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. ADV-2023-299 Hon. Mike Menahan **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

Before the Court are motions for preliminary injunctions filed by Plaintiffs Planned Parenthood of Montana ("PPMT"), All Families Healthcare, Blue Mountain Clinic, Dr. Samuel Dickman, and Helen Weems, in which they seek to enjoin Defendants the State of Montana, the Montana Department of Public Health and Human Services ("DPHHS"), and DPHHS Director Charlie Brereton (collectively, "the State") from enforcing the DPHHS rule proposed at Montana

Administrative Register Notice 37-1024 amending Mont. Admin. R. 37.82.102 and 37.86.104 ("the Rule"), 2023 House Bill 544 ("HB 544"), and 2023 House Bill 862 ("HB 862"). Raph Graybill, Tanis Holm, Peter Im, and Dylan Cowit represent Plaintiffs PPMT and Dr. Dickman. Akilah Deernose, Alex Rate, Erin Erickson, Hillary Schneller, Jen Rasay, and Adria Bonillas represent Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Ms. Weems. Montana Attorney General Austin Knudsen, Thane Johnson, Alwyn Lansing, Michael Russell, Levi Roadman, and Emily Jones represent Defendants.

FACTS

Plaintiffs challenge the constitutionality of the Rule, HB 544, and HB 862, all of which restrict Medicaid coverage of abortions in Montana. In support of their motions, Plaintiffs submitted the affidavits of Dr. Dickman, the Chief Medical Officer of PPMT; Martha Fuller, President and Chief Executive Officer of PPMT; Ms. Weems, a nurse practitioner and the sole clinician at All Families Healthcare; and Nicole Smith, the Executive Director of Blue Mountain Clinic. In support of its response to Plaintiffs' motions, the State submitted the affidavit of Michael Randol, the Medicaid and Health Services Director at DPHHS. On May 23, 2023, this Court held an evidentiary hearing on Plaintiffs' motions, at which it heard testimony from Dr. Dickman, Ms. Weems, Ms. Smith, Mr. Randol, and the State's expert witness Dr. George Mulcaire-Jones. On the same day, the Court held an evidentiary hearing on PPMT and Dr. Dickman's request for a preliminary injunction enjoining 2023 House Bills 575 and 721 in Case No. ADV-2023-231. Pursuant to the parties' stipulation, in both cases, the Court may rely on testimony taken in either hearing. Dkt. 41 at 2. The parties stipulated to the qualifications of the expert witnesses for purposes of the hearing. *Id.*

The Rule and HB 544 are similar in substance. They restrict Medicaid coverage of abortions in three ways. First, they require that abortions covered by Medicaid be provided by a physician, not by an advanced practice clinician ("APC") such as a physician's assistant or an advanced practice registered nurse ("APRN"). Second, they require that Medicaid patients seeking abortions first obtain prior authorization from DPHHS. As part of the prior authorization process, patients must undergo an in-person physical examination and cannot obtain an abortion without one. Third, the Rule and HB 544 create new, narrow definitions of "medically necessary service" that apply only to abortions. HB 862, the other restriction Plaintiffs challenge, bans Medicaid coverage of abortions except in cases of rape or incest or if the abortion is necessary to save the pregnant person's life.

Based on affidavits and live testimony, the Court finds that when Medicaid does not cover an abortion sought by a Medicaid patient, the patient's ability to access the abortion is severely impeded. At the hearing, Dr. Dickman and Ms. Weems both testified about the effect of the availability of Medicaid coverage on abortion access. The Court finds their testimony credible in light of their experience as abortion providers and in particular their experience providing abortions to Medicaid patients. Dr. Dickman also testified that he had conducted research that found that when Medicaid does not cover abortions, a significant percentage of low-income patients seeking abortions are forced to delay paying for essentials such as bills and groceries. Dkt. 5 ("Dickman Aff.") ¶¶ 57–59. The State's witnesses did not offer evidence regarding the effect on abortion access when Medicaid does not cover abortions.

