanans by effectively banning APCs from providing abortions to them, notwithstanding decisions by this Court and the Montana Supreme Court that prohibit the State from banning qualified APCs from providing that care. *Weems I*; *Weems II.* PPMT, All Families, and Blue Mountain—which represent all of the in-person abortion providers operating in Montana—employ a total of two full-time physicians and two part-time contract physicians between them. These physicians provide abortions only in Helena

and Missoula, so all Medicaid-eligible abortion patients will be forced to travel to Helena or Missoula to access care.

72. At All Families, Ms. Weems, a nurse practitioner, is the *only* abortion provider, so the Rule will prevent Medicaid patients from accessing abortion care at All Families, full stop. All Families is in Whitefish and is the only provider in the Flathead Valley.

73. Moreover, without Medicaid coverage for abortion care, which makes up a substantial part of All Families' practice, the Rule may force All Families to close. The Flathead Valley would once again be without any abortion provider, and the community would also lose critical access to safe and confidential contraception, STI testing, and LGBTQ+ care.

74. PPMT employs only one physician full-time—Dr. Dickman—and he only provides abortions two days per month. PPMT also employs a contract physician who provides abortions one day per month. The physician-only requirement will dramatically decrease abortion access for patients at PPMT.

75. PPMT *physicians* only provide abortions in Helena and Missoula. The Rule's physician-only provision will thus end abortion access in Billings and Great Falls, where PPMT operates the only abortion clinics and relies on APCs to provide abortion services to patients.

76. Blue Mountain has one physician who regularly provides abortions. That physician also maintains a full family practice. The physician-only requirement will dramatically decrease access to abortion care for Blue Mountain and also impact its family practice patients, for whom there is already a considerable wait.

77. DPHHS has designated 52 of Montana's 56 counties as health professional shortage areas.[3] Given the shortage of abortion providers in the state, it would be logistically and financially infeasible for Plaintiffs to hire more full-time physicians to meet the increased need for physicians if the Rule were to take effect.

78. The Rule will therefore severely limit availability for abortions for Medicaid patients and force patients outside of Helena and Missoula to travel much farther to receive care. It will also prevent Medicaid patients from receiving care from their trusted and qualified chosen providers.

79. In response to a comment about the physician-only requirement, DPHHS states that the "rules do not preclude advanced practice nurses and physician assistants from performing abortions if they are otherwise legally entitled to do so," Ex. B at 423, suggesting that the Rule is not a categorical bar because APCs can provide abortions for Medicaid recipients without getting reimbursed. But barring Medicaid reimbursement for services provided by APCs is in effect the same as barring Medicaid-eligible Montanans from accessing those services from APCs, and it infringes on their right to get an abortion from their chosen provider as recognized in *Armstrong*, *Weems I*, and *Weems II.*

2. Impact of the Prior Authorization Requirement

80. The prior authorization requirement—including the onerous and medically unnecessary in-person physical exam—effectively bans the provision of medication abortion via telehealth for Medicaid patients. Telehealth improves access for rural

[3] *Montana Health Professional Shortage Area (HPSA) Designations*, Mont. Dep't of Pub. Health & Hum. Servs., https://dphhs.mt.gov/ecfsd/primarycare/shortageareadesignations.

patients, patients with disabilities, and patients with limited access to transportation. Over half of the abortions that All Families provides are via telehealth. In 2022, 28% of the abortions PPMT provided that were covered by Medicaid were provided via telehealth.

81. The Montana Supreme Court recently affirmed a preliminary injunction against another attempt by the State to ban medication abortion services via telehealth, recognizing that such restrictions are unconstitutional. *See PPMT v. State*, ¶ 51. DPHHS cannot circumvent this preliminary injunction by issuing a rule banning telehealth for Montanans eligible for Medicaid.

82. The prior authorization process involves onerous and invasive paperwork requirements and a physical examination that is not in line with the standard of care.

83. In the Notice of Amendment, DPHHS states that its contract with its Medicaid utilization review contractor requires completion of the prior authorization review "within three working days, considering the submission of timely and accurate documentation" and characterizes this delay as "add[ing] only minimal time to the process." Ex. B at 417. But even if a third-party contract requires the process to be completed in three working days, the Rule itself contains no such requirement. And the three-day clock does not even begin to run until all information is submitted—a clerical error could mean the information is incomplete, or the reviewer could arbitrarily seek additional information, causing further delay.

84. Three working days could also stretch to five or more calendar days when there is an intervening weekend or long weekend. Because of the time-sensitive nature of

abortion and the increased risks and costs of care as pregnancy progresses, *any* delay for a patient waiting for an abortion is significant.

85. Indeed, if the entire prior authorization process—including approval or denial—takes longer than one day (or even if it is provided in one day but takes too long for the abortion to be provided that same day), then it will delay the abortion and force patients to endure the continuing symptoms and risks of pregnancy. DPHHS does not even assert that it will try to complete the prior authorization process in one day.

86. Thus, the Rule's prior authorization requirement imposes a de facto waiting period for Medicaid patients seeking abortions.

87. Further, the requirement for a physical examination during the prior authorization process will force Medicaid patients seeking abortions to make an additional visit to a health center. Medicaid patients who now do not need to make a single in-person visit because they receive medication abortion via direct-to-patient telehealth will be forced to make a medically unnecessary in-person visit. Similarly, patients who can now receive an abortion in one in-person visit will be forced to visit the clinic yet another time beforehand to complete the required physical examination and other prior authorization requirements.

88. Additional-trip requirements have been shown to have devastating effects on access to abortion, including preventing some patients from accessing care entirely. This is especially true for those who may have inflexible work schedules or caretaking responsibilities, do not have reliable access to transportation, or are victims of intimate partner violence.

89. The interaction between the Rule's prior authorization requirement and physician-only requirement will further delay abortions for Medicaid-eligible Montanans. At PPMT for example, because of limited physician availability and scheduling issues, the time between physician appointments can be from one to three weeks. Even if DPHHS approves a prior authorization request in three business days, a second appointment with a physician may not be available for another one to three weeks. And if DPHHS does not approve the request by the next available physician appointment, a patient could have to wait yet another one to three weeks. These delays will increase risks to patients.
90. The Rule provides that "[i]f prior authorization is not obtained, due to an emergency situation or otherwise, a claim for payment for such physician services will undergo post-service, prepayment review." Ex. A at 2354. In the Notice of Amendment, DPHHS points to this provision in response to multiple commenters' concern that the Rule will force Medicaid-eligible Montanans to delay their abortions unnecessarily. Ex. B at 417. To the extent that this provision permits Plaintiffs to provide abortions before receiving prior authorization, it forces them to choose between (1) delaying abortions for Medicaid-eligible Montanans to wait for a prior authorization that the Rule states is "require[d]," Ex. A at 2354, or (2) providing care without knowing whether they will be reimbursed for it.
91. If DPHHS denies a request for prior authorization, the Rule provides no indication of how long the appeal process may take. Again, because abortion is time-sensitive, any delay resulting from an administrative appeal would impose additional medical risks

on patients. A delay could also push a patient beyond the window during which they can obtain care.

92. Under the Rule, a patient can be denied coverage because of their inability to comply with the paperwork requirements of the Rule or because a bureaucrat—or a third-party contractor—second-guesses their health care provider's medical judgment.

93. In a fiscal note accompanying House Bill 544, a pending piece of legislation that would also restrict abortion access for Medicaid-eligible Montanans—including via a prior authorization requirement functionally identical to the Rule's prior authorization requirement—the State estimates the cost of implementing the prior authorization requirement. *See* Fiscal Note to HB 544 (attached hereto as Exhibit I). It states that, "[b]ased on an informal quote from a vendor, it is estimated enhanced documentation and prior authorization costs will be $965 per case," *id.* at 2, which far exceeds the cost of an abortion.

3. Impact of the Redefinition of "Medically Necessary"

94. Under *Jeannette R.*, the Montana Constitution requires DPHHS to cover medically necessary abortions and forbids singling out for differential treatment low-income Montanans seeking abortions. DPHHS cannot circumvent this constitutional requirement by narrowing the definition of medical necessity solely for abortions.

95. The Rule's narrowing of the definition of "medically necessary" for abortions alone will deny Medicaid-eligible Montanans access to abortions that a health care provider has deemed medically necessary under the definition of medical necessity that applies for every other medical procedure.

96. For example, the redefinition of medical necessity does not include abortions in cases involving lethal fetal conditions or diagnoses. In response to several comments raising this concern, DPHHS confirmed that under the Rule, Medicaid coverage would not be available in these cases if the abortion does not separately meet the narrow new definition of medical necessity. Ex. B at 429.

97. The Rule's requirements will result in needless delays for Medicaid-eligible Montanans seeking an abortion: delays caused by forcing patients to wait for an appointment with a physician when a qualified APC would otherwise have been available; by forcing them to undergo an in-person, medically unnecessary physical examination when they could have been seen via telehealth; by forcing them to wait for prior authorization for a procedure that their health care provider has already deemed medically necessary; and if the prior authorization is eventually denied, by forcing them to raise money for an abortion.

98. The inevitable result of these unnecessary and unjustified hurdles will be to force many Medicaid patients to carry a pregnancy to term, even though an abortion was medically necessary in the judgment of their health care provider.

99. The State of Montana, DPHHS, and/or Director Brereton are aware that the Rule violates the Montana Constitution and decisions of this Court and the Montana Supreme Court and have elected to promulgate the Rule anyway. Numerous commenters raised the Rule's constitutional infirmities, Ex. B at 414, but the agency has chosen to proceed undeterred and adopt the Rule unchanged.

100. The effect of the Rule is to prevent Montanans with low incomes from accessing abortion. DPHHS concedes, as it must, that the Rule will "significantly and directly"

affect Plaintiffs and, by extension, their patients' health and exercise of their constitutional rights. *See* Ex. A at 2363.

CLAIMS FOR RELIEF

First Claim
Violation of the Right to Privacy Of Article II, Section 10 of the Montana Constitution

101. Plaintiffs hereby reaffirm and re-allege each and every allegation made in the preceding paragraphs as if set forth fully herein.

102. Article II, section 10 of the Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This right includes the fundamental "right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14.

103. Violations of these rights are subject to strict scrutiny by the Court. The State must show "a compelling interest in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bona fide* health risk." *Id.* at ¶ 59.

104. The Rule in MAR Notice No. 37-1024 violates the right to privacy of Medicaid patients seeking abortions in Montana. It has no bona fide health justification and is not narrowly tailored to effectuate a compelling State interest, in violation of article II, section 10 of the Montana Constitution.

105. The Rule also violates Plaintiffs' patients' right to informational privacy because it unnecessarily requires them to divulge sensitive and unnecessary medical information to DPHHS.

<u>Second Claim</u>
Violation of the Right to Equal Protection of the Laws
Of Article II, Section 4 of the Montana Constitution

106. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

107. Article II, section 4 of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws."

108. The Rule violates equal protection because it creates several classifications that burden the fundamental right to abortion without being narrowly tailored to effectuate a compelling State interest. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (strict scrutiny applies if distinctions drawn by a law affect fundamental rights).

109. The Rule discriminates against pregnant Medicaid patients seeking to exercise their fundamental right to abortion, as compared to pregnant Medicaid patients not seeking abortions, including those who decide to continue their pregnancies and give birth.

110. The Rule discriminates against Medicaid patients seeking abortions who seek care from an APC, as compared to Medicaid patients seeking abortions who seek care from a physician.

111. The Rule discriminates against pregnant Medicaid patients seeking to exercise their fundamental right to abortion, as compared to pregnant Medicaid patients seeking miscarriage management, which involves nearly identical care, but which is specifically excepted from the Rule.

112. The Rule discriminates based on suspect classes, including based on sex, because it has a disproportionate impact on women with low incomes and is based on

impermissible stereotypes about decision making by women, pregnant people, and people with the capacity for pregnancy.

113. The Rule discriminates against APCs, as compared to physicians.

114. The Rule discriminates against Medicaid providers who provide abortions, as compared to those who provide care for pregnant people not seeking abortions.

Third Claim
Violation of the Montana Administrative Procedure Act,
§ 2-4-101, *et seq.*, MCA

115. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

116. MAPA allows for judicial review of agency action, and courts may enjoin enforcement of an administrative rulemaking for certain enumerated reasons, including that it "impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff" or that it "was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent." Section 2-4-506(1)–(2), MCA; *see also* § 2-4-704(2)(a)(i), MCA (courts may reverse administrative decision if it is "in violation of constitutional or statutory provision").

