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Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

HELEN WEEMS and JANE DOE, Plaintiffs, vs. THE STATE OF MONTANA, by and through Timothy C. Fox, in his official capacity as Attorney General, and ED CORRIGAN, in his official capacity as the County Attorney for Flathead County, Defendants.	Cause No. _____ Hon. _____ **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs, advanced practice registered nurses ("APRNs"), seek to provide abortion services and thereby reduce the burdens currently faced by pregnant people seeking abortion in Montana. They apply pursuant to Mont. Code Ann. § 27-19-301 for preliminary injunction to prevent the enforcement against APRNs of Mont. Code Ann. § 50-20-109(1)(a), which limits the provision of abortion to physicians and physician assistants.[1] Undersigned counsel provided notice of this application to Defendants, State of Montana, by and through Timothy C. Fox, in his official capacity as Attorney General and Ed Corrigan, the County Attorney for Flathead County, on January 30, 2018 and duly served this application and the accompanying complaint.

INTRODUCTION

APRNs are registered professional nurses with advanced education and training, including certified nurse practitioners ("CNPs") and certified nurse midwives ("CNMs"), to whom the State gives broad authority to prescribe medications and practice independently within their scope of practice. APRNs, including Plaintiffs, consistently engage in patient care that is comparable to, or more complex and carries greater risk than, abortion in the first and early second trimester. Despite this, the State restricts the provision of abortion to physicians and physician assistants only, and prohibits APRNs from providing abortion care on threat of felony criminal prosecution. Mont. Code Ann. §§ 50-20-109(1)(a), (6) ("the APRN Restriction" or "the Restriction").

In February 2018, Plaintiff Helen Weems and Susan Cahill, a physician assistant who has provided abortion services in Flathead and the surrounding counties for nearly 40 years, will re-open All Families Healthcare ("All Families"), a primary care clinic in Whitefish. All Families will restore abortion services to the area, which has been without an abortion provider since 2014 after anti-abortion vandalism destroyed Ms. Cahill's clinic. Although Ms. Weems has over 15 years of clinical experience, including in procedures comparable to early abortion, the APRN Restriction bars her from providing abortion services simply because she is a certified nurse practitioner. Absent the APRN Restriction, Ms. Weems would complete her training in abortion and provide care to her patients—doubling the number of days and tripling the number of

[1] Other provisions of Montana law presume physician or physician assistant involvement in an abortion. *See* Mont. Code Ann. § 50-20-110; the Montana Parental Notification Measure, LR-120; Mont. Code Ann. § 50-20-501 *et seq*. Plaintiffs also seek a preliminary injunction against the enforcement of these provisions against APRNs, as they would likewise limit APRNs' authority to provide abortion services.

appointments during which All Families could offer this service. Barring Ms. Weems from performing abortions therefore affirmatively prevents the expansion of services and perpetuates ongoing harms to people seeking abortion that would otherwise be ameliorated.

The APRN Restriction is unconstitutional under a straightforward application of *Armstrong v. State*, 1999 MT 261, ¶ 75, 296 Mont. 361, 390, 989 P.2d 364, 384, which held that Montanans' fundamental rights to privacy and procreative autonomy encompass the right to obtain abortion from a qualified health care provider of one's choosing. Accordingly, the Montana Supreme Court held unconstitutional a law limiting the provision of abortion to physicians-only. *Id.* Because the APRN Restriction suffers the same flaws as the physician-only law struck down in *Armstrong*, Plaintiffs are likely to succeed on the merits of their claim that it violates their patients' fundamental rights. Additionally, because it singles out APRNs who wish to provide abortion and their patients seeking that care without adequate justification, Plaintiffs are likely to succeed on the merits of their claims that the Restriction violates their equal protection rights and those of their patients.

Preventing willing and qualified APRNs, including Plaintiffs, from expanding access to abortion irreparably harms Plaintiffs and their patients not only by violating their constitutional rights, but also by heightening burdens Montanans face in accessing abortion in a state where access is already very limited. The State's interests will be adequately protected if a preliminary injunction is issued because permitting Plaintiffs to provide abortion will reduce barriers to abortion, advance Montanans' health, and protect their constitutional rights.