The Court turns to the evidence regarding the individual requirements of the Rule and HB 544. With respect to the physician-only requirement, Plaintiffs' affidavits offer evidence that few physicians provide abortions in Montana and that Plaintiffs rely heavily on APCs for abortion care,

such that the physician-only requirement will dramatically reduce the availability of abortions for Medicaid patients. Dkt. 6 ("Fuller Aff.") ¶¶ 14, 19; Dkt. 8 ("Weems Aff.") ¶ 20; Dkt. 7 ("Smith Aff.") ¶ 21. Further, Plaintiffs offered evidence that APCs provide abortions as safely and effectively as physicians. Dickman Aff. ¶¶ 20, 21; Weems Aff. ¶ 17. The Court credits this testimony, along with Ms. Weems's testimony that because she is the sole clinician at All Families Healthcare, the physician-only requirement could force her to close her clinic. Weems Aff. ¶¶ 9, 27. The State failed to rebut Plaintiffs' evidence about the effect of the physician-only requirement on their operations.

As to the prior authorization requirement of the Rule and HB 544, the Court finds that the requirement would force Medicaid patients to make an additional in-person trip to a health care provider to receive a physical examination and that it would impose a waiting period on Medicaid patients; this would especially burden those who have limited access to transportation, inflexible work schedules, caretaking responsibilities, or are victims of intimate partner violence. Dickman Aff. ¶ 29; Weems Aff. ¶¶ 24–25; Smith Aff. ¶¶ 29–30, 39–40, 46. Dr. Mulcaire-Jones testified that it would be possible for a Medicaid patient to obtain the in-person examination at a health care provider other than Plaintiffs, elsewhere in Montana. Be that as it may, the requirement would still force Medicaid patients to make an unnecessary in-person trip to *a* provider and delay their care for a period of time that the Rule and HB 544 do not limit.

The Court also finds that the prior authorization requirement would eliminate Plaintiffs' provision of medication abortion to Medicaid patients via direct-to-patient telehealth. Direct-to-patient medication abortion allows patients to connect with a health care provider from their own home or a location of their choosing for a virtual appointment through a secure video platform, typically without requiring the patient to undergo an ultrasound. Dickman Aff. ¶ 28; Weems Aff.

¶ 13. Providers perform a screening process to determine whether a patient is eligible for a direct-to-patient medication abortion, including confirming that it is not medically necessary for the patient to receive an ultrasound prior to the abortion. If the patient is eligible, the abortion medication is then mailed to the patient. Dickman Aff. ¶ 28. In this case, Plaintiffs offered evidence that direct-to-patient medication abortion is a safe and effective method of abortion that improves access for rural patients and patients who have difficulty accessing transportation. Fuller Aff. ¶¶ 10, 24–25; Dickman Aff. ¶¶ 31, 35; Weems Aff. ¶¶ 29–30; Smith Aff. ¶¶ 28–30.

At the hearing on HB 575 and HB 721, both parties also offered testimony about the safety of direct-to-patient medication abortion, including whether it is medically necessary to perform an ultrasound prior to a medication abortion. Dr. Dickman and Plaintiffs' expert witness Dr. Steven Ralston testified that direct-to-patient medication abortion is safe and effective and that the standard of care does not require providing an ultrasound prior to a medication abortion in all cases. Dr. Mulcaire-Jones testified that providing an ultrasound is necessary in all cases and that direct-to-patient medication abortion is not safe and does not conform with the standard of care. With respect to abortion safety and the standard of care for providing abortions, the Court credits the testimony of Drs. Dickman and Ralston over the testimony of Dr. Mulcaire-Jones. Drs. Dickman and Ralston are both abortion providers, and Dr. Ralston testified about the research demonstrating the safety and efficacy of direct-to-patient medication abortions and the major medical organizations that support it, including the American College of Obstetricians and Gynecologists, the Society for Family Planning, the Royal College of Obstetricians and Gynaecologists, the National Abortion Federation, and the World Health Organization. In contrast, Dr. Mulcaire-Jones testified that he has never provided or observed an abortion, and he did not cite any scientific research that direct-to-patient medication abortion is unsafe.

Accordingly, the Court finds that direct-to-patient medication abortion is safe and conforms with the standard of care, which does not require an ultrasound prior to all medication abortions.