117. The Rule violates § 2-4-506(1), MCA, because it violates the constitutional rights of Plaintiffs and their patients.

118. The Rule violates § 2-4-506(1), MCA because it violates the rights of Plaintiffs and their patients under §§ 53-6-104, 49-3-205, MCA.

119. The Rule violates §§ 2-4-506, § 2-4-305(6), MCA, because its narrowing of the definition of "medically necessary," which applies only to abortions, exceeds the

scope of DPHHS's authority. *See also* § 2-4-704(2)(a)(ii), MCA (courts may reverse administrative decision if it is "in excess of the statutory authority of the agency").

120. The Rule is arbitrary and capricious in violation of §§ 2-4-305(6), 2-4-506(2), because it violates the legislature's stated intention to provide medically necessary care to Medicaid-eligible Montanans and to provide care in a manner that is cost-effective.

121. The Rule violates §§ 2-4-305(6)(b), 2-4-506, MCA, because the onerous requirements it imposes are not reasonably necessary to ensure compliance with Montana law, especially in light of the report DPHHS commissioned that found 100% compliance with existing rules. *See also* § 2-4-704(2)(a)(v), MCA (courts may reverse administrative decision if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record").

122. The Rule violates § 2-4-506, MCA, because it grants DPHHS officials unrestricted discretion to grant or deny prior authorization for abortions.

123. The Rule violates § 2-4-506, MCA, because it is impermissibly vague and will lead to arbitrary results.

Fourth Claim
Violation of the Freedom of Provider Choice Provisions
Of § 53-6-104, MCA

124. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

125. DPHHS must "provide reasonable freedom of choice to recipients of medical aid to select the . . . provider of medical care [or] services." Section 53-6-104, MCA.

126. DPHHS must also “provide for professional freedom of those licensed practitioners who provide medical assistance” through Medicaid. *Id.*

127. The Rule violates these provisions of § 53-6-104, MCA, because it restricts Medicaid-eligible Montanans seeking abortions, including Plaintiffs’ patients, from selecting an advanced practice clinician provider of their choice.

128. The Rule violates these provisions of § 53-6-104, MCA, because it restricts the professional freedom of APCs to provide abortions.

Fifth Claim
Violation of the Inalienable Right to Seek Safety, Health, and Happiness Of Article II, Section 3 of the Montana Constitution

129. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

130. Article II, section 3 of the Montana Constitution provides that all Montanans have the “[i]nalienable rights” to “seek[] their safety, health and happiness in all lawful ways.”

131. The Rule violates the right of Plaintiffs and their patients to seek “safety, health and happiness in all lawful ways” because it infringes on Montanans’ right to abortion, which is a constitutionally protected procedure, and on the provider-patient relationship, in violation of article II, section 3 of the Montana Constitution.

Sixth Claim
Violation of the Right to Individual Dignity Of Article II, Section 4 of the Montana Constitution

132. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

133. Article II, section 4 of the Montana Constitution provides that all Montanans have the right to individual dignity.

134. The Rule violates the right to individual dignity of Plaintiffs and their patients in violation of article II, section 4 of the Montana Constitution.

Seventh Claim
Violation of the Montana Governmental Code of Fair Practices,
§ 49-3-205, MCA

135. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

136. The Montana Governmental Code of Fair Practices requires that government services be made available or performed without discrimination based on sex. Section 49-3-205, MCA.

137. The Rule impermissibly discriminates against women.

INJUNCTIVE RELIEF

138. The Rule subjects Plaintiffs' patients to irreparable harm and violates fundamental rights guaranteed by the Montana Constitution. Plaintiffs are entitled to a permanent injunction. Section 27-19-101, MCA.

139. Plaintiffs are entitled to preliminary injunctive relief under §§ 27-19-201(1), (2), MCA because they have established that they are likely to succeed on the merits of their claims under the Montana Constitution, that they and their patients will suffer irreparable injury if the Rule is enforced during the pendency of the litigation, and that the public interest and balance of the equities weigh in favor of granting preliminary relief.

140. Plaintiffs are entitled to a temporary restraining order enjoining the enforcement of the Rule until such time as this Court can set a hearing and consider Plaintiffs' application for a preliminary injunction, filed concurrently herewith. On these verified pleadings, the concurrently filed brief in support of application for

preliminary injunction and temporary restraining order, and accompanying affidavits, "it clearly appears . . . 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." Section 27-19-315(1), MCA. Absent a temporary restraining order, an unconstitutional rule would go into effect on Monday, May 1, 2023.

141. Further, Plaintiffs, through the undersigned counsel, "certify to the court in writing the efforts . . . that have been made to give notice and the reasons supporting the [Plaintiffs'] claim that notice should not be required." Section 27-19-315(2), MCA. As described above, undersigned counsel twice asked DPHHS to consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule, but the agency refused both times. Exs. C–F. Undersigned counsel also provided a copy of these filings to the Attorney General's Office simultaneous with their filing with the Court and will serve the Director of DPHHS with conformed copies of the filings and a summons as soon as possible.

WRIT OF PROHIBITION

142. Plaintiffs are entitled to a writ of prohibition pursuant to § 27-27-101, MCA. Because the Rule is clearly unlawful, Plaintiffs request that the Court issue a writ of prohibition directing Defendants to refrain from enforcing it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue:

1. A declaration that the Rule amending Mont. Admin. R. 37.82.102 and 37.86.104 proposed at Montana Administrative Register Notice 37-1024 and adopted in the April

28, 2023 edition of the MAR violates Plaintiffs' and their patients' constitutional rights to privacy, equal protection, and dignity, and their right to seek safety, health, and happiness; their statutory rights under the Freedom of Provider Choice Provisions of § 53-6-104, MCA, and the Montana Governmental Code of Fair Practices; Plaintiffs' equal protection rights and statutory rights under § 53-6-104, MCA; and the Montana Administrative Procedure Act;

2. A temporary restraining order prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the Rule until such time as the Court can conduct a hearing and rule on the merits of Plaintiffs' application for a preliminary injunction and request for a writ of prohibition;
3. A preliminary injunction prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the Rule;
4. A writ of prohibition directing Defendants and their agents, employees, appointees, and successors not to enforce, threaten to enforce, or otherwise apply the Rule;
5. A permanent injunction prohibiting Defendants and their agents, employees, appointees, and successors from enforcing, threatening to enforce, or otherwise applying the Rule;
6. An order awarding Plaintiffs attorney's fees and costs pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine; and
7. Such further relief as may be just and proper.

Respectfully submitted this 28th day of April, 2023.

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Attorneys for Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Helen Weems

* *Application for admission* pro hac vice *forthcoming*

VERIFICATION

STATE OF Florida)
)ss.
County of Highlands)

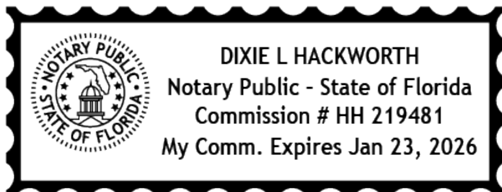
I, Martha Fuller, being first duly sworn upon her oath, verify that the statements contained in the foregoing complaint complaint, except for (1) the statements in paragraphs 14–16, 38–39, 72–73, and of the complaint and (2) the statements about Blue Mountain Clinic and All Families Healthcare in paragraphs 52, 67, 71, and 80 of the complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 04/27/2023

Martha Fuller

Subscribed and sworn to before me this 27th day of April, 2023.

(NOTARIAL SEAL)



Printed Name: Dixie L Hackworth, Online Notary

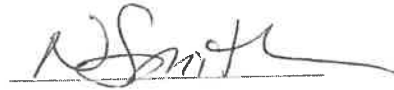
Signer Martha Fuller produced Montana DL, as identification along with multi-factor KBA authentication and audio/video recording to be notarized online.

VERIFICATION

STATE OF COLORADO)
) ss.
County of Arapahoe)

I, Nicole K. Smith, PhD, MPH. being first duly sworn upon her oath, verify that the foregoing statements contained in paragraphs 16, 39, and 76 of the complaint, as well the statements about Blue Mountain Clinic in paragraphs 52, 67, and 71 of the complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 27 April 2023



Nicole K. Smith, PhD, MPH

Subscribed and sworn to before me this 27th day of April, 2023.

(NOTARIAL SEAL)

Printed Name: Tanelia Astorga Lara

VERIFICATION

STATE OF MONTANA)
)ss.
County of Flathead)

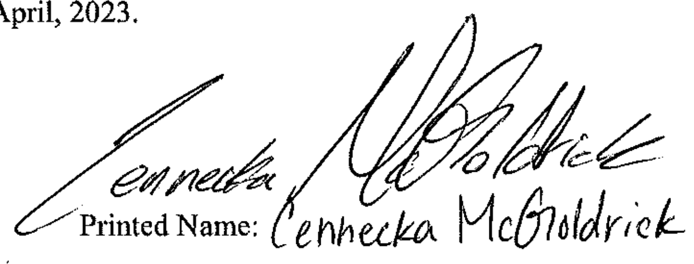
I, Helen Weems, MSN, APRN-FNP, verify that the foregoing statements contained in paragraphs 14–15, 38, and 72–73 of the complaint, as well the statements about All Families Healthcare in paragraphs 52, 67, 71, and 80 of the complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 4/27/23

Helen Weems, MSN, APRN-FNP

Subscribed and sworn to before me this 27 day of April, 2023.

(NOTARIAL SEAL)



Printed Name: Cennecka McGoldrick

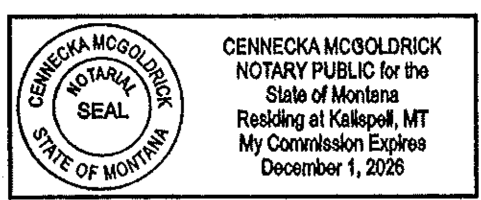


Exhibit A

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.82.102 and 37.86.104 pertaining to Medicaid coverage of abortion services	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On January 12, 2023, at 1:00 p.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: https://mt-gov.zoom.us/j/89568682525?pwd=WHZYMWVOOHdpZlhiYUd3aWNzTEY0QT09, meeting ID: 895 6868 2525, and password: 822643; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 895 6868 2525, and password: 822643. Find your local number: https://mt-gov.zoom.us/u/kbHzPoel8.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on December 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.82.102 MEDICAL ASSISTANCE DEFINITIONS (1) through (18)(c) remain the same.

(d) With respect to abortion services reimbursable under the Montana Medicaid program, subsection (a) is limited by ARM 37.86.104(11).

(19) through (35) remain the same.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-106, 53-6-107, 53-6-111, 53-6-113, 53-6-131, 53-6-141, MCA

37.86.104 PHYSICIAN SERVICES, REQUIREMENTS (1) through (7)(b) remain the same.

(c) In a case where the recipient is sterile before the hysterectomy or there is a life-threatening emergency that precludes the recipient from giving prior acknowledgment of receipt of hysterectomy information, the requirements in (7)(a) and (7)(b) do not apply. Instead, the physician who performed the hysterectomy either:

(i) and (ii) remain the same.

(8) Coverage of physician services for abortions is limited as follows:

(a) the life of the mother will be endangered if the fetus is carried to term; ~~or~~

(b) the pregnancy is the result of an act of rape or incest; or

(c) to the extent required by statute, when an abortion is a medically necessary service, even if the abortion does not meet the standard in (8)(a) and (9).

(9) Physician services for abortions, in a case of endangerment of the mother's life, must meet the following requirements in order to receive Medicaid reimbursement:

(a) and (10) remain the same.

(11) Abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when:

(a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or

(b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from:

(i) a physical condition that would, as certified by a physician, be significantly aggravated by the pregnancy; or

(ii) a psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy.

(12) Physician services for abortions require prior authorization. If prior authorization is not obtained, due to an emergency situation or otherwise, a claim for payment for such physician services will undergo post-service, prepayment review. The request for prior authorization or the claim for payment must be accompanied by a completed and signed Physician Certification for Abortion Services Form (MA-037 form).

