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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.: CDV-23-299 Judge: Seeley **AFFIDAVIT OF NICOLE K. SMITH, PhD, MPH IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND APPLICATION FOR WRIT OF PROHIBITION**

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**Applications for admission pro hac vice forthcoming

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

1. I submit this affidavit in support of Plaintiffs' Application for a Temporary Restraining Order, Preliminary Injunction, and Writ of Prohibition against enforcement of the rule related to Medicaid coverage of abortion services.

Background and Experience

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

3. For the past 46 years, Blue Mountain Clinic has been providing patient-centered and evidence-based health care, education, and advocacy in Missoula County and beyond. Blue Mountain Women's Clinic first opened in 1977 as the first and only abortion clinic in the state of Montana. In 1991, the Clinic expanded its health services to include comprehensive family medical care to better serve its community. To reflect these changes, the Clinic changed its name to Blue Mountain Clinic.

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

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

University's School of Public Health, a Master's degree in Public Health from Portland State University, and a Bachelor's degree in Psychology from Carroll College.

6. I reviewed the proposed rule concerning Medicaid coverage of abortion services, and, on behalf of Blue Mountain Clinic, submitted oral testimony in opposition at the public hearing held by the Department of Public Health and Human Services (the "Department") on January 12, 2023, and written comments in opposition on January 20, 2023.

7. I understand the final rule will be published publicly on Friday, April 28, 2023, and is set to take effect Monday, May 1. Although the Department has not published the final rule publicly, I also understand the Department is expected to finalize the rule as proposed. The near-immediate effective date is destabilizing to Blue Mountain Clinic and our patients. Like any health care practice, it takes time to retool our practices. Because we provide sexual and reproductive health care, however, we are—far too often—forced to contend with uncertainty that is unheard of for other health care providers.

8. And this rule would have devastating consequences for the Clinic and our patients. It restricts the provision of abortion for Medicaid patients to physicians only, eliminating our Medicaid patients' access to advanced practice clinicians for abortion care. It also eliminates telehealth as an option for Medicaid patients seeking medication abortion care, requiring those who already face significant challenges accessing care to do so in-person—and from only the few physicians who may remain available to them for abortion care. For those who are able to access care in person, and from a physician, the rule creates a new and narrow definition of "medically necessary," and imposes a prior authorization requirement, various documentation requirements, and an unnecessary physical exam to support a physician's determination that an abortion is medically necessary. Individually and together, the rule's requirements will deny many, if not

most, of our Medicaid patients' access to abortion, and delay others from accessing this time-sensitive care. It will cruelly compel the poorest Montanans to continue their pregnancies and to give birth, undermining a core purpose of the Medicaid program—to provide medical assistance to Montanans in need. It will have life-altering health and financial consequences for our Medicaid patients who have made the decision to end a pregnancy. And the ramifications of the rule will ripple out and harm our family practice patients as well.

9. If implemented, the rule will decimate access to abortion for the most vulnerable Montanans who rely on Medicaid to access a wide range of health care services, including abortion care. The impact on *all* of Blue Mountain Clinic's patients—not only the patients who turn to us for abortion care—will be equally grave.

Blue Mountain Clinic's Practice and Our Patients

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

11. The Clinic serves approximately 3,500 patients per year, accounting for over 7,000 visits. For many of them, Blue Mountain Clinic is their medical home—they turn to us whenever they need health care. Blue Mountain Clinic serves over 1,000 patients who rely on Medicaid to access health care services and who have chosen the Clinic as their primary healthcare provider, or "Passport Provider" as it is called under Montana's Medicaid primary care case management program.

12. About 25% of Blue Mountain Clinic's patients travel more than 50 miles to access services at the Clinic. Some travel even further, for example, from Deer Lodge—which is about 85 miles and over an hour away. Others make use of the telehealth program for abortion, and do not need to make this in-person trip.

13. Blue Mountain Clinic's family medicine practice offers pediatric care to elder care, and includes wellness exams, internal medicine, preventative care, and mental health. All four of the Clinic's primary health care providers serve patients as part of the Clinic's family medicine practice.

14. Blue Mountain Clinic's abortion care practice offers two options. The Clinic offers medication abortion up to 11 weeks, as measured from the first day of the person's last menstrual period ("LMP") and procedural abortion up to 21 weeks and 6 days LMP. There are multiple safe and effective regimens for medication abortion—including mifepristone and misoprostol and misoprostol only.

15. In 2022, the Clinic launched its medication abortion by mail program using a telehealth model. This enables patients to access abortion care without having to travel to the Clinic. Patients consult with a provider remotely, and after options counseling, a review of patient history, confirmation of the patient's eligibility for medication abortion, and obtaining informed consent, the provider writes a prescription for medication abortion and abortion pills are mailed to the patient in Montana.

