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**FILED**

APR 28 2023

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 BY: [Signature] Clerk of District Court  
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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.: CDU-23-299

Judge: Seeley

**APPLICATION FOR  
 TEMPORARY RESTRAINING  
 ORDER, PRELIMINARY  
 INJUNCTION, AND WRIT  
 OF PROHIBITION**

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Plaintiffs Planned Parenthood of Montana; All Families Healthcare; Blue Mountain Clinic; Samuel Dickman, M.D.; and Helen Weems, APRN-FNP (collectively, “Plaintiffs”), on behalf of themselves and their patients, seek a temporary restraining order (“TRO”), preliminary injunction, and a writ of prohibition to prevent enforcement of the unconstitutional administrative rule amending Mont. Admin. R. 37.82.102 and 37.86.104, which was initially proposed by the Montana Department of Public Health and Human Services (“DPHHS”) at Montana Administrative Register (“MAR”) Notice 37-1024 and was adopted as proposed in a Notice of Adoption published in the April 28, 2023 edition of the MAR (“the Rule”).

The restrictions in the Rule, if allowed to be enforced, would effectively ban most Montanans with low incomes from accessing abortion. Further, the Rule directly contravenes controlling, on-point decisions by this Court and the Montana Supreme Court. *See Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (recognizing “right to seek and obtain a pre-viability abortion,” which is part of “procreative autonomy component of personal autonomy” under constitutional privacy guarantee and holding unconstitutional statute that restricted

provision of abortion to physicians only); *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4; Order — Mots. Sum. J., *Weems v. State*, No. ADV-2018-73 (Mont. Dist. Ct., Feb. 25, 2022) (granting summary judgment and entering permanent injunction), *appeal pending* No. DA 22-0207; *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (Mont. Dist. Ct.1st Jud. Dist., May 1922, 1995) (requiring DPHHS to cover medically necessary abortions through Medicaid). The Rule is also contrary to the preliminary injunction granted in *Planned Parenthood of Montana v. State by & through Knudsen*, No. DV-21-0999, 2021 WL 9038524 (Mont. Dist. Ct. 13th Jud. Dist., Oct. 7, 2021), *aff'd*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301. Absent injunctive relief, the Rule will take effect on Monday, May 1, 2023.

On January 23, 2023, undersigned counsel contacted DPHHS through its Chief Legal Counsel and requested that the agency 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, citing the above authorities. *See* Compl. Ex. C. The agency refused. *See* Compl. Ex. D. On April 21, 2023, undersigned counsel again contacted the Chief Legal Counsel for DPHHS and renewed the request to consider a delayed effective day or a stay of enforcement, specifically to avoid the need for immediate injunctive relief from a court. *See* Compl. Ex. E. The agency again refused, *see* Compl. Ex. F, making this motion necessary.

Plaintiffs are likely to succeed on the merits of their claims because the Rule violates the rights to privacy and equal protection guaranteed by the Montana Constitution. The Rule is designed to unlawfully eliminate or restrict access to abortion for Medicaid-eligible Montanans in at least three overlapping ways. First, it bars DPHHS from covering abortions provided by advanced practice clinicians, such as nurse practitioners and physician assistants. Second, it

requires pregnant people eligible for Medicaid to obtain prior authorization for abortions, which involves an in-person examination that is medically unnecessary for many patients and burdensome paperwork requirements—including submitting to the State highly personal and medically unnecessary information. Because patients cannot obtain prior authorization on the day of their initial visit, this effectively requires an extra clinic visit and imposes a waiting period. And finally, 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 health services.

As detailed in the concurrently filed Brief in Support, enforcement of the rule during the pendency of this litigation will cause irreparable injury for Plaintiffs by burdening their fundamental rights, and both the balance of the equities and the public interest favor maintaining the status quo and vindicating Plaintiffs’ patients’ fundamental constitutional rights.

Plaintiffs seek emergency injunctive relief to enjoin the enforcement of the Rule. They respectfully request that the Court issue a temporary restraining order and a preliminary injunction directing DPHHS and its agents, employees, appointees, and successors not to enforce, threaten to enforce, or otherwise apply the Rule with respect to any abortions provided during the pendency of the temporary restraining order and preliminary injunction. They also request a writ of prohibition compelling Defendants not to enforce the Rule.

Pursuant to § 27-19-315(2), MCA, the undersigned hereby certifies that he notified Defendants of Plaintiffs’ intent to seek immediate injunctive relief. As detailed above and in the concurrently filed Brief in Support, the undersigned has sought since January 2023 to negotiate a delayed effective date or a stay of enforcement, with the express purpose of avoiding the need to seek a TRO. DPHHS twice refused. On April 28, 2023, the undersigned notified counsel for the State and for DPHHS of Plaintiffs’ intent to seek a TRO and will additionally provide copies of

these filings to counsel for the State and DPHHS. A TRO should issue because the rule will take effect Monday, May 1, 2023, absent relief from the Court and will immediately burden Plaintiffs' and their patients' fundamental rights and cause irreparable injury.

The near-immediate effective date, for which Defendants alone are responsible, requires the issuance of a TRO enjoining enforcement of the Rule until such time as the Court may conduct a hearing.

Respectfully submitted this 28th day of April, 2023.



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