(13) Supporting documentation must be submitted for abortions covered under (8)(a) or (c). The following documentation must be submitted with the prior authorization request or with any claim for payment for which prior authorization was not received to support the determination of medical necessity:

(a) History and Physical, which should include (at a minimum) as it relates to the pregnancy:

(i) medical history, including age, current medications and allergies, number of times the patient has been pregnant and number of times she has had a live birth, last menstrual period, status and results of any pregnancy test, allergies, chronic illnesses, surgeries, behavioral health issues, smoking, substance abuse, and obstetric history;

(ii) brief review of systems to identify symptoms a patient may be experiencing;

(iii) the results of a physical examination, including vital signs, heart, lungs, abdomen, extremities, and estimate of gestational age (if imaging is not available);

(iv) results of laboratory tests (if available), including Rh factor, Hemoglobin, and Human Chorionic Gonadotropin;

(v) imaging (if available), to estimate gestational age;

(vi) documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition;

(vii) reason for the abortion procedure;

(viii) for medication/chemical abortions, documentation confirming review of contraindications, adequate patient education, and compliance with the requirements of the Physician-Related Services Manual;

(ix) treatment plan; and

(x) signed informed consent for the proposed abortion procedure.

(14) Physician services for abortions must be performed by a physician as defined in 37-3-102, MCA.

(15) Prior authorization is not required for treatments for incomplete abortions, miscarriages, or septic abortions.

(11) and (12) remain the same, but are renumbered (16) and (17).

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.82.102 and ARM 37.86.104 with respect to when Medicaid pays for abortion services provided to beneficiaries of the program.

The following summaries explain the programmatic changes and the reasonable necessity for the proposed rule amendments.

Since the 1970s, there has been a bar on the use of federal funds to pay for abortions in the Medicaid program except in certain, limited circumstances, pursuant to the Hyde Amendment. The Hyde Amendment, an annual appropriations rider on the federal appropriations act that funds the U.S. Department of Health and Human Services, imposes limits on federal funding of abortion services. Under the current version of the Hyde Amendment, abortion services provided because of rape or incest or where the life of the mother is endangered by the pregnancy, are eligible for federal funds. The Montana Medicaid program cannot use federal funds or state matching funds to pay for abortions performed for any other reason.

Rules promulgated by the Montana Department of Social and Rehabilitation Services sought to limit Medicaid coverage of abortion services to those situations in which federal financial participation was available – i.e., those abortions subject to one of the Hyde Amendment exceptions. These rules were challenged in *Jeannette*

R. v. Ellery, No. BDV-94-811 (1st Jud. Dist., Lewis and Clark County). There, the district court noted that, under the MCA, the Montana Medicaid program was established for the purpose "of providing necessary medical services to eligible persons who have need for medical assistance." *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, *14 (1st Jud. Dist., May 22, 1995). The court concluded that the "statute does not give the Department the authority to limit or eliminate those services enumerated under Section 53-6-101(2), MCA, unless there are insufficient funds to provide medical assistance for all eligible people." *Id.* at *16. Although another MCA provision directed the department to administer the program in accordance with the federal Medicaid statutes, the court said that such provision "is intended to tell the Department to make sure that the program provides at least those services included in Title XIX [the federal Medicaid Act] and to provide them in the manner directed by Title XIX. It does not tell the Department to limit those services to only those within Title XIX." *Id.* at *16-17.[1] The court stated that "[t]he legislature can pass its own Hyde Amendment if it wishes. However, it exceeds the power of the Department for it to limit the services provided by the legislature." *Id.* It, thus, concluded that the department had a statutory obligation to pay for medically necessary abortions in the Montana Medicaid program.[2] The court emphasized that its decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions." *Id.* at *28; *see also Id.* at *4 ("this case has nothing to do with indigent women who may seek an elective abortion. . . . Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.").

Following the decision in *Jeannette R.*, the department has covered abortion services where a physician has determined the procedure to be medically necessary. Because of the Hyde Amendment, these abortion services are funded by state general funds only. When Medicaid payment is sought for abortion services, the Montana Medicaid program requires the submission of the MA-037 form, Montana Healthcare Programs Physician Certification for Abortion Services, in addition to the claim form. The form provides three options for certification by the physician performing the abortion to support Medicaid coverage of the abortion: (1) the abortion is necessary to save the member's life; (2) the pregnancy resulted from rape or incest; or (3) the abortion is medically necessary, but the member's life is not endangered, with space to provide an optional explanation. The form does not require the submission or attachment of additional documents for any of the three options for Medicaid coverage certification.

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[1] Case law, including a decision by the *Jeannette R.* court, has held that state Medicaid programs have to cover all abortions covered by federal Medicaid.
[2] While acknowledging that he did not need to reach the issues, the district court also concluded that the regulations violated the Montana Constitution's privacy and equal protection provisions. However, there is good reason to believe that such rulings are mere dicta under principles of constitutional avoidance.

The 2021 Montana Legislature directed the department to review and report on the history, utilization data, policies, rules, and definitions for Medicaid-reimbursed abortions. *See* H.B. 2. During the September 2021 meetings of the Interim Budget Committee for Section B and the Children, Families, and Health and Human Services Interim Committee, the department presented a summary of current laws, rules, policies, procedures, and claims estimates associated with Medicaid-reimbursed abortions titled "Abortion Services and Montana Medicaid." The Interim Committees requested that the department conduct an in-depth review of abortion claims paid by Montana Medicaid, as well as a legal review of the current state of the law concerning Medicaid-reimbursed abortions. As a result of this request, the department, using the services of a contractor, reviewed all Medicaid-reimbursed abortions for which the department claimed federal financial participation for the 10-year period, July 2011 – 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 – June 2021 (79 claims for SFY 2019, 67 claims for SFY 2020, and 75 claims for SFY 2021). In September 2022, the department presented the results of this analysis of Montana Medicaid-funded abortion services to the Interim Budget Committee for Section B. The analysis concluded that the information submitted on or with the MA-037 form lacks sufficient information to support medical necessity. With respect to medically necessary abortions, the department's contractor reported that the MA-037 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 an actual complication or disease, other than the pregnancy itself. The four conditions routinely indicated on the MA-037 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 that established that the requirements of the Physician-Related Services Manual for such abortions were met.

The department'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-037 form.

The results of the in-depth review of Medicaid-reimbursed abortion claims have caused the department grave concern:

- If Medicaid-reimbursed abortion claims were audited, by the federal government or otherwise, the department would not have sufficient documentation to support that the abortions meet the criteria for payment by

the Medicaid program, regardless of whether federal financial participation is available pursuant to the Hyde Amendment.

- With respect to medically necessary abortions, funded only by State general fund: The consistent lack of documentation, coupled with the conditions routinely provided on the MA-037 forms as the basis for medical necessity, lead the department to reasonably believe that the Medicaid program is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions.

Faithfulness to the scope of the Medicaid program as established by the legislature and to Montana taxpayers and the state funds justifies the department's decision to require the submission of documentation to support Medicaid payment for abortion services and, with respect to abortion, to provide greater specificity as to what constitutes medically necessary services and the documentation needed to support such abortion payment claims, as set forth in further detail below. Such requirements are not uncommon and are applied to other Medicaid-reimbursed services to ensure program integrity.

<u>37.82.102(18)(d)</u>
As indicated above, the department proposes to provide greater specificity as to what abortions constitute medically necessary services. So that all of the rules concerning Medicaid coverage of abortion services are located in one rule, the department proposes to include, in the definition of "medically necessary services" in this rule, a cross reference to ARM 37.86.104 where the department proposes to provide such greater specificity.

<u>37.86.104(7)(c), (9)</u>
The department proposes to make minor, non-substantive punctuation changes to these provisions.

<u>37.86.104(8)</u>
ARM 37.86.104(8) identifies the situations in which the Montana Medicaid program covers abortion services for Medicaid beneficiaries. The rule currently lists those covered by the Medicaid program as a result of the Hyde Amendment: where the pregnancy endangers the life of the mother or where the pregnancy results from rape or incest. The department proposes to amend this provision to indicate that, when the Montana Medicaid statute requires it (as the district court in *Jeannette R.* held that the statute currently does), the Montana Medicaid program also covers medically necessary abortions even if the life of the mother is not endangered. This is merely a codification of current practice by the Montana Medicaid program as a result of the decision in *Jeannette R.*

<u>37.86.104(11)</u>
As noted above, the Montana legislature established the Montana Medicaid program "for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." 53-6-101, MCA. The district court in *Jeannette R.* determined that this required coverage of medically necessary abortions even

where the life of the mother would not be endangered if the pregnancy was carried to term. The court, however, stated that "[i]t is clear that the state need not fund nontherapeutic, elective abortions." To ensure that the Medicaid program is only covering medically necessary abortions, not providing payment for abortions that are, essentially, elective, nontherapeutic abortions, and using appropriate funds, the department proposes to provide greater specificity as to when an abortion is medically necessary. Namely, the department proposes that abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when: (a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or (b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from a physical or psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy. The department proposes to further strengthen the requirement of medical necessity by requiring, in ARM 37.86,104(13), documentation that the woman was diagnosed with the condition by a medical professional qualified by education, training, and/or experience to make such a diagnosis and that she is being treated for such condition.

37.86.104(12)
Beginning with abortion services provided on or after the effective date of the final rule, the department proposes to require prior authorization on abortion services to ensure covered services are consistent with the Hyde Amendment (where the pregnancy endangers the life of the mother or the pregnancy results from rape or incest), or are medically necessary and the appropriate funds are utilized. Requests for authorization must be submitted electronically to the department's contracted Quality Improvement Organization through the Qualitrac Portal. The department recognizes, however, that there may be instances where a physician seeks Medicaid reimbursement for abortion services where – as a result of an emergency situation or otherwise – prior authorization was not obtained. In such circumstances, the department proposes to require post-service, prepayment review of the claim for payment for the abortion service for the same reasons. The department further proposes that any request for prior authorization or any claim for payment for abortion services that did not receive prior authorization be accompanied by a completed and signed MA-037 form.

The department notes that it is not unusual for prior authorization to be required for certain services. While the department has exercised its discretion and is not enforcing certain prior authorization requirements during the COVID-19 public health emergency, prior authorization is required for Medicaid coverage of a large number of medical services and medical products, including:

- Wheel chairs.
- Hearing aids.
- Physician administered drugs, such as Sublocade, a medication for opioid use disorder.

- Breast augmentation.
- Transcranial magnetic stimulation, a procedure for treatment resistant depression.
- Out of state inpatient hospital stays.

It is the department's practice to require prior authorization especially when there may be questions as to whether the service is medically necessary. For example, as provided in ARM 37.86.104(3), prior authorization is required for physician services for conditions or ailments that are generally considered cosmetic in nature. With respect to such services, the department requires prior authorization (and limits Medicaid coverage to such cases "where it can be demonstrated that the physical and psycho-social wellbeing of the recipient is severely affected in a detrimental manner by the condition or ailment").

Here, in order to ensure that Montana Medicaid is only paying for abortions where required by federal or state statutory law – and, thus, is not paying for elective, nontherapeutic abortions consistent with case law – the department proposes to require prior authorization or post-service, prepayment review of claims for such services.

37.86.104(13)
Where Medicaid payment is sought for an abortion based on medical reasons – whether the physician concludes that the life of the mother will be endangered if the unborn child is carried to term or that the abortion is otherwise medically necessary – the department proposes to require certain clinical documentation, in addition to the completed and signed MA-037 form, in order to document and justify the physician's conclusion and support appropriate reimbursement.[3]

The department proposes to require documentation of the woman's medical history and physical condition, including (1) medical history; (2) brief review of systems to identify symptoms a patient may be experiencing; (3) the results of a physical examination, including estimate of gestational age (if imaging is not available); (4) results of laboratory tests (if available); (5) imaging (if available), to estimate gestational age; (6) documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition; (7) reason for the abortion procedure; (8) for medication/chemical abortions, documentation confirming review of contraindications, adequate patient education,

[3] The department is not proposing to require documentation in addition to the completed and signed MA-037 for abortions in which Medicaid coverage is sought because the pregnancy is a result of rape or incest. However, the department will closely monitor such claims and take appropriate action if the number of claims for coverage of abortion because of rape or incest spikes after the proposed changes are adopted and implemented and the rates for such abortions exceed historical rates.

and compliance with the requirements of the Physician-Related Services Manual; (9) treatment plan; and (10) signed informed consent for the proposed abortion procedure.