16. One of Blue Mountain Clinic's physicians provides abortion care up to 18 weeks LMP, five days a week. Both physician assistants provide medication abortion in-person and via telehealth, four days a week. Blue Mountain Clinic also has one locum (contract) physician who works in the Clinic on a contract basis, primarily to provide abortion care up to 21.6 weeks LMP

or when no other clinician is available. Because the Clinic's physician assistants provide medication abortion, the Clinic prioritizes scheduling physicians to care for patients in need of procedural abortions.

17. In 2022, Blue Mountain Clinic provided about 400 abortions. Almost 40% of those abortions were for patients who are insured through Medicaid.

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

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

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

Restricting Medicaid-Covered Abortions to Physicians Only Will Harm Blue Mountain Clinic and its Patients

21. Last year, Blue Mountain Clinic's two physician assistants provided about 24% of total abortions provided by the Clinic for Medicaid patients and about 42% of medication abortions provided by the Clinic for Medicaid patients. In the same year, the Clinic's abortion care physician provided about 68% of abortions for Medicaid patients, and the Clinic's locum physician provided the remaining 8%.

22. The rule will restrict the provision of abortion care to physicians only. If it takes effect, the Clinic will have only one full-time abortion care provider available for Medicaid patients; patients will be unable to access abortion care from either of Blue Mountain Clinic's physician assistants. As a result, Blue Mountain Clinic's sole full-time abortion care physician will need to take on all of our Medicaid patients seeking abortion, substantially increasing the number of abortion patients she sees. Because Blue Mountain Clinic's locum (contract) physician only provides a limited number of abortions on a contract basis, they will be unable to assist with a new influx of Medicaid patients who can only be seen by a physician. And Blue Mountain Clinic cannot simply find and hire more physicians considering there is a nationwide shortage of physicians who provide abortion care, especially in Montana. Likely candidates might come from out-of-state, but they would need to have a license to practice in Montana. And even if the Clinic were able to find someone, the Clinic would face logistical and financial challenges scheduling and arranging for out-of-state physicians to travel to provide care only a few days a week.

23. At a minimum, the rule will strain Blue Mountain Clinic's one abortion care physician, and the impacts will fall on both patients seeking abortion care from her, and on her family medicine patients. That physician is currently booked out three months for family medicine appointments. Abortion is time-sensitive health care, and Blue Mountain Clinic works to schedule

appointments for patients seeking abortion care as soon as we are able to. Making time for each abortion patient—and for an in-person visit and physical exam, per the rule—will further strain her schedule, limiting the time she has with each patient, and limiting the overall number of patients for whom she can provide medical care.

24. Further, scheduling every Medicaid patient seeking an abortion with one physician will mean her patients seeking primary care will wait even longer to see their provider. That is unfair, and deeply harmful to our family medicine patients—especially at a time when Montana faces a primary care crisis.

25. Additionally, I understand that the rule will eliminate Medicaid patients' access to abortion at All Families Healthcare, where the sole clinician is a nurse practitioner. Blue Mountain Clinic is the next closest provider—though still approximately a three-hour drive one-way. When there was no abortion provider in the Kalispell area from around 2014 to 2018, before All Families Healthcare opened in 2018, Blue Mountain Clinic's clinicians were far busier with abortion patients. The rule would propel us back to that time, and with the added constraint on our own advanced practice clinicians.

26. Abortion is also intimate care, for which it is especially critical that patients have a trusting relationship with their provider. The physician-only rule prioritizes a provider's credentials over a patient's choice of provider, only for Medicaid patients and for no reason. Some of our patients have longstanding relationships with a particular Blue Mountain Clinic provider, who they visit for care across their lifespan. Disrupting that patient-provider relationship by eliminating Medicaid patients' access to their chosen provider is cruel and unwarranted.

27. And the rule indicates no reason for this restriction. It certainly will not save the State money, as the Medicaid reimbursement rate for advanced practice clinicians is about 75% of

the rate for physicians. The costs Medicaid will pay for continued pregnancy, and labor and delivery care, also far exceed that for abortion care.

Eliminating Telehealth Abortion for Blue Mountain Clinic's Medicaid Patients Will Harm Blue Mountain Clinic and All of Its Patients

28. I also understand the rule requires a physical exam as part of the package of documentation required to support a physician's certification that an abortion is medically necessary. This requirement would eliminate the option of telehealth for our Medicaid patients. Requiring a physical exam would mean each of our patients would have to come in person for care at least once.