Finally, the Court turns to the issue of medical necessity. The Court finds that there is no health-based justification for the narrow definitions of medical necessity in the Rule and HB 544, which change the definition of "medically necessary" only for abortion. Dickman Aff. ¶ 57. The Court also finds that Dr. Dickman and Ms. Weems exercise their clinical judgment to make an individualized determination of medical necessity with respect to each of their abortion patients who are Medicaid recipients.

At the hearing, the State introduced as an exhibit the MA-037 form, the state-created form on which abortion providers document medical necessity. The form includes a space for the provider to write a brief explanation regarding medical necessity and instructs the provider to "[a]ttach additional documentation as needed." The Court finds that, on its face, the form does not require providers to submit additional documentation or to submit sufficient documentation for DPHHS to confirm the provider's finding of medical necessity. The Court credits the testimony of Dr. Dickman and Ms. Weems that they complete the MA-037 forms truthfully and accurately.

According to Mr. Randol, based on an audit of the forms, DPHHS concluded that the abortion providers did not provide sufficient explanations or documentation for it to independently verify the findings of medical necessity, but as the Court has found, DPHHS did not require such documentation to begin with. The State argued at the hearing that the Rule and HB 544 are designed to prevent Medicaid fraud. The Court finds that the State has introduced no evidence that abortion providers in Montana do not make individualized determinations of medical necessity for each Medicaid patient, that they are untruthful in completing the MA-037 forms on which they document medical necessity, or that they engage in Medicaid fraud.

With respect to the evidence regarding HB 862, which would ban Medicaid coverage of abortions except in cases of rape or incest or if the abortion is necessary to save the pregnant person's life, the Court finds that Medicaid covers very few abortions in these two categories. During the ten-year period from July 2011 to June 2021, DPHHS reports that only six abortions in Montana were reported as falling in these two categories. Dkt. 24 ("Randol Aff.") ¶ 15.

PRINCIPLES OF LAW

Pursuant to 2023 Senate Bill 191, as of March 2, 2023, "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; *and* (d) the order is in the public interest." *See* SB 191, 2023 Leg. Reg. Sess. (Mont. 2023) (amending § 27-19-201, MCA) (emphasis added). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard" and "closely follow United States supreme court case law." SB 191, § 1. This new standard is conjunctive, not disjunctive, meaning the moving party must establish all four factors to obtain relief. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011) (addressing interaction of four factors).

Under the federal preliminary injunction standard, "[a] preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) (citing *Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)).

ANALYSIS

Upon consideration of the parties' arguments, the Court determines that Plaintiffs have standing to challenge the Rule, HB 544, and HB 862 and that they have met their burden to show that the laws should be preliminarily enjoined.

I. Standing

At the outset, the Court must address the State's argument that Plaintiffs do not have standing to bring their claims. Plaintiffs bring the claims at issue at this stage on behalf of their patients. The Montana Supreme Court has repeatedly held that health care providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong v. State*, 1999 MT 261, ¶ 13, 296 Mont. 361, 989 P.2d 364; *see also Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 250, 440 P.3d 4 ("*Weems I*") ("[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.") (quoting *Armstrong*, ¶¶ 8–13). Although the Rule, HB 544, and HB 862 operate through restrictions placed on abortion providers, they impact the constitutionally protected rights of Plaintiffs' Medicaid patients by making it much more difficult, if not impossible, for them to access abortion. Applying Montana's well-settled precedent, the Court concludes that Plaintiffs have standing to bring claims asserting their patients' constitutional rights.

Defendants ask this Court to disregard Montana Supreme Court precedent "in light of [the] shifting legal landscape" around abortion cases. The Court is not persuaded there have been any relevant changes in federal standing law, and in any event the Court cannot—and will not—disregard directly applicable precedent on standing from the Montana Supreme Court. *Cf. State*

v. Whitehorn, 2002 MT 54, ¶ 14, 309 Mont. 63, 50 P.3d 121 ("Under the principles of binding authority, the District Court could not overrule our holding …, only this Court could do so."). *Armstrong* and *Weems I* confer third-party standing on abortion providers to challenge laws that "impact the constitutional rights of women patients" or which are "directed at health care providers." Plaintiffs therefore plainly have standing.