The department proposes to require this level of documentation because it is consistent with the level of recordkeeping required as a condition for coverage under U.S. Centers for Medicare & Medicaid Services rules for procedures carried out at ambulatory surgical centers and is the minimum standard documentation that would normally be requested with respect to procedures if a determination of medical necessity is to be made. The department proposes to require documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition. This proposed requirement would help ensure the accuracy of the diagnosis on which the conclusion of medical necessity rests and, thus, provide assurance that the Montana Medicaid program is not paying for elective, non-therapeutic abortions.

The proposed documentation would also establish that the safety and wellbeing of the female patient has been considered. The assessment, including physical examination and imaging (with a determination of gestational age) is especially important when medication/chemical abortions are being performed.

As with the proposed requirement for prior authorization or post-service, prepayment review, it is not unusual for the department 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. For example, the department requires the submission of documentation to support claims for Medicaid payment of the following services:

- Targeted case management.
- Out-of-state inpatient hospital stays.
- Certain prescription medications.
- Orthodontia.
- Hearing aids.
- Ambulance transports.
- Botox injections.

<u>37.86.104(14)</u>
States cannot claim federal financial participation for abortion services unless a physician certifies in writing that, in their professional opinion, the life of the mother would be endangered if the pregnancy were carried to term, or that the abortion is necessary as a result of rape or incest. 42 C.F.R. § 441.201 defines physician as a doctor of medicine or osteopathy who is licensed to practice in the state. To ensure compliance with 42 CFR Part 441 (Subpart E – Abortions), the department proposes

to limit abortion services to those services rendered by a physician as defined in 37-3-102, MCA.

The department recognizes that there is ongoing litigation on whether medical practitioners other than physicians may lawfully perform abortions in the State of Montana. That is a different issue than whether the abortion is eligible for coverage and payment under the Montana Medicaid program. To comply with federal and state statutes, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries, the Medicaid program can limit Medicaid payment to services provided by certain types of health care providers.

37.86.104(15)
The requirements outlined in ARM 37.86.104(12) through 37.86.104(14) do not apply to treatment for incomplete abortions, miscarriages, or septic abortions.

Fiscal Impact

The department estimates that the proposed rule amendments will result in additional state fund expenditures in costs for utilization review of prior authorization or post-service, prepayment review documentation. The department believes that such expenditures are necessary to ensure that the Montana Medicaid program only covers abortion services where required by federal or state law and that it is not covering elective, nontherapeutic abortions.

The proposed rule amendments would preclude mid-level providers from providing abortion services. The department anticipates cases previously handled by mid-levels will shift to physicians, whose reimbursement rate is higher than mid-levels, slightly increasing costs to the department.

5. The proposed rule changes are intended to be effective upon the day after the date of publication of the adoption notice.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kassie Thompson, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., January 20, 2023.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless

a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above.

9. An electronic copy of this notice is available on the department's web site at https://dphhs.mt.gov/LegalResources/administrativerules, or through the Secretary of State's web site at http://sosmt.gov/ARM/register.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will significantly and directly impact small businesses.

There are two clinics with fewer than 50 full-time employees that provide abortions in Montana for which reimbursement is sought from the Montana Medicaid program. The probable impact of the proposed rule amendments will require additional time for the clinic to provide the necessary prior authorization/post-service, prepayment review documentation and require the clinic to use physicians to provide Medicaid-reimbursed abortion services, rather than mid-level practitioners. There are no alternative methods that may be reasonably implemented to minimize or eliminate the effects of adopting the proposed rule changes.

12. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ PAULA M. STANNARD
Paula M. Stannard
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human Services

Certified to the Secretary of State December 13, 2022.

Exhibit B

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 37.82.102 and 37.86.104 pertaining to Medicaid coverage of abortion services	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 23, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1024 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2353 of the 2022 Montana Administrative Register, Issue Number 24.

2. The department has amended the above-stated rules as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Several commenters expressed privacy concerns with the proposed rules and that a woman's right to privacy is specifically protected under the Montana Constitution. Several commenters suggested the proposed rule is an attempt to not comply with the Montana State Constitution and the Supreme Court decision: Armstrong vs. State.

RESPONSE #1: The department disagrees with these comments. The Montana Supreme Court in *Armstrong v. State*,1999 MT 261, 296 Mont. 361, 989 P.2d 364 (Mont. 1999), interpreted the provision in the Montana Constitution recognizing a fundamental right to individual privacy as including a right to personal autonomy over the decision whether to keep or terminate a pregnancy prior to viability. The department does not challenge that conclusion of the Montana Supreme Court in this rulemaking.
This rulemaking addresses only the question of when the Montana Medicaid program will pay for abortion services. Pursuant to the statutes governing the program, the Montana Medicaid program is only authorized to pay for medically necessary services for Medicaid beneficiaries. This rulemaking defines medical necessity for abortion purposes so that the definition cannot be used to authorize payment of elective nontherapeutic abortions, requires the submission of documentation to support the medical necessity of the abortion, and imposes prior authorization/prepayment review, to ensure that the Medicaid program is only paying for abortion services where that statutory limitation is met.
In *Jeannette R. v. Ellery,* 1995 Mont. Dist. LEXIS 795 (1st Jud. Dist., May 22, 1995), the district court found that the Montana statutory requirement to pay for medically necessary health care services meant that the Medicaid program is required to pay

for abortions that are medically necessary, but the court emphasized that its decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions" and, in fact, stated ""[i]t is clear that the state need not fund nontherapeutic elective abortion"). *Jeanette R.*, 1995 Mont. Dist. LEXIS 795, *26, *29; *see also Id*. at *4 ("this case has nothing to do with indigent women who may seek an elective abortion. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.").[1] The requirements established in this rulemaking are imposed to ensure that the Montana Medicaid program only pays for services for which there is statutory authority to cover – and that it does not pay for elective, nontherapeutic abortions. While the Montana Supreme Court grounded the right to abortion that it recognized in 1999 in *Armstrong* in the Montana Constitution, it also looked to the caselaw of the U.S. Supreme Court and the lower federal courts that, prior to *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), recognized a privacy right in the U.S. Constitution encompassing a right to obtain an abortion. In *Beal v. Doe*, the U.S. Supreme Court held that "the provisions of the Social Security Act do not require a State, as a condition of participation, to include the funding of elective abortions in the Medicaid program." *Beal v.* Doe, 432 U.S. 438, 447 n.15 (1977).[2] In *Maher v. Roe*, the U.S. Supreme Court upheld a Connecticut regulation that required prior authorization for state Medicaid benefits for medically necessary first-trimester abortions and submission of, among other things, the attending physician's certification that the abortion is medically necessary. The U.S. Supreme Court noted that "[t]he decision whether to expend state funds on nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature." *Maher v. Roe*, 432 U.S. 464, 479 (1977). The Supreme Court also held that "[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes." *Id.* at 480. That is the department's goal in this rulemaking.

<u>COMMENT #2</u>: Several commenters expressed opposition to the proposed rules and suggest health care provider records already sufficiently document when and why abortions are medically necessary, as they do for all other services.

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[1] The prior authorization/prepayment review of the medical documentation submitted to the Montana Medicaid program to support the medical necessity of the abortion services will be conducted by medical professionals.

[2] A later decision of the U.S. Supreme Court upheld the constitutionality of the Hyde Amendment, the annual appropriations rider that restricts the use of federal funds to pay for abortions provided through the Medicaid program, finding that it did not violate the Due Process or Equal Protection guarantees of the Fifth Amendment or the Establishment Clause of the First Amendment – and that states participating in the Medicaid program had the right to fund only those medically necessary abortions for which they received federal reimbursement. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980).

RESPONSE #2: The department acknowledges the commenters' contention that health care provider records sufficiently document when and why abortions are medically necessary. However, none of that documentation is currently submitted to the Medicaid program, so that the program may ensure that it only pays for medically necessary abortion services. If, as the commenters suggest, health care provider records already document the medical necessity of such abortions, the requirement to submit such documentation (and other, routinely kept medical records) should impose little burden on such abortion providers.
The Montana Medicaid program proposed to institute consistent documentation requirements. This decision was made following the in-depth review of abortion claims paid by Montana Medicaid, as directed by the 2021 Montana legislature. The review concluded that when additional documentation was submitted it often lacked sufficient diagnosis or other information to support medical necessity. Instead, the claims typically correlated to an assessment of the situation, rather than documentation to support the medical necessity. With respect to the need for documentation to support medical necessity, please also see the proposal notice.

COMMENT #3: A commenter expressed opposition to the proposed amendment and suggests existing provisions of the Hyde Amendment already limit access to abortions, and the proposed restrictions would create unnecessary administrative hurdles, increase costs, and deny coverage for medically necessary health care.

RESPONSE #3: It is the department's responsibility to ensure compliance with federal and state laws. The Hyde Amendment limits when federal funds can be utilized for abortion services. As interpreted by the *Jeannette R.* district court, state Medicaid statutes require the department to pay for medically necessary abortion services, regardless of whether such abortions meet the requirements of the Hyde Amendment for federal funding – but do not require the department to pay for elective, nontherapeutic abortions. The provisions proposed in MAR Notice No. 37-1024 that the department finalizes here serve to ensure Montana adheres to such statutory restrictions.

COMMENT #4: Several commenters expressed opposition to the proposed rules and suggest the requirement of a physical exam to determine medical necessity goes against FDA guidelines and clinical best practices which allow telehealth services for the provision of medication abortion.

RESPONSE #4: The department acknowledges that the FDA requirements and guidelines with respect to medication/chemical abortion have recently changed and permit the provision of medication/chemical abortion through telehealth services. The department also recognizes that such requirements and guidelines are being actively litigated. The department's proposal to require documentation of a physical examination and imaging will ensure that the safety and well-being of the female patient – as a Medicaid beneficiary – has been considered. For example, physical examination and imaging are especially important when medication/chemical abortions are being performed, among other things, to ensure the gestational age is

within FDA guidelines on the safety and efficacy of medication/chemical abortions, to rule out ectopic pregnancy, and to screen for potential Rh incompatibility.[3]

COMMENT #5: Several commenters expressed concerns that the proposed rules would limit the abortions that qualify for medical necessity and adding a prior-authorization review could leave many Medicaid enrollees without the care they need. The commenters also expressed concern that prolonging a pregnancy before an abortion is accessible can have negative impacts: abortion services can be more expensive, more invasive for a patient, or require a longer recovery.

RESPONSE #5: The department has a responsibility to ensure that the Montana Medicaid program only provides reimbursement for health care services for which there is statutory authority – i.e., where such services are medically necessary. The regulatory changes being made in this rulemaking – revising the definition of medical necessity for abortion services, requiring submission of documentation to establish medical necessity, and imposing a prior authorization/prepayment review requirement – are designed to ensure that the Medicaid program does not pay for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions.
With respect to the commenters' concern that prior authorization could prolong a pregnancy, which could have negative impacts, the department notes that if prior authorization is not obtained – due to an emergency situation or otherwise – the claim will not be automatically denied, but will be subject to prepayment review of the required documentation to ensure medical necessity. Separate from reimbursement, nothing in the proposed rule would expressly prohibit an authorized Medicaid provider operating within their scope of practice from performing an abortion during an emergency situation or otherwise. In addition, the department's contract with the Medicaid utilization review contractor requires completion of the prior authorization or prepayment review within three working days, considering the submission of timely and accurate documentation. Thus, the requirement for prior authorization should add only minimal time to the process.

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[3] The department notes that there are nonfrivolous safety concerns about the FDA's recent changes to certain risk evaluation and mitigation strategies (REMS) imposed on mifepristone and the process by which they were changed. As of the date on which this adoption notice is certified to the Secretary of State, the U.S. Court of Appeals for the Fifth Circuit has refused FDA's request to stay that part of a federal district court decision which preliminarily enjoined/stayed the effective date of FDA's changes to certain REMS in 2016 and 2021/2023, including (1) increase in the maximum gestational age for use from 49 days to 70 day; (2) reduction in required in-person office visits from three to one; (3) authorization for nondoctors to prescribe and administer mifepristone; (4) elimination of reporting of non-fatal adverse events; and (5) removal of the in-person dispensing requirement. *See Alliance for Hippocratic Medicine et al. v. Food & Drug Administration et al.*, 2023 U.S. App. LEXIS 8815 (5th Cir. Apr. 12, 2023). The U.S. Supreme Court has administratively stayed the district court's order.