BACKGROUND

I. Abortion Access in Montana

Legal abortion is common and one of the safest medical procedures in the United States. Affidavit of Suzan Goodman, M.D., M.P.H. ("Goodman Aff.") ¶¶ 8, 12. Approximately one in four women in the United States will have an abortion at some point in their lives. Goodman Aff. ¶ 8. Abortion carries similar or lower risk than other outpatient procedures, and is safer than carrying a pregnancy to term. Goodman Aff. ¶¶ 12-14; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) ("Nationwide, childbirth is 14 times more likely than abortion to result in death . . . .").

Pregnant people seek abortions for a variety of medical, family, economic, and personal reasons. Affidavit of Joey Banks, M.D. ("Banks Aff.") ¶ 9. At least 40% of pregnant people

seeking abortion services in Montana are already parents. *See* Banks Aff. ¶ 9. Many are low-income. Banks Aff. ¶ 11. Some people seek abortion because they decide they cannot parent another child at this time; some are young people who do not feel ready to carry a pregnancy while pursuing work or educational opportunities; and others face serious health issues or have received a diagnosis of a fetal anomaly. Banks Aff. ¶ 9.

Medication and aspiration abortion are the two most common techniques used for early abortion, both of which are safe and effective. Goodman Aff. ¶ 9. Medication abortion involves the ingestion of pills to terminate the pregnancy and is available up to 10 weeks measured from the first day of a patient's last menstrual period ("LMP"). Goodman Aff. ¶ 10. Typically, in a medication abortion, a patient takes mifepristone, the first medication, in the health facility, and then misoprostol, the second medication, at home, where they pass the pregnancy in a process similar to miscarriage. Goodman Aff. ¶ 10. Approximately half of Montanans who obtain abortion in the state obtain a medication abortion.[2]

Aspiration abortion is performed throughout the first trimester and early into the second trimester. Goodman Aff ¶ 11. In an aspiration procedure, which is sometimes called surgical abortion (although no incision is made), a clinician dilates the patient's cervix and inserts a thin tube through the cervix into the uterus. Goodman Aff ¶ 11. Gentle suction is used to evacuate the uterine contents. It usually takes between two and ten minutes to complete the procedure. Goodman Aff ¶ 11.

Abortion access in Montana is very limited, and pregnant people seeking abortion services face considerable barriers obtaining this time-sensitive, essential health care. As of 2014, 93% of Montana counties had no abortion provider. Banks Aff. ¶ 8. Abortion services are offered at four clinics in the State: Billings, Missoula, Helena, and Great Falls, each separated by great distances. *See* Banks Aff. ¶¶ 18, 22. Not only are there few providers, but access is not always available in each location on a consistent, fixed schedule. Banks Aff. ¶ 18.

Access depends heavily on the availability of individual physicians or physician assistants who provide abortion, and may vary from week to week or month to month. Banks

[2] Mont. Dep't of Public Health & Hum. Servs., Pub. Health & Safety Div., *2015 Mont. Vital Statistics*, Table A-3: Frequency and Percent of Induced Abortions by Method and Year, Montana Occurrences, 2003-2015 (Feb. 2017), http://dphhs.mt.gov/Portals/85/publichealth/documents/Epidemiology/VSU/2015MTVitalStatisticsReport.pdf.

Aff. ¶ 18. A provider may be unavailable because they are sick, take a vacation, or have other obligations. Banks Aff. ¶ 19. When a provider is available, the Helena clinic provides abortion up to 14.6 weeks LMP and the Great Falls clinic provides only medication abortion up to 10 weeks LMP. Banks Aff. ¶ 21. Abortion is also regularly available up to 21.6 weeks LMP only at the Billings clinic and up to 18 weeks LMP at the Missoula clinic. Banks Aff. ¶¶ 20-21. The availability or unavailability of one provider, or one appointment day, can therefore significantly impact access, and ameliorate or worsen the burdens people face when seeking abortion services. *See* Banks Aff. ¶¶ 19-25.