The State also argues that Plaintiffs lack standing because they have not demonstrated a "close relationship" to their Medicaid patients. Under *Armstrong*, abortion providers by definition have a close relationship with their patients. *Armstrong*, ¶ 9; *see also Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("The closeness of the relationship [between a patient and an abortion provider] is patent . . . . A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State."). Moreover, the Court finds, based on the testimony of Dr. Dickman and Ms. Weems regarding their conversations with their patients and the affidavits of Ms. Weems and Ms. Smith, that Plaintiffs all have relationships with their patients of sufficient closeness to establish standing. *See* Weems Aff. ¶ 21; Smith Aff. ¶ 26.

II. Privacy Claims

Article II, section 10 of the Montana Constitution "protects a woman's right of procreative autonomy—i.e., here the 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.

This Court must first address the State's argument that the restrictions on Medicaid coverage of abortions in the Rule, HB 544, and HB 862 do not implicate the right to privacy at all because they deal only with whether Medicaid will provide funding for particular abortions. In *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (1st Jud. Dist., May 22, 1995)

("*Jeannette R.*"), this Court recognized that the State violates Medicaid patients' right to privacy when it "inject[s] coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion." *See* Order on Mots. for Summ. J., *Jeannette R.* at 18 (quoting *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981)). When the State chooses not to fund medically necessary abortions, the right at issue "is not an assurance of governmental funding of abortion," but rather "the right to privacy, which is the right to be left alone [and] protects the individual from undue governmental interference." *Id.* at 19. *Jeannette R.* held that the State must cover all medically necessary abortions. *Id.* at 23. The evidence in this case provides no basis to depart from that holding; in fact, the record further supports the conclusion that prohibiting Medicaid from covering abortions infringes on Medicaid recipients' ability to access abortion. The Court concludes that, like the administrative rule at issue in *Jeannette R.*, the Rule, HB 544, and HB 862 infringe on Plaintiffs' patients' right to privacy.

After this Court decided *Jeannette R.*, the Montana Supreme Court held in *Armstrong* that "except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so." *Armstrong*, ¶ 62. Under *Jeannette R.* and *Armstrong*, Medicaid must pay for medically necessary abortions, and it must leave to a patient and their provider decisions regarding whether an abortion is medically necessary—a decision that is within a medical provider's clinical judgment. Any interference with this relationship is subject to strict scrutiny. *Id.* ¶ 34.

The Court analyzes in turn the requirements of the Rule, HB 544, and HB 862 under strict scrutiny, beginning with the physician-only provisions of the Rule and HB 544. The State contends that these provisions do not prohibit APCs from providing abortions to Montanans on Medicaid, arguing instead that they only bar reimbursement. But just as the rule prohibiting Medicaid from covering medically necessary abortions in *Jeannette R.* infringed on the right to abortion of Medicaid-eligible Montanans, barring Medicaid from covering abortions provided by APCs infringes on the right to abortion of Medicaid-eligible Montanans who seek abortion care from such providers. Applying the strict scrutiny analysis, this Court concludes that there is no medically acknowledged bona fide health reason for restricting Medicaid coverage of abortions to physicians only. *Armstrong* held that there was no bona fide health reason to require that "abortions be performed only by a physician to the exclusion of a trained, experienced and medically competent physician assistant." *Armstrong*, ¶ 66. Further, just last month, the Montana Supreme Court held that "there is no medically acknowledged, bona fide health risk for the State to restrict the availability of abortion care by preventing [advanced practice registered nurses ("APRNs")] from performing abortions." *Weems v. State*, 2023 MT 82, ¶ 1, ___ Mont. ___, ___ P.3d ___, 2023 WL 3400808 ("*Weems II*"). The physician-only requirements of the Rule and HB 544 do not satisfy strict scrutiny.