COMMENT #6: Several commenters expressed opposition to the proposed rules and suggest it is inconsistent with the state's duty to provide safe, legal health care to Montanans. They state the amendments to these rules are unnecessary and harmful.

RESPONSE #6: The department disagrees with the characterization of the state's duty with respect to the Medicaid program: The obligation of the Medicaid program is to pay for statutorily authorized, medically necessary health care for Medicaid beneficiaries. The rule amendments are necessary to ensure that the abortion services for which claims are submitted to the Medicaid program are medically necessary and, thus, that the department only pays for abortion services for which there is statutory authorization.

COMMENT #7: Several commenters expressed opposition to the proposed rules and suggest it unfairly targets lower-income residents who rely on government-provided health insurance by increasing barriers to accessing care.

RESPONSE #7: The department disagrees that the rules unfairly target lower-income residents. Consistent with the purpose of the Medicaid program and the statutory limits on Medicaid coverage of health care services, the purpose of the rules is to ensure that covered abortion services are medically necessary and that the appropriate funds are utilized to pay for them. The department notes that the documentation requirements for prior authorization/prepayment review are borne by the health care providers/facilities providing abortion services for which Medicaid reimbursement is sought, not the Medicaid beneficiaries.

COMMENT #8: Several commenters expressed opposition to the proposed rules and state it has been proven that limiting abortion access does not decrease the total number of abortions, but rather decreases the number of safe abortions, and increases the number of unsafe abortions.

RESPONSE #8: The department disagrees that the rules would have any direct impact on access to abortion. The rules do not prohibit any woman from obtaining an abortion or any health care provider from performing any abortion; they simply identify the requirements that must be met for abortion services to be covered by Medicaid, consistent with the statutory limitations on the program. The department has a strong obligation to ensure that such statutory limitations are being recognized in its administration of the Medicaid program.

COMMENT #9: Several commenters expressed opposition to the proposed rules and stated it should be up to the individuals seeking the abortion to decide if an abortion is right for them, no matter their income level. Commenters expressed that the proposed amendments are intrusive and put bureaucracy in the middle of decisions best left to doctors and patients.

RESPONSE #9: The department denies that the rules would have the impact the commenters suggest. Nothing in the rules preclude individuals from choosing an

abortion. The rules simply address when Medicaid coverage will be available for abortion services provided to Medicaid beneficiaries. Please also see the response to Comment #8.

COMMENT #10: A commenter expressed opposition to the proposed amendment and suggests leading organizations such as the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Academy of Family Physicians strongly oppose efforts to impede access to abortion care or interfere in the relationship between a person and health care provider.

RESPONSE #10: The purpose of the rule amendments is not to impede access to abortion services or to interfere in the relationship between a person and a health care provider, and the department denies that they would unduly impact access to such services or interfere with such relationships. Consistent with law, the rule amendments simply address when Medicaid coverage will be available for abortion services provided to Medicaid beneficiaries. Please also see the response to Comment #8.

COMMENT #11: A commenter expressed opposition to the proposed amendment and suggests the proposed amendment would increase burdens on health care providers, limit the number and types of providers available, and restrict medication abortion, a safe and effective option for ending a pregnancy.

RESPONSE #11: The department is responsible for implementing and operating the Medicaid program in faithfulness to the scope and limitations of the Medicaid program as established by the legislature. This responsibility undergirds these rules. The department recognizes that the rules impose specific documentation requirements to establish the medical necessity of Medicaid-covered abortions and that this may have the effect of putting additional burden on some health care providers. However, the collection of much of the required information is simply good clinical practice and/or information already required to be reported, such as to the department's Office of Vital Records, or otherwise.
As noted in the proposal notice, the Medicaid program can – and does – limit Medicaid payment to services provided by certain types of health care providers, in order to comply with federal and state statutes, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries. With respect to medication/chemical abortion, the department agrees that it can be a safe and effective option for ending a pregnancy if the pregnant woman has been screened and meets the requirements for a medication/chemical abortion, if there are no contraindications, if the pregnant woman has been adequately educated on medication/chemical abortion, if there is adequate monitoring, oversight, and follow up, etc. *See also* the response to Comment #4.

COMMENT #12: A commenter expressed opposition to the proposed amendment and quoted, "Abortion is an essential and time-sensitive health care procedure that 1 in 4 people will have before they turn 45 years old." (Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014," by Rachel

Jones and Jenna Jerman, is currently available online and will appear in a forthcoming issue of the American Journal of Public Health). The commenter stated without question, abortion can be medically necessary and health care providers should be able to determine the appropriate care their patients need without the department imposing limitations. By narrowing the abortions that are covered for Medicaid enrollees and requiring prior authorization, the department would be delaying and denying Montanans from getting the abortion care they need which can lead to long-lasting negative outcomes.

RESPONSE #12: The department does not deny that abortion services can be medically necessary – and, to the extent required by the Medicaid statutes and consistent with any statutory limitations imposed on the Medicaid program, will cover such abortion services. The requirements imposed by these rules are designed to ensure that the Medicaid program only pays for abortion services that are medically necessary and that, consistent with the statutory limitations on the program, it does not pay for elective, nontherapeutic abortions.

COMMENT #13: A commenter expressed opposition to the proposed amendment and quoted "Turnaway Study," Bixby Center for Global Reproductive Health, available at https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf, further stating studies show that a person who is denied a wanted abortion is more likely to experience life-threatening maternal and infant health complications, more likely to have a household income below the poverty line and experience economic hardship, and more likely to stay in contact with violent partners, putting them and their children at greater risk than if they were able to receive the abortion.

RESPONSE #13: The department acknowledges the Turnaway Study, as well as the methodological criticisms that have been leveled against it (including selection bias, poor participation rate and high attrition).
As noted in response to other comments, the purpose of the rules is to ensure that the department operates the Medicaid program consistent with the statutory limitations on Medicaid coverage of abortion services.

COMMENT #14: A commenter expressed opposition to the proposed amendment saying the state of Montana should ensure the provision of quality health care – including abortion – to all who need it, not only those who have private insurance or who are able to pay for care. The commenter suggests that this amendment, in contrast, will create significant, totally unnecessary physical, emotional, and financial hardship and harm for Montana Medicaid beneficiaries who require abortions.

RESPONSE #14: The department rejects the contention that the rules will create physical, emotional, or financial hardship or harm for Medicaid beneficiaries who need abortions. Consistent with the law, the Montana Medicaid program will continue to cover medically necessary abortions, while imposing certain conditions on Medicaid's payment for abortion services to ensure that integrity and that it is not paying for elective, nontherapeutic abortion services.

COMMENT #15: A commenter expressed opposition to the proposed amendment stating any policies that limit a person's choice to terminate a pregnancy, except for the last three months, consistent with the United States Constitution interpretations, in the words of two of the Justices of the Supreme Court (during their confirmation hearings) "is settled law."

RESPONSE #15: The department acknowledges that the Montana Supreme Court has interpreted the Montana constitutional right to individual privacy as including a right to personal autonomy over the decision whether to keep or terminate a pregnancy prior to viability; similarly, prior to *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the U.S. Supreme Court had recognized a federal constitutional right to privacy that encompassed a right to obtain an abortion. Such constitutional right to obtain an abortion is separate and distinct from whether public funds must pay for such abortions under Medicaid for eligible beneficiaries. Both Montana and federal courts have recognized that there is no requirement that Medicaid pay for elective, nontherapeutic abortions. *See, e.g., Jeannette R v. Ellery*, 1995 Mont. Dist. LEXIS 795, *4, *26, *29 (1st Jud. Dist., May 22, 1995) (decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions"; "[i]t is clear that the state need not fund nontherapeutic elective abortion"; "this case has nothing to do with indigent women who may seek an elective abortion"); *Maher v. Roe*, 432 U.S. 464, 479-480 (1977) (upholding, against constitutional challenge, Connecticut Medicaid regulation requiring prior authorization for medically necessary first-trimester abortions and submission of attending physician's certification of medically necessity, noting "[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes"). Here, the department's rule amendments do not serve to limit a person's exercise of her constitutional rights, but merely provide greater specificity as to when and under what conditions Medicaid will pay for abortion services for Medicaid beneficiaries.

COMMENT #16: The department received a comment expressing opposition to the proposed rule and stating the department should advocate for the freedom of the individual and ensure the separation of Church and State.

RESPONSE #16: The department rejects the implication that the rules, which address when the Montana Medicaid program will pay for abortion services provided to Medicaid beneficiaries, implicate individual freedom or the Religion Clauses of the Montana or U.S. Constitution.
The department notes that its responsibilities are established by statute. While its mission is to improve and protect the health, well-being, and self-reliance of all Montanans, that mission has to be accomplished consistent with the statutory authority provided by the legislature and with its constitutional and statutory obligations with respect to religious freedom.

COMMENT #17: The department received several comments opposing the amendment. The commenters stated the cost of childbirth and the cost of caring for

a child have a larger financial impact on social welfare programs than the cost of an abortion.

RESPONSE #17: The department acknowledges the comment. However, the purpose of the rules is not to save the State of Montana money, but to ensure that the Medicaid program is carried out consistent with the directives of the legislature, which limit Medicaid payment to medically necessary health care services. Since the rules do not preclude any pregnant beneficiary from obtaining an abortion – but only address when Medicaid will pay for it – and the pregnant beneficiary remains free to obtain an abortion even if Medicaid does not pay for it, the department does not know whether or how implementation of the rules will affect Medicaid childbirth costs or the cost of social welfare programs.

COMMENT #18: Several commenters expressed opposition to the proposed amendment and suggest the current administration has pledged "financial relief" and cutting red tape "to get rid of unnecessary government regulations" and yet, that is all this proposal does. The commenters further suggest that this amendment is contrary to the administration's goal of cutting red tape and reducing government, as well as a politically motivated mandate that focuses on punitive measures and lacks insight as to the results, rather than meeting the mission of DPHHS.

RESPONSE #18: The department rejects the notion that these rules are inconsistent with the administration's regulatory reform initiatives or the department's mission statement. As the commenter notes, the purpose of the regulatory reform initiative is "to get rid of unnecessary government regulations" and/or regulations that are unduly burdensome. Here, the department has determined that the rules are necessary to ensure compliance by providers and facilities that provide abortion services with the Medicaid purpose and limit of providing medically necessary care. As stated in the proposal notice, the results of the in-depth review of Medicaid-reimbursed abortion claims – which found a consistent lack of documentation, coupled with the types of conditions routinely provided on the MA-037 forms as the basis for medical necessity – have caused the department grave concern and led it to reasonably believe that the Medicaid program is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions. In such a situation, it is appropriate and consistent with the administration's commitment to the rule of law and program integrity on behalf of Montana taxpayers to impose certain new regulatory requirements to ensure compliance with the statutory limitations on the Medicaid program.
With respect to the department's mission statement, please see the response to Comment #16.

COMMENT #19: Several comments were submitted expressing opposition to the proposed changes and suggesting the prior authorization requirement could prohibit a woman from obtaining an abortion in an emergency.

RESPONSE #19: The department understands the commenters' concerns that there are instances where obtaining prior authorization is not possible. The

department proposed rules and these final rules do not require immediate rejection of claims for reimbursement for abortion services if prior authorization was not obtained. Rather, the rules provide that if prior authorization is not obtained, due to an emergency situation or otherwise, the provider's claim for payment will undergo a post-service, prepayment review. Separate from reimbursement, nothing in the proposed rule would expressly prohibit an authorized Medicaid provider operating within their scope of practice from performing an abortion during an emergency situation or otherwise.

COMMENT #20: A commenter expressed opposition to the proposed amendment and suggests it would only allow reimbursement from physicians and undermines the professional license and scope of practice of advanced practice nurses and PAs.