29. Although Blue Mountain Clinic's telehealth abortion program is relatively new, it is critical for our patients who face the most challenges accessing in-person care, including those traveling from more rural areas, people with disabilities, and people who struggle with gas money or who do not have adequate transportation (like vehicles that can handle Montana's harsh winter weather). People who need to keep their abortion confidential because they live with an abusive partner, people who do not have control over their work schedule, or those who have to arrange for childcare, also benefit from the comparative ease of our telehealth program.

30. The rule would foreclose this avenue for safe, effective care for our Medicaid patients. For some, the requirement of an in-person visit will be insurmountable and will force them to forgo abortion care. Others will try to manage the logistical arrangements—from work or school, to childcare, and adequate transportation—but gathering the money for all of that can take time, pushing people further into pregnancy, and increasing the actual costs of obtaining an abortion later in pregnancy. Delay means a person continues to endure the symptoms and risks of pregnancy, and can mean they are pushed too far to be eligible for a medication abortion or pushed beyond the point at which abortion is available in Montana.

Other Aspects of the Rule, Including Prior Authorization and the Narrowed Definition of "Medically Necessary" Abortion, Will Harm Blue Mountain Clinic and Its Patients

31. Even for those patients who do manage to make an in-person visit for a physical exam and reach Blue Mountain Clinic's physician for abortion care, the rule imposes additional obstacles.

32. I understand that the rule will newly require prior authorization and supporting documentation, including the results of a physical exam, to determine whether a Medicaid patient's abortion meets the new and narrow definition of "medically necessary."

33. Blue Mountain Clinic is familiar with prior authorization through our family practice. Prior authorization requests are generally handled by the Clinic's medical assistants. The process can be cumbersome and onerous because insurers may require additional documentation, physician review of the prior authorization request, and/or for the patient to try a medication on the insurer's preferred medication list first prior to authorizing the medication a provider determines is best. Sometimes, requests are denied simply because a form is missing information, submitted documentation is inadequate, or the reviewer does not fully understand why the requested medication or procedure is medically necessary. When a request is denied for these reasons, insurers return the request for prior authorization to the Clinic, and the Clinic's medical assistants address any noted deficiencies, collect additional information and/or documentation if necessary, and resubmit a revised prior authorization request.

34. Completing prior authorization requests, including those that have been denied and returned to the Clinic, takes time away from the provision of direct patient care—rather than focusing solely on serving patients in the Clinic, staff spend time filling out forms, scheduling additional testing for the patient when necessary, collecting and faxing documentation, and spending time on the phone with insurers, pharmacists, and other health care providers to ensure

prior authorization requests are fully supported so a patient can get care as timely as possible. Depending on the insurer and the request, a decision approving or denying a prior authorization request can take several days or weeks.

35. Medicaid does not currently require prior authorization for any reproductive or sexual health care services—including contraception, pregnancy tests, abortion care or any gynecological care. Instead, Blue Mountain Clinic's experience with Medicaid and prior authorization is primarily related to prescription medications. That experience does not—and cannot—map on to abortion care.

36. Medicaid often requires a patient to try a medication on its preferred medication list before approving a prescription for a different medication a provider determines is medically necessary. There is no comparison when it comes to abortion care—there is no "alternative" for a patient who has made the decision to end a pregnancy. And, although medical assistants are often able to get a patient's medication through the prior authorization process the same day as their appointment—receiving an approval or denial from Medicaid has taken up to a week.

37. I do not expect this process to necessarily reflect how prior authorization would work for abortion care. And there are various other aspects of the process that make it impossible to know how the prior authorization process could even work for abortion care. Will the Department ensure that prior authorization requests and supporting documentation are reviewed by a health professional who is trained in abortion care and/or knowledgeable about the impacts of delaying or denying abortion care? Does the Department intend to require physicians who provide abortion, not other staff like medical assistants, to seek prior authorization on behalf of their patients? Will Blue Mountain Clinic's abortion care physician be forced to spend more time on paperwork or on the phone with Medicaid? Will prior authorization requests for abortion be

fast-tracked for evaluation to avoid harms related to delayed abortion care? Or could we and our patients be waiting days or weeks for Medicaid to approve or deny a request? And is there an appeal process? If so, how long might that take?

38. Delaying a patient's abortion care by even a day so that Medicaid can determine whether it is "medically necessary" can mean a patient forgoes that care because of all the challenges associated with making even just one in-person visit to the clinic, let alone two.

39. I understand that in comments and responses to the proposed rule, the Department indicated its prior authorization reviewer is contracted to complete review in three working days. Even if that is the maximum time review is expected to take, and so review may be done more quickly, it is reasonable to expect that decisions about approvals or denials for abortion may be a more involved process for the prior authorization reviewer than merely referencing a preferred medication list, as mentioned above. Additionally, that three-day clock would start to run once the reviewer has completed any follow-ups for any needed additional information and documentation. Patients for whom we submit complete documentation on a Friday might not receive an approval or denial until the following Wednesday. In that time, a patient's situation could change; they could become ineligible for the abortion care for which authorization was sought. (e.g., the delay could mean that the patient is no longer eligible for medication abortion).