Turning to the prior authorization requirements in the Rule and HB 544, the Court concludes that Plaintiffs have established that these requirements infringe on their patients' right to abortion because they require Medicaid patients to make an extra in-person visit to a health care provider, impose a waiting period, and ban Plaintiffs' provision of medication abortion to Medicaid patients via direct-to-patient telehealth. The State has not demonstrated that the prior authorization requirements address a medically acknowledged, bona fide health risk. For that

reason alone, this Court concludes that these provisions fail strict scrutiny as articulated in *Armstrong*. This conclusion is bolstered by *Planned Parenthood of Montana v. State by & through Knudsen*, 2022 MT 157, ¶ 51, 409 Mont. 378, 515 P.3d 301("*PPMT v. State*"), in which the Montana Supreme Court affirmed a preliminary injunction of a statute that also required an extra visit, imposed a waiting period, and banned direct-to-patient medication abortion.

The State argues that the prior authorization requirements serve the compelling governmental interest in preventing Medicaid fraud. But the Montana Supreme Court has never recognized this as a compelling interest that can justify an abortion restriction. Further, the State has introduced no evidence that abortion providers engage in Medicaid fraud when they make medical necessity determinations. Regardless, the Court concludes that the Rule and HB 544 are not narrowly tailored to address any interest in preventing Medicaid fraud. Far from paperwork requirements ensuring that providers are not committing fraud, they impede Medicaid patients' access to abortions by requiring patients to make an additional visit to a health care provider, imposing a waiting period, and eliminating the option of medication abortion via direct-to-patient telehealth for Montanans on Medicaid.

The State's invocation of a risk of a federal audit is also unavailing. The hypothetical possibility of an audit is not a medically acknowledged bona fide health risk, nor is it otherwise a compelling state interest that would justify infringing on a constitutional right. Moreover, federal law prohibits Montana Medicaid from seeking federal funds for abortions unless there is a risk of death to the pregnant person or the pregnancy results from rape or incest. It has nothing to say about whether Montana Medicaid may otherwise cover medically necessary abortions. The State introduced no evidence that there was insufficient documentation for the six abortions between July 2011 and June 2021 that fell into the two federally funded categories.

The Court turns to the final provision of the Rule and HB 544, the narrowed definitions of medical necessity. The definition of medical necessity in Mont. Admin. R. 37.82.102(18)(a) has remained substantially unchanged since it was promulgated in 1980, *see* MAR Notice No. 46-2-222 at 631–32 (Feb. 28, 1980), including when this Court decided *Jeannette R.* in 1995. The State cannot circumvent *Jeannette R.*'s requirement that it cover medically necessary abortions by restricting the category of abortions classified as medically necessary. The State has offered no medically acknowledged, bona fide health risk that the new definitions address, nor has it offered any reason to implement a definition of medical necessity unique to abortion. Nor does the State offer any reason why its narrow, more restrictive definitions of medical necessity are authorized under *Jeannette R.* or could somehow be read to effectuate that decision. Rather, the definitions serve to limit access to abortions otherwise required to be covered by *Jeannette R.*, and this Court has before it no reason to disturb the analysis and holding of that case. At their core, these definitions attempt to supplant the clinical judgment of Plaintiffs as to what constitutes "medical necessity"—an essential component of the provider-patient relationship that *Armstrong* and its progeny protect from government disruption and interference. As a result, the provisions of the Rule and HB 544 that narrow the definition of medical necessity fail strict scrutiny.

Finally, the Court addresses HB 862, which bars Medicaid coverage for abortions except in cases where the patient is at risk of death or the pregnancy results from rape or incest. *Jeannette R.* declared unconstitutional a regulation that did the same thing. The State has not established any medically acknowledged bona fide health risk that HB 862 addresses—indeed, it bans virtually all medically necessary abortions under Medicaid, save for these extremely narrow exceptions. Under the principles articulated in *Jeannette R.* and *Armstrong*, HB 862 fails strict scrutiny.

For all of these reasons, this Court concludes that at this preliminary stage, Plaintiffs have shown they are likely to succeed on their claims that the Rule, HB 544, and HB 862 violate the right to privacy under the Montana Constitution.