RESPONSE #20: The department disagrees that the rules undermine the professional license and scope of practice of advanced practice nurses and physician assistants. It noted in the proposal notice the ongoing litigation on whether medical practitioners other than physicians may lawfully perform abortions in the State of Montana. That is a different issue than whether the abortion is covered and eligible for payment under the Montana Medicaid program. The rules do not preclude advanced practice nurses and physician assistants from performing abortions if they are otherwise legally entitled to do so. The rule amendments only address abortion coverage and payment policies under the Montana Medicaid program and do not extend beyond that. DPHHS asserts its right to make such coverage and payment policy determinations under the Medicaid program.
Federal regulations prohibit the use of federal funds for abortion services unless a physician certifies in writing, in their professional opinion, the life of the mother would be endangered if the pregnancy were carried to term, or that the abortion is necessary as a result of rape or incest. 42 C.F.R. § 441.201 defines a physician as a doctor of medicine or osteopathy who is licensed to practice in the state.
To comply with federal and state statutes, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries, the Medicaid program can limit Medicaid payment to services provided by certain types of health care providers, and has done so here.

COMMENT #21: Several commenters expressed opposition to the proposed amendment and stated Montana voters, in rejecting the recent LR-131 referendum, have made clear that Montanans do not support efforts to restrict abortion-related health services. The commenters stated the proposed amendment goes against the will of Montana voters. The commenters expressed a perception that the proposed rule amendment is a way of ignoring the voice of the voters.

RESPONSE #21: Several commenters did not address the proposed rule and instead provided comments in opposition to LR-131, or contended that the proposed rule is a way to circumvent the voters' rejection of LR-131 and enact it through administrative rule. The department disagrees. The rules address when and under what conditions the Montana Medicaid program will pay for abortion services provided to Medicaid beneficiaries. It has nothing to do with the subject of the

referendum, medical services required to be provided to infants born alive after an abortion or otherwise. Furthermore, the department has complied with all of the requirements established by the Montana Administrative Procedure Act for a rulemaking.

COMMENT #22: The department received a comment stating they felt DPHHS thought the amendment would go unnoticed by many Montanans because it is not a bill. The commenter stated it was a sneaky way of denying women health care when time is of the essence.

RESPONSE #22: The department disagrees with the commenter. First, the rules do not deny women health care; the Montana Medicaid program will continue providing coverage of medically necessary abortion services for eligible beneficiaries, with the requirement that the Medicaid provider submit, to the Medicaid program, documentation to support the medical necessity of the services. If time is of the essence for the abortion services (because of an emergency situation or otherwise), Medicaid will not deny the claim because of failure to obtain prior authorization. Rather, the provider can submit the documentation for post-service, prepayment review.
Second, there was sufficient public notice about the proposed rule to provide adequate opportunity for public participation in the rulemaking process. The department testified about the Montana Medicaid program's coverage of abortion services and the lack of supporting documentation during at least one interim committee meeting and indicated that it was considering options to address the issue. Consistent with the Montana Administrative Procedure Act, notice of the proposed amendments to the Medicaid abortion coverage rules (and of the public hearing on the proposed amendments) was published in the Montana Administrative Register and was posted to both the Secretary of State's and the department's website. Copies of the proposal notice were sent to all parties on the department's interested parties list. The proposal notice was covered by various media outlets – and the commenter clearly received notice of the proposed rule amendments. The department held a hearing on the proposed rules, attended by approximately 90 people and at which 30 individuals provided comment, and the department received 474 written submissions on the proposed rule.

COMMENT #23: A commenter expressed opposition to the proposed amendment and suggests there is no reason anyone should ever need to justify wanting to end an unwanted pregnancy. The only reason anyone should ever have a child is that they want to. Removing abortion care from Medicaid will lead to innumerable coercive, traumatic, and dangerous unwanted pregnancies.

RESPONSE #23: The department agrees that, ideally, all children should be loved and wanted. The department has not proposed to remove and is not removing abortion services from coverage under the Montana Medicaid program; and it will continue to cover medically necessary abortion services. The rule amendments provide greater specificity as to when Montana Medicaid funds can be utilized to pay

for abortion services and the documentation that providers will be required to furnish in order to receive Medicaid reimbursement.

COMMENT #24: Several comments were received in opposition stating the department should not be involved in any personal, private medical situations in any way, shape, or form.

RESPONSE #24: To the extent that the comments contend that the department should not be able to receive any personal medical information to support/document medical necessity, the department disagrees. The department is responsible for administering the Montana Medicaid program in accordance with the statutory limitation that Medicaid provide coverage only for medically necessary services. Medical records are necessary to ensure compliance with such limitation, especially when, as here, there may be questions as to whether the service is medically necessary or not. The department takes its obligation to protect this health information seriously. The information itself is protected from improper access, use, and disclosure under the HIPAA Privacy Rule, 45 CFR Parts 160 and 164 Subparts A and E, and Montana's Government Health Care Information Act, Title 50, chapter 16, part 6, MCA. The medical records and other documentation will be reviewed by medical professionals employed by the Montana Medicaid program's utilization review contractor, which is also subject to the requirements (and penalties) of the HIPAA Privacy Rule and the Montana Government Health Care Information Act. The department reminds the commenters that the Montana Medicaid program requires prior authorization for other procedures when medical necessity is in doubt, as well as conducts routine utilization reviews. These customary activities require the handling of sensitive medical records and other documentation.

COMMENT #25: A commenter expressed opposition to the proposed amendment and suggested it would force women to forgo abortions or have them much later in pregnancy, after waiting for paperwork to be approved, if at all, and could result in death.

RESPONSE #25: The department disagrees that the requirement for prior authorization would force women to forgo medically necessary abortions or would expose them to increased risk because of delay. The prior authorization process should not lead to delays in medically necessary care. Pursuant to its contract obligations to the department and the Montana Medicaid program, the department's utilization review vendor must complete requests for prior authorization within three working days considering the submission of timely and accurate documentation. Moreover, as discussed in response to other comments, if prior authorization cannot be obtained, due to an emergency situation or otherwise, the rules provide for post-service, prepayment review of the medical necessity documentation.

COMMENT #26: A commenter expressed opposition to the proposed amendment and stated the requirements interfere with or restrict a provider's ability to provide quality care to all of their patients. This commenter expressed that these restrictions could result in providers leaving the state or choosing to not practice within Montana.

RESPONSE #26: The department disagrees that the rules would restrict a provider's ability to provide quality care to all their patients.

COMMENT #27: The department received a comment in support of the proposed amendment and stated they do not support utilizing taxpayer dollars to pay for abortions.

RESPONSE #27: The department appreciates the support. The purpose of the rule amendments is to ensure that taxpayer funds are only used for medically necessary abortions, consistent with the statutes governing the Medicaid program.

COMMENT #28: A commenter expressed opposition to the proposed amendment. The commenter stated the proposed amendment assumes that some abortions are "medically necessary" while others are "nontherapeutic" or "elective." Abortion is medically necessary, just as all obstetric care and miscarriage care are medically necessary, and there is no reason to single abortion care out from other pregnancy care.

RESPONSE #28: The department disagrees with the commenter's contention that all abortions are medically necessary. The Montana legislature established the Montana Medicaid program "for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." 53-6-101, MCA. As the department has recognized, there are certain medical procedures that, depending on the patient's situation in context, could have a therapeutic purpose or a nontherapeutic purpose. Thus, for example, physician services for conditions or ailments that are generally considered cosmetic in nature are not a benefit of the Medicaid program, unless, through a prior authorization process, it can be demonstrated that the physical and psycho-social wellbeing of the recipient is severely affected in a detrimental manner by the condition or ailment and certain other prior authorization requirements are met. ARM 37.86.104(3). And both state and federal courts have long accepted that certain abortions are not medically necessary, but are rather elective, nontherapeutic abortions for which state Medicaid programs do not have to pay. *See, e.g., Jeannette R. v. Ellery,* 1995 Mont. Dist. LEXIS 795, *26, *29 (1st Jud. Dist., May 22, 1995) (while the department is required to pay for medically necessary abortions through the Medicaid program, its decision "does not conclude that the state of Montana must fund elective, nontherapeutic abortions"; "[i]t is clear that the state need not fund nontherapeutic, elective abortions"); *Maher v. Roe*, 432 U.S. 464, 479-480 (1977) (upholding Connecticut regulation that required prior authorization for state Medicaid benefits for medically necessary first-trimester abortions and holding that "[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes").

COMMENT #29: A commenter expressed opposition to the proposed amendment and suggested the Montana legislature established the Montana Medicaid program "for the purpose of providing necessary medical services to eligible persons who

have need for medical assistance." 53-6-101, MCA. Pregnancy care is essential medical care and abortion care, being an integral part of pregnancy care, is also essential medical care.

RESPONSE #29: Please see the response to Comment #28.

COMMENT #30: A commenter expressed opposition to the proposed amendment. The commenter stated the rules are a continual attack on the rights and agency of the poor and disproportionately affects marginalized groups such as people of color, indigenous, and LGBTQ+ populations.

RESPONSE #30: The department disagrees. The department treats all Montanans served by its programs with dignity and respect. But it is required to operate such programs, including the Medicaid program, in compliance with the statutory requirements imposed by the legislature. The rules seek to ensure, consistent with the Montana statutes governing the Medicaid program, that it covers only medically necessary abortions.

COMMENT #31: A commenter expressed opposition to the proposed amendment and suggests DPHHS admits that requiring preauthorization increases Montana taxpayer costs. Taxpayers should not be on the hook for supporting extreme political agendas.

RESPONSE #31: The potential increase in expenditures resulting from prior authorization or post-service prepayment review is necessary to ensure that the Montana Medicaid program only covers abortion services where required by federal or state law and that it is not covering elective, nontherapeutic abortions.

COMMENT #32: A commenter expressed opposition to the proposed amendment and stated many females are sexually victimized. These victims should not have their right to choose an abortion taken away. They are already traumatized. The choice over their body should never be taken away.

RESPONSE #32: Under the Hyde Amendment, Montana Medicaid statutes, and these rules, the Medicaid program covers abortions when the pregnancy results from rape or incest, as certified by the physician on the MA-037 form; the form does not require the woman to have reported the rape or incest to the appropriate authorities if, in the professional judgment of the physician, she was and is unable to do so. The rules do not impose any documentation requirements in addition to the completed and signed MA-037 for abortions in which Medicaid coverage is sought because the pregnancy is a result of rape or incest. The department notes that upon finalization of the rule, it will closely monitor such claims and take appropriate action if the number of claims for coverage of abortion because of rape or incest spikes and the rates for such abortions exceed historical rates.

COMMENT #33: A commenter expressed opposition to the proposed amendment and suggests it is a "forced birth" amendment.

RESPONSE #33: The department disagrees with the assertion. Under the rules, the department will continue to cover medically necessary abortions. The rule amendment intends to ensure the abortion services covered by Medicaid are medically necessary and statutorily authorized.

COMMENT #34: A commenter expressed opposition to the proposed amendment and suggests roughly 80% of abortions are performed before eight weeks and can be provided by a doctor or midlevel practitioner. They state that safety has been established so why limit access to doctors only.

RESPONSE #34: As discussed earlier, federal regulations prohibit the use of federal funds for abortion services unless a physician certifies in writing, in their professional opinion, the life of the mother would be endangered if the pregnancy were carried to term, or that the abortion is necessary as a result of rape or incest. 42 C.F.R. § 441.201 defines a physician as a doctor of medicine or osteopathy who is licensed to practice in the state. To ensure compliance with federal and state law, to maximize the availability of federal financial participation, to protect the integrity of the Medicaid program, and to protect the health and safety of Medicaid beneficiaries, the Medicaid program can limit Medicaid payment to services provided by certain types of health care providers. In this case, the department will not authorize payment of abortion services unless provided by a physician as defined in 37-3-102, MCA.

COMMENT #35: A commenter expressed support for the proposed amendment stating the proposed rules bring the department's rules in conformity with Jeannette R. v. Ellery to ensure general fund tax dollars are only being used to fund abortions of unborn babies when the procedure is medically necessary and to ensure that there is sufficient documentation to support that taxpayer funded abortions meet the criteria for payment by the Montana Medicaid Program. The commenter stated agreement with the contractor's recommendations and urges the department to adopt the proposed amendment as drafted. The commenter suggests the proposed amendment is not an assault on the Montana Supreme Court's decision in the Armstrong case and it ensures good financial stewardship and faithfulness for the administration of the Montana Medicaid Program. The commenter suggests requiring health care providers to provide greater specificity to medically necessary health care services is not a hindrance to health care, instead, it serves as an important verification that general fund dollars are not being used to fund unnecessary medical procedures. Funding unnecessary medical procedures ultimately reduces the funds reserved to assist qualifying individuals under Montana's Medicaid program.