40. In any event, Blue Mountain Clinic could not guarantee that in one day, a patient could get an appointment for a physical exam, a clinician could collect the requisite paperwork—possibly from other providers—for a physician to certify an abortion is "medically necessary," and then speak with Medicaid to try to secure prior authorization; nor guarantee Medicaid would provide an answer that same day. Even if Medicaid authorized abortion care that same day, a physician might be able to provide a patient with pills for a medication abortion. But an abortion

procedure requires more time and staff. Patients might be required to come in for a second visit, which further delays their abortion care, subjects them to the continued symptoms and risks of pregnancy, and means making yet another set of work, school, childcare, and transportation arrangements. One visit may be challenging enough for a patient; two may be insurmountable.

41. It is even harder to imagine making these arrangements for multiple patients each day—or on multiple occasions. At a minimum, it would take significant staff time away from actual abortion care and from our family medicine practice.

42. Additionally, the uncertainty of waiting on an approval or denial decision can be excruciating for patients. Our Medicaid patients are already struggling financially; anxiety over whether Medicaid will cover their abortion care, when they have no other health coverage and limited financial alternatives, will only exacerbate stress and anxiety. There is simply no reason to cause our patients, who may already be experiencing stress or anxiety, to suffer more.

43. Collecting the information and documentation necessary to support a prior authorization request may well take longer than a day. In addition to a physical exam, the rule states that documentation from a medical professional must support the "diagnosis of the physical or psychological condition" and indicate that the pregnant person is "receiving care for such condition." That indicates that a Blue Mountain Clinic physician or other staff may need to seek records from other providers—with whom patients may have chosen *not* to share their pregnancy or abortion decision. Not only does this take time away from patient care and delay a decision about whether an abortion is "medically necessary," but it also endangers the confidentiality of our patient's decisions about their health care.

44. There is simply no reason to add a layer of red tape and uncertainty for our patients to access time-sensitive, essential health care. And the rule indicates none.

Individually and Together the Rule's Requirements Will Have Devastating Consequences for Blue Mountain Clinic's Patients

45. The rule will directly harm our Medicaid patients who seek abortion care—who make up almost 40% of our patients who seek abortion care. If the rule goes into effect, Blue Mountain Clinic would need to try to make substantial changes to its clinic operations and workflow, including by re-assigning staff duties related to handling prior authorization requests and collecting documentation for abortion care, shifting physician schedules, and adjusting to keep up with the increased demand for in-person clinic appointments for Medicaid patients seeking abortion.

46. More importantly, should the rule take effect, many of our patients will simply be unable to access abortion care. They will not be able to travel for an in-person visit, and because physician availability will be limited, they will not be able to secure an appointment due to work, school, childcare, and/or transportation reasons, or will be delayed in doing so. Of those who make it to an in-person appointment, many will ultimately be denied because the narrow definition of "medically necessary" will not be possible to satisfy, and/or the prior authorization process will prove infeasible for time-sensitive abortion care.

47. Medicaid patients who are unable to access abortion care as a result will be compelled to continue their pregnancies and to give birth against their will, bearing all the attendant health risks, burdens, and costs of carrying a pregnancy to term and unplanned parenthood.

48. Further, the impact of these changes will inevitably ripple out and harm our family medicine patients—many of whom are insured through Medicaid and who turn to Blue Mountain Clinic as their primary care provider (called "Passport Provider" under Montana's Medicaid primary care case management program)—who would now face longer wait times, decreased physician availability, and limited scheduling options for primary care appointments.

49. For the reasons described above, there is simply no valid reason for the rule. The rule will not improve patient health (as set out above) or save the State money. The Medicaid reimbursement rate for advanced practice clinicians is about 75% of the rate of physicians, so the state will be spending more money by limiting the provision of abortion care to physicians only. Not only that, the costs that Medicaid will pay for continued pregnancy and labor and delivery far exceed the costs for abortion care. It is particularly cruel to use the Medicaid program to penalize Montanans when the purpose of the program is to provide medical assistance to people who otherwise would not be able to afford health care services.

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

Dated: 27 April 2023

Nicole K. Smith, PhD, MPH

State of Colorado)
)
County of Arapahoe)

TANELIA ASTORGA LARA
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20184038624
MY COMMISSION EXPIRES 09/28/2026

Signed and affirmed to me this 27th day of April 2023.

Notary Public