III. Equal Protection Claims

Article II, Section 4 of the Montana Constitution states that "[n]o person shall be denied the equal protection of the laws." Mont. Const. Art. II, § 4. This clause "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corrs.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992 (2001). Plaintiffs argue that the Rule, HB 544, and HB 862 each violate the equal protection clause by discriminating against pregnant Medicaid patients who decide to terminate their pregnancies and that the Rule and HB 544 also violate the guarantee by discriminating against pregnant Medicaid patients seeking an abortion from an APC.

Under the equal protection clause, if a classification "affects a suspect class or threatens a fundamental right," the Court must apply strict scrutiny. *Id.* ¶ 31. To survive strict scrutiny, the law or policy must be "narrowly tailored to serve a compelling State interest." *Id.* Because the Rule, HB 544, and HB 862 each infringe on Montanans' fundamental right to access pre-viability abortions, *see supra*, this Court must apply strict scrutiny. The Rule and statutes can survive strict scrutiny only if they are narrowly tailored to address a medically acknowledged, bona fide health risk, the lone compelling interest that the Supreme Court has recognized can justify a restriction on pre-viability abortions. *See Armstrong*, ¶ 59.

First, Plaintiffs have established that they are likely to succeed on the merits of their claim that the Rule, HB 544, and HB 862 each violate equal protection by discriminating against pregnant Medicaid patients who decide to terminate their pregnancies. The Rule and statutes enact

restrictions that will prevent pregnant Medicaid patients who decide to terminate their pregnancies from accessing those medically necessary abortions, *see supra*, without imposing similar restrictions on medically necessary care for Medicaid patients who choose to continue their pregnancies. As this Court explained in *Jeannette R.*, "[t]he state has taken the class of indigent pregnant Medicaid eligible women and divided them. One class, who needs medically necessary treatment (an abortion) are not entitled to help from the state. However, another class (those women for whom child birth is a medically necessary treatment) are entitled to state financial help." *Jeannette R.* at 22. Plaintiffs have established that this classification is not narrowly tailored to address a medically acknowledged, bona fide health risk—preventing Medicaid patients from obtaining medically necessary care does not address any such risk.

Second, Plaintiffs have established that they are likely to succeed on the merits of their claim that the Rule and HB 544 each violate equal protection by discriminating against pregnant Medicaid patients seeking an abortion from an APC. The Rule and HB 544 treat two similarly situated classes differently: Medicaid would cover abortions for pregnant Medicaid patients who seek an abortion from a physician but not for pregnant Medicaid patients who seek an abortion from an APC. Plaintiffs have established that this classification is not narrowly tailored to address a medically acknowledged, bona fide health risk. Plaintiffs have established that APCs can safely and effectively provide abortions; *see also Weems II*, ¶ 51 ("The State has failed to meet its burden of demonstrating that APRN-FNPs and APRN-CNMs providing abortion care present a medically acknowledged, bona fide health risk. The State has failed to present any evidence that demonstrates abortions performed by APRNs include more risk than those provided by physicians or PAs. The State has failed to identify any reason why APRNs should be restricted from providing abortions, and thus failed to articulate a medically acknowledged, bona fide health risk."). The Court

concludes that Plaintiffs have shown they are likely to succeed on their claims that the Rule, HB 544, and HB 862 violate the equal protection clause of the Montana Constitution.

IV. Remaining Preliminary Injunction Factors

Turning to irreparable harm, the Montana Supreme Court has held that "the loss of a constitutional right constitutes irreparable harm," *PPMT v. State*, ¶ 60, which Plaintiffs have demonstrated here. The same is true under federal preliminary injunction law. *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019). As described above, the statutes and the Rule infringe on the fundamental constitutional rights of Plaintiffs' Medicaid patients.