RESPONSE #35: The department agrees and thanks the commenter for their support of the rule amendment.

COMMENT #36: The department received a comment in opposition stating that the commenter has an appreciation for the department's due diligence and commitment

to adhering to the Hyde Amendment and related court decisions. The commenter stated the requirement to obtain prior authorization adds additional burdens to providers and is a tactic by insurance companies to delay or discourage needed patient care. They assert that physicians spend close to 14 hours per week on prior authorizations which is one of the top administrative burdens leading to physician burnout. The commenter recommends that rather than implement prior authorization requirements the department should require providers to fill the form out in its entirety. They further state that if the department is to pursue adoption it is essential to mandate the department processes the prior authorization requests within 48 hours.

RESPONSE #36: While the department appreciates the commenter's suggestion that it require providers to complete the MA-037 form in its entirety, the department does not believe that such a requirement would be sufficient to ensure that the department is only paying for medically necessary abortions, and is not covering elective, nontherapeutic abortions. With respect to the requirement for prior authorization and the prior authorization process, please see the response to Comment #25.

COMMENT #37: The department received several comments stating the proposed rule amendments would limit access to necessary abortion services for women experiencing miscarriages.

RESPONSE #37: Consistent with the definition of abortion in Montana statutes (*see, e.g.,* 50-20-104 and 50-20-703, MCA), a miscarriage (or spontaneous abortion) does not constitute an abortion for purposes of these rules: The rules specifically provide that prior authorization is not required for incomplete abortions, miscarriages, or septic abortions.

COMMENT #38: The department received several comments in opposition to the rule stating it may require a woman to continue a pregnancy, even if serious fetal abnormalities are detected. Such abnormalities may be incompatible with life upon delivery.

RESPONSE #38: The department acknowledges that, in certain instances, a pregnancy may involve fetal abnormalities. It is the department's understanding that serious fetal abnormalities that are incompatible with life upon delivery are rare. However, there is a possibility that, while the rules would not preclude a woman from obtaining an abortion, the circumstances would not meet the definition of medical necessity and, thus, Medicaid coverage would not be available. Depending on the type of fetal abnormality involved and the method of detection, there is also the possibility of misdiagnosis and/or correction of some abnormalities during fetal development. The department also notes that there may be instances where the fetal abnormality or the development of such fetus may threaten the woman's physical health, consistent with the definition of medical necessity, thus, establishing medical necessity and permitting Medicaid to cover the abortion.

COMMENT #39: The department received a comment in opposition to the proposed rule amendment stating the imposition of a prior authorization requirement creates an unnecessary barrier to care and that the definition of medical necessity is narrow and will lead to widespread denials. The commenter further stated that the requirement for a physical examination prohibits access to telehealth services and will disproportionally harm people living in rural areas.

RESPONSE #39: The department disagrees that the definition of medical necessity is unduly narrow. In defining medical necessity, the department sought to create a balanced definition that would not be overly narrow, nor overly broad, such that the definition could be used to justify Medicaid coverage of elective nontherapeutic abortions.
With respect to the requirement for prior authorizations, please see the responses to Comments #5, #19, #22, and #28.
With respect to documentation of a physical examination and the availability of telehealth, please see the response to Comment # 4.

COMMENT #40: The department received comments from several individuals sharing their personal stories related to how having an abortion impacted their lives.

RESPONSE #40: The department thanks the commenters for participating in the rulemaking process and appreciates the sharing of their personal experiences.

4. These rule amendments are effective May 1, 2023.

/s/ PAULA M. STANNARD	/s/ CHARLES T. BRERETON
Paula M. Stannard Rule Reviewer	Charles T. Brereton, Director Department of Public Health and Human Services

Certified to the Secretary of State April 18, 2023.

Exhibit C

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January 23, 2023

Via Email and U.S. Mail

Paula M. Stannard
Chief Legal Counsel
Montana Department of Public Health and Human Services
111 N. Sanders Street, Ste 210
Helena, MT 59601
paula.stannard@mt.gov

Re: DPHHS proposed rule change related to Medicaid coverage of abortion services

Dear Ms. Stannard:

This office represents Planned Parenthood of Montana. The Department's proposed changes to the Medicaid program will deny low-income Montanans access to abortion care services. The proposed rules invade rights secured by the Montana Constitution and are squarely prohibited by the decisions in *Jeanette R. v. Ellery*, No. BDV-94-811 (1st. Jud. Dist., May 22, 1995), *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, and *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4. The proposed changes to the Medicaid program also trigger several other legal issues.

Despite these legal issues, the Department has not provided for any time between the publication of the adoption notice and the effective date of the rules. *See* MAR Notice No. 37-1024, Item 5 ("The proposed rule changes are intended to be effective upon the day after the date of publication of the adoption notice."). If the proposed rules take effect, they will have an immediate, grave, and irreparable impact on the health of patients in Montana seeking abortion care and their constitutional rights.

Planned Parenthood of Montana requests the Department's confirmation that it intends to adopt the proposed rules (or substantively similar rules), as well as the date DPHHS plans to publish the adoption notice. Should the rules become effective as proposed, Planned Parenthood of Montana and other providers intend to seek declaratory and injunctive relief against the new rules. To facilitate orderly and expedient judicial review, Planned Parenthood of Montana requests that the Department consider either (1) delaying the effective date of the rules to 90 days after the publication of the adoption notice, or (2) stipulating to a stay of enforcement of the rules until such time as a court is able to rule on a request for declaratory relief regarding their statutory and constitutional legality. Co-counsel and I are available to discuss these proposals with you at your convenience. Please provide the above information and confirm the Department's position on these proposals by the end of business on Wednesday, January 25, 2023.

Should the Department refuse to provide information regarding the planned publication date of its adoption notice or consider these proposals, Planned Parenthood of Montana and other providers will need to seek immediate injunctive relief to protect their patients, causing the Department to expend further time and expense. *See* § 27-19-315(2), MCA.

Finally, please preserve all information in your possession—documents, correspondence, and other communications, including any information you assert is subject to a claim of privilege—related to the proposed rule changes to the Medicaid program affecting coverage for abortion care services. This preservation request applies to, but is not limited to, electronic communications such as emails, text

messages, or any other electronic messaging or media, as well as call logs and calendars. The request extends to any auspice of state government outside the Department that the Department communicated with regarding the proposed rules or related matters, including the Office of the Governor, the Legislature and individual legislators, and the Office of the Attorney General. Please do not hesitate to contact me with any questions regarding this preservation request.

I will calendar January 25, 2023 for your reply. Co-counsel and I stand ready to discuss the proposals regarding a delayed effective date or a stipulated stay of enforcement at your earliest convenience.

Sincerely,

Raph Graybill

CC: Office of the Governor, via:
Anita Milanovich, Chief Legal Counsel (anita.milanovich@mt.gov)

Office of the Attorney General, via:
Christian Corrigan, Solicitor General (christian.corrigan@mt.gov)

Planned Parenthood of Montana, via:
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Planned Parenthood Federation of America
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Blue Mountain Clinic and All Families Healthcare, via:
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Akilah Deernose (deernosea@aclumontana.org)

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Exhibit D

Im, Peter <peter.im@ppfa.org>

DPHHS proposed rule change related to Medicaid coverage of abortion services

Stannard, Paula <Paula.Stannard@mt.gov> Wed, Jan 25, 2023 at 6:47 PM
To: Emma Edwards <eedwards@silverstatelaw.net>, "Milanovich, Anita" <Anita.Milanovich@mt.gov>, "Corrigan, Christian" <Christian.Corrigan@mt.gov>
Cc: Raph Graybill <rgraybill@silverstatelaw.net>, "peter.im@ppfa.org" <peter.im@ppfa.org>, "camila.vega@ppfa.org" <camila.vega@ppfa.org>, "tholm@yellowstonelaw.com" <tholm@yellowstonelaw.com>, "deernosea@aclumontana.org" <deernosea@aclumontana.org>, "hschneller@reprorights.org" <hschneller@reprorights.org>, "jrasay@reprorights.org" <jrasay@reprorights.org>, "abonillas@reprorights.org" <abonillas@reprorights.org>, "erickson@bebtlaw.com" <erickson@bebtlaw.com>

DPHHS acknowledges receipt of Raph Graybill's January 23, 2023 letter.

In large part, it seems to be an untimely comment letter. While not prejudging the outcome of the rulemaking, DPHHS is not prepared to agree to delay the effective date, or to stipulate to a stay of enforcement, of any final rule that may result from the proposed rule referenced in the letter outside of the rulemaking and the rulemaking process.

DPHHS notes that the request for a response by January 25, 2023 appears to reflect a misunderstanding of the rulemaking timeframes and process, as set forth in the Montana Administrative Procedure Act and the Administrative Rules of Montana (and, in particular, ARM 1.2.419), and the need to consider all comments timely submitted by January 20, 2023 at 5:00 pm.

Paula Stannard

Paula M. Stannard

Chief Legal Counsel

Department of Public Health & Human Services

O: (406) 444-3127

paula.stannard@mt.gov

From: Emma Edwards <eedwards@silverstatelaw.net>
Sent: Monday, January 23, 2023 11:12 AM
To: Stannard, Paula <Paula.Stannard@mt.gov>; Milanovich, Anita <Anita.Milanovich@mt.gov>; Corrigan, Christian <Christian.Corrigan@mt.gov>
Cc: 'Raph Graybill' <rgraybill@silverstatelaw.net>; peter.im@ppfa.org; camila.vega@ppfa.org; tholm@yellowstonelaw.com; deernosea@aclumontana.org; hschneller@reprorights.org; jrasay@reprorights.org; abonillas@reprorights.org; erickson@bebtlaw.com

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Exhibit E

GRAYBILL
LAW FIRM, PC

BENJAMIN R. GRAYBILL
RAPH GRAYBILL
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graybilllawfirm.com

Telephone: (406) 452-8566
Toll Free: (866) 452-8566
Telefax: (406) 727-3225

April 21, 2023

Via Email

Paula M. Stannard
Chief Legal Counsel
Montana Department of Public Health and Human Services
111 N. Sanders Street, Ste 210
Helena, MT 59601
paula.stannard@mt.gov

Re: DPHHS rule change related to Medicaid coverage of abortion services

Dear Ms. Stannard:

I am in receipt of your letter denying my request for a copy of the administrative rule you will adopt on Friday, April 28, 2023. I understand that the rule will take effect the following business day, May 1, 2023.

Your decision to keep the contents of the rule secret makes compliance with it impossible. Without the ability to review any changes made to the rule since it was proposed in the December 23, 2022 edition of the MAR, or know with certainty what the final rule requires, abortion providers cannot undertake the planning necessary to comply with it during the single day between when it is published and when it takes effect. We ask that you reconsider your decision to hide the rule from public view; continued secrecy around this rule sets program participants up to fail.

I also write to renew two requests from my letter of January 23, 2023. Planned Parenthood of Montana and other providers again request that the Department consider either (1) delaying the effective date of the rule to 90 days after the publication of the adoption notice, or (2) stipulating to a stay of enforcement of the rule until such time as a court is able to rule on a request for declaratory relief regarding its statutory and constitutional legality.

These proposals will avert the need for immediate relief from a court; we urge you to consider them. If you will not release the rule prior to its adoption, please provide your response regarding a delayed effective date or stay of enforcement by 12:00 P.M. on Wednesday, April 26, 2023.

Sincerely,

Raph Graybill

CC: Planned Parenthood of Montana, via:
Edmiston and Colton
Tanis Holm (tholm@yellowstonelaw.com)

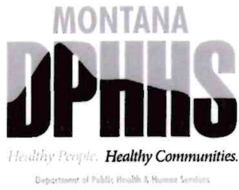
Planned Parenthood Federation of America
Peter Im (peter.im@ppfa.org)
Dylan Cowit (dylan.cowit@ppfa.org)

Blue Mountain Clinic and All Families Healthcare, via:
ACLU of Montana
Alex Rate (ratea@aclumontana.org)
Akilah Deernose (deernosea@aclumontana.org)

Center for Reproductive Rights
Hillary Schneller (hschneller@reprorights.org)
Jen Rasay (jrasay@reprorights.org)
Adria Bonillas (abonillas@reprorights.org)

Bohyer Erickson Beaudette & Tranel
Erin Erickson (erickson@bebtlaw.com)

Exhibit F



Department of Public Health and Human Services

Director's Office ♦ PO Box 4210 ♦ Helena, MT 59620 ♦ (406) 444-5622 ♦ Fax: (406) 444-1970
https://dphhs.mt.gov

Greg Gianforte, Governor
Charles T. Brereton, Director

April 26, 2023

By Email to rgraybill@silverstatelaw.net

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
P.O. Box 3586
Great Falls, MT 59403

Re: DPHHS rule change related to Medicaid coverage of abortion services

Dear Mr. Graybill:

This letter is in response to your letter dated April 21, 2023.

The Department of Public Health and Human Services (DPHHS) rejects the suggestion in your letter that it is "hid[ing] the rule" or "keep[ing] the contents of the rule secret." DPHHS makes its rules available to the public and to regulated entities consistent with the Montana Administrative Procedure Act and the applicable Administrative Rules of Montana. DPHHS notes that the reference to a May 1, 2023 effective date suggests access to the version of the adoption notice submitted to the Secretary of State.

Your letter also included a request for a delayed effective date or stay of enforcement of DPHHS's rule change related to Medicaid coverage of abortion services in order to facilitate litigation. DPHHS declines to delay the effective date of the rule or stipulate to a stay of enforcement of the rule for that purpose.

Sincerely,

Paula M. Stannard

Paula M. Stannard
Chief Legal Counsel
Office of Legal Affairs

Exhibit G

GRAYBILL
LAW FIRM, PC

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April 19, 2023

Via Email

Paula M. Stannard
Chief Legal Counsel
Montana Department of Public Health and Human Services
111 N. Sanders Street, Ste 210
Helena, MT 59601
paula.stannard@mt.gov

Re: DPHHS rule change related to Medicaid coverage of abortion services

Dear Ms. Stannard:

I write to request a copy of the final rule affecting Medicaid coverage of abortion services that DPHHS will adopt in the April 28, 2023 edition of the Montana Administrative Register ("MAR").

As you know, the proposed version of this rule published in the December 23, 2022 edition of the MAR provided that the rule would be effective the day after adoption. To the extent the final rule contains a similar next-day effective date, an advance copy of the rule is necessary for Planned Parenthood and other abortion providers in Montana to review the rule and determine how to conform their operations to it. This is essential to prevent "regulation by surprise," particularly in an area affecting Montanans' fundamental constitutional rights.

The final rule that DPHHS has noticed for publication in the April 28, 2023 edition of the MAR is, without doubt, "public information" as that term is defined in § 2-6-1002(11), MCA ("'Public information' means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law."). Montana recognizes no deliberative process privilege, nor does Montana law recognize a privilege for draft documents. *See* Order on Cross-Motions for Summary Judgment, *O'Neill v. Gianforte*, CDV-2021-951 (1st Jud. Dist. Ct. Dec. 14, 2022) (denying executive branch claims of deliberative process privilege). Indeed, the "right to know" in Montana expressly secures the public's right to observe the government's deliberations leading up to a decision or final adoption. Mont. Const., Art. II, Sec. 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government"); *O'Neill*, CDV-2021-951 at 10 ("Now I want to see all agencies, in particular, opened up to the public. I want their documents examined; I want their deliberations open" (quoting Mont. Const. Convention, Verbatim Transcript, p. 2499 (Delegate Berg)).

To allow our clients time to determine how the proposed rule will affect their provision of care, and the constitutional rights of their patients, please furnish a copy of the proposed final rule by 12:00 P.M. on Thursday, April 20, 2023.

Sincerely,

Raph Graybill

CC: Planned Parenthood of Montana, via:
Edmiston and Colton
Tanis Holm (tholm@yellowstonelaw.com)

Planned Parenthood Federation of America
Peter Im (peter.im@ppfa.org)
Dylan Cowit (dylan.cowit@ppfa.org)

Blue Mountain Clinic and All Families Healthcare, via:
ACLU of Montana
Alex Rate (ratea@aclumontana.org)
Akilah Deernose (deernosea@aclumontana.org)

Center for Reproductive Rights
Hillary Schneller (hschneller@reprorights.org)
Jen Rasay (jrasay@reprorights.org)
Adria Bonillas (abonillas@reprorights.org)

Bohyer Erickson Beaudette & Tranel
Erin Erickson (erickson@bebtlaw.com)

Exhibit H

Department of Public Health and Human Services

Director's Office ♦ PO Box 4210 ♦ Helena, MT 59620 ♦ (406) 444-5622 ♦ Fax: (406) 444-1970
https://dphhs.mt.gov

Greg Gianforte, Governor

Charles T. Brereton, Director

April 20, 2023

By Email to rgraybill@silverstatelaw.net

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403

Re: Medicaid Draft Final Rule Request

Dear Mr. Graybill:

This letter is in response to your letter dated April 19, 2023, requesting a working draft copy of the administrative rule to be finalized and released/published in the April 28, 2023 Montana Administrative Record (MAR).

Pursuant to the Montana Administrative Procedure Act and the Secretary of State's implementing regulations, final administrative rules are publicly available at the time of publication in the MAR, which satisfies the constitutional and statutory public records/public information requirements. The subject rule will be finalized and publicly available in the April 28, 2023 MAR.

Sincerely,

Paula M. Stannard
Chief Legal Counsel
Office of Legal Affairs

Exhibit I

Fiscal Note 2025 Biennium

Bill information:	
HB0544 - Provide requirements for coverage of abortion under Medicaid and CHIP (Gillette, Jane)	
Status:	As Introduced

☐Significant Local Gov Impact ☒Needs to be included in HB 2 ☒Technical Concerns

☐Included in the Executive Budget ☐Significant Long-Term Impacts ☐Dedicated Revenue Form Attached

FISCAL SUMMARY

	FY 2024 Difference	FY 2025 Difference	FY 2026 Difference	FY 2027 Difference
Expenditures:				
General Fund	$183,340	$189,094	$194,941	$201,182
Federal Special Revenue	$493,598	$506,625	$519,653	$533,404
Revenue:				
General Fund	$0	$0	$0	$0
Federal Special Revenue	$493,598	$506,625	$519,653	$533,404
Net Impact-General Fund Balance:	($183,340)	($189,094)	($194,941)	($201,182)

Description of fiscal impact: HB 504 allows the Department of Public Health and Human Services (department) to provide Medicaid coverage of abortions only if performed by a physician and only under certain circumstances. HB 544 will result in higher provider rate costs as mid-level practitioners are currently allowed to perform these services. Additional contractual services will be required for case reviews to ensure each abortion meets the allowable criteria outlined in HB 504.

FISCAL ANALYSIS

Assumptions:

1. There were 648 Medicaid covered abortions in FY 2022. Based on the most recent 5-year total abortion count average, there is expected to be a 2.6% annual growth. The estimated number of Medicaid covered abortions for FY 2024 are 682, FY 2025 are 700, FY 2026 are 718, and FY 2027 are 737. (665*1.026=682; 682*1.026=700; 700*1.026=718; 718*1.026=737).
2. Mid-level practitioners (mid-levels) performed 56.7% of Medicaid abortions in FY 2022. Under HB 544, these abortions will be performed by physicians. Mid-levels are paid at 90% of the physician rate for services. The FY 2022 rate for an abortion for mid-levels was $398.23. The inflationary rate according to the 12-month ending June 2022 Consumer Price Index (CPI) for medical care services was 4.8%. Based on this the assumed mid-level rate in FY 2024 is $437.37 ($398.23*1.048 = $417.34 FY 2023 rate, $417.34*1.048=$437.37). This

will convert to a physician rate of $485.97 ($437.37/.9). This is an increase cost of $48.60 per abortion ($485.97-$437.37). This resulted in an increased cost of $18,807 in FY 2024 (682 abortions*0.567=387 impacted abortions 387*$48.60=$18,807). This assumed cost is $20,219 in FY 2025, $21,723 in FY 2026 and $23,381 in FY 2027.

3. Based on an informal quote from a vendor, it is estimated enhanced documentation and prior authorization costs will be $965/per case. This would equate to approximately $658,130 in FY 2024, $675,500 in FY 2025, $692,870 in FY 2026, and $711,205 in FY 2027. (682*$965=$658,130; 700*$965=$675,500; 718*$965=$692,870; 737*$965=$711,205). These reviews would be contracted services.
4. Abortions services are 100% state funded while contract services are funded at the current FMAP of 25% state funded and 75% federal funded.

PROVIDING FOR PRIOR AUTHORIZATION; PROVIDING THAT ONLY ABORTION SERVICES PROVIDED BY A PHYSICIAN ARE COVERED SERVICES

	SFY 2022	SFY 2023	SFY 2024	SFY 2025	SFY 2026	SFY 2027
Total Mid-Level Abortions	368	377	387	397	407	418
Total Per Mid-Level Procedure Cost	$ 398.23	$ 417.34	$ 437.37	$ 458.36	$ 480.36	$ 503.42
Total Per Physician Procedure Cost	$ 442.47	$ 463.71	$ 485.97	$ 509.29	$ 533.73	$ 559.36
Caseload Growth at 2.6%						
Medical Care Services CPI at 4.8%						
Physician to Mid-Level Differential at 90.0%						
Estimated Expenditure for Mid-Level to Physician	$ 16,277	$ 17,482	$ 18,807	$ 20,219	$ 21,723	$ 23,381
Total Abortions	648	665	682	700	718	737
Per Case Review Contract Cost	$ 965.00	$ 965.00	$ 965.00	$ 965.00	$ 965.00	$ 965.00
Total Case Review Contract Cost	$ 625,320	$ 641,725	$ 658,130	$ 675,500	$ 692,870	$ 711,205
FMAP	**SFY 2022**	**SFY 2023**	**SFY 2024**	**SFY 2025**	**SFY 2026**	**SFY 2027**
Claim Cost						
State Share	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Federal Share	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Contract Cost						
State Share	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
Federal Share	75.00%	75.00%	75.00%	75.00%	75.00%	75.00%
FUNDING	**SFY 2022**	**SFY 2023**	**SFY 2024**	**SFY 2025**	**SFY 2026**	**SFY 2027**
State - Claim Cost	$ 16,277	$ 17,482	$ 18,807	$ 20,219	$ 21,723	$ 23,381
Federal - Claim Cost	$ -	$ -	$ -	$ -	$ -	$ -
State - Contract Cost	$ 156,330	$ 160,431	$ 164,533	$ 168,875	$ 173,218	$ 177,801
Federal - Contract Cost	$ 468,990	$ 481,294	$ 493,598	$ 506,625	$ 519,653	$ 533,404
State - Total	**$ 172,607**	**$ 177,913**	**$ 183,339**	**$ 189,094**	**$ 194,940**	**$ 201,182**
Federal - Total	**$ 468,990**	**$ 481,294**	**$ 493,598**	**$ 506,625**	**$ 519,653**	**$ 533,404**

	FY 2024 Difference	FY 2025 Difference	FY 2026 Difference	FY 2027 Difference
Fiscal Impact:				
FTE	0.00	0.00	0.00	0.00
Expenditures:				
Operating Expenses	$658,131	$675,500	$692,871	$711,205
Benefits	$18,807	$20,219	$21,723	$23,381
TOTAL Expenditures	$676,938	$695,719	$714,594	$734,586
Funding of Expenditures:				
General Fund (01)	$183,340	$189,094	$194,941	$201,182
Federal Special Revenue (03)	$493,598	$506,625	$519,653	$533,404
TOTAL Funding of Exp.	$676,938	$695,719	$714,594	$734,586
Revenues:				
General Fund (01)	$0	$0	$0	$0
Federal Special Revenue (03)	$493,598	$506,625	$519,653	$533,404
TOTAL Revenues	$493,598	$506,625	$519,653	$533,404
Net Impact to Fund Balance (Revenue minus Funding of Expenditures):				
General Fund (01)	($183,340)	($189,094)	($194,941)	($201,182)
Federal Special Revenue (03)	$0	$0	$0	$0

Technical Notes:

1. The fiscal impact of HB 544 is anticipated to be similar to the fiscal impact of the department's currently proposed amendments to ARM 37.82.102 and 37.86.104 pertaining to Medicaid coverage of abortion services.

NOT SIGNED BY SPONSOR

Sponsor's Initials *Date*

Budget Director's Initials

2-27-23

Date