Further, Plaintiffs have established that if the Rule, HB 544, and HB 862 were to take effect, they would have devastating health consequences for Plaintiffs' Medicaid patients. Because of the low number of physicians providing abortions in Montana, the physician-only requirement in the Rule and HB 544 would significantly reduce the availability of abortions and impede abortion access for Montanans on Medicaid. The prior authorization requirements in the Rule and HB 544 would require an additional visit to a health care provider, impose a waiting period, and eliminate direct-to-patient medication abortion, irreparably harming rural Medicaid patients, Medicaid patients with disabilities, Medicaid patients with limited access to transportation, and Medicaid patients suffering from intimate partner violence. Finally, the Rule and HB 544's restriction of the definition of medical necessity would limit the abortions Medicaid would cover, meaning that Montanans on Medicaid whose abortions would be covered under the definition of medical necessity applicable to almost all other medical care—and whose health care providers have deemed their abortions to be medically necessary—would be forced either to draw on their limited financial resources to pay for an abortion or to forgo medically necessary care. HB 862 would go farther, making it impossible for almost all Medicaid patients to obtain coverage

for their abortions. The Court concludes that the Rule, HB 544, and HB 862 would each cause Montanans on Medicaid to delay their abortions, needlessly subjecting them to increased medical risk, or to carry a pregnancy to term against their will. The Rule, HB 544, and HB 862 would each cause Plaintiffs' patients irreparable harm.

As to the remaining preliminary injunction factors, the balance of the equities and the public interest, these "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The State has no legitimate interest in enforcing unconstitutional regulations and laws. *See Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017). The equities and the public interest weigh in favor of protecting Plaintiffs' patients' constitutional rights by preserving the status quo, under which Plaintiffs make clinical determinations of medical necessity with respect to their Medicaid patients free from unwarranted government intervention, consistent with the values of privacy, bodily autonomy, and individual dignity secured by the Montana Constitution's Declaration of Fundamental Rights. *See Armstrong*, ¶ 56. Granting a preliminary injunction will ensure that Montanans on Medicaid continue to have access to constitutionally protected abortions and safe, effective medical care.

CONCLUSION

Because the Court issues a preliminary injunction, it need not reach the issue of Plaintiffs' request in the alternative for a writ of prohibition.

Upon consideration of the evidence and the parties' arguments, the Court finds the following:

1. Plaintiffs have established that they are likely to succeed on the merits of their claims that the Rule, HB 544, and HB 862 violate the Montana Constitution's guarantees of the right to privacy and the right to equal protection;

2. Plaintiffs and their patients will suffer irreparable harm if enforcement of the Rule, HB 544, and HB 862 is not preliminarily enjoined;
3. The balance of the equities weighs in favor of granting preliminary relief; and
4. Granting a preliminary injunction would serve the public interest.

ORDER

IT IS HEREBY ORDERED that Plaintiffs' Motions for Preliminary Injunctions are **GRANTED** and Defendants are **ENJOINED** from enforcing the Department of Public Health and Human Services rule proposed at Montana Administrative Register Notice 37-1024 amending Mont. Admin. R. 37.82.102 and 37.86.104, 2023 House Bill 544, and 2023 House Bill 862 with respect to any abortions provided while this order is in effect, pending a final disposition of this litigation.

Pursuant to Montana Code Annotated § 27-19-306(1)(b)(ii), no bond is required.

DATED this ___ day of June, 2023.

_____
MIKE MENAHAN
District Court Judge

cc: Raphael Graybill, via email: rgraybill@silverstatelaw.net
Tanis Holm, via email: tholm@yellowstonelaw.com
Peter Im, via email: peter.im@ppfa.org
Dylan Cowit, via email: dylan.cowit@ppfa.org
Akilah Deernose, via email: deernosea@aclumontana.org
Alex Rate, via email: ratea@aclumontana.org
Erin Erickson, via email: erickson@bebtlaw.com
Jen Rasay, via email: jrasay@reprorights.org
Hillary Schneller, via email: hschneller@reprorights.org
Adria Bonillas, via email: abonillas@reprorights.org
Austin Knudsen, via email: austin.knudsen@mt.gov
Thane Johnson, via email: thane.johnson@mt.gov
Michael Russell, via email: michael.russell@mt.gov
Levi Roadman, via email: levi.roadman@mt.gov

Alwyn Lansing, via email: alwyn.lansing@mt.gov
Emily Jones, via email: emily@joneslawmt.com

Electronically Signed By:
Hon. Judge Mike Menahan
Tue, Jul 11 2023 03:14:47 PM