Flathead and the surrounding counties have been without an abortion provider since 2014, when Ms. Cahill was forced to close the primary care clinic at which she provided abortion services after it was destroyed by vandalism. Affidavit of Helen Weems, MSN, APRN-FNP ("Weems Aff.") ¶¶ 5-6. An abortion provider in Livingston also closed her longstanding clinic in 2013. Banks Aff. ¶ 24. These closures had a substantial impact on access: between 2011 and 2014, the median distance a person had to travel to their nearest abortion provider in the state *increased by* nearly 50 miles. Banks Aff. ¶ 24. Indeed, for some people, the nearest abortion provider may be 180 or more miles away. Banks Aff. ¶ 25.

The dearth of providers compounds the burdens pregnant people confront when seeking abortion services. Patients often struggle to find transportation to an abortion provider, as well as to arrange time off work or school, and for childcare. Banks Aff. ¶¶ 12-16. Finding transportation and time for travel can be particularly burdensome given their great distances some people must travel to even the closest provider. Banks Aff. ¶¶ 24-25. Distances can be even greater for some patients if the nearest provider is unable to see them without delay. Banks Aff. ¶ 23. Patients thus decide between delaying the procedure, or making what may be an 8-hour trip to and from another clinic, and whether to make that hours-long trip in one day or stay overnight. Banks Aff. ¶ 23. Both alternatives carry costs: leaving very early in the morning to make an early appointment, making an hours-long trip twice in one day, and missing an entire day of work or school; or paying for lodging, missing additional school or work, and arranging for additional hours of childcare. Banks Aff. ¶¶ 14-15.

Because many people seeking abortion struggle financially, some are forced to delay to save money to pay for the procedure, as well as for costs such as transportation and lodging. Banks Aff. ¶¶ 12-13. But delay can increase barriers to abortion, as the procedure can become

more expensive and carry comparatively greater risk as pregnancy advances. Banks Aff. ¶ 13; Goodman Aff. ¶ 12. Delay can also mean a patient becomes ineligible for certain methods, like medication abortion, that would otherwise have been best for them. Banks Aff. ¶ 13. Further, because only two Montana clinics regularly offer abortion after the first trimester, delay can mean a person has fewer locations at which to obtain that care. *See* Banks Aff. ¶¶ 20-22. As the number of abortion providers decreases, the financial costs, travel distances and cost, and obstacles of scheduling around work, school, and childcare may increase. *See* Banks Aff. ¶¶ 13, 25, 31.

II. APRNs and Early Abortion Care

Under current law, only physicians and physician assistants can provide abortions. Mont. Code Ann. § 50-20-109(1)(a). As a result, APRNs, registered nurses who have advanced education and training, Mont. Code Ann. § 37-8-102(1), cannot provide abortion services.

APRNs include CNPs and CNMs who practice independently within their scope of practice and to whom the State grants prescriptive authority. *See* Mont. Code Ann. §§ 37-8-102, 37-8-409; Mont. Admin. R. 24.159.1403 *et seq*. Montanans, particularly those in underserved communities, may rely on advanced practice clinicians, including APRNs, as their primary health care providers. Banks Aff. ¶¶ 3, 29; *see also* Goodman Aff. ¶ 28. In contrast to physician assistants, who practice under authority delegated to them by physicians, APRNs practice independently. *See* Mont. Code Ann. § 37-20-301; Mont. Admin. R. 24.159.1406.

The State, through the Board of Nursing, permits APRNs to determine their scope of practice with guidance from national professional organizations, except when it comes to abortion. *See generally* Mont. Admin. R. 24.159.1405-06. Organizations the Board of Nursing recognizes as guiding the scope of practice for APRNs do not prohibit APRNs from providing early abortion care. To the contrary, organizations such as the American College of Nurse Midwives and National Association of Nurse Practitioners in Women's Health support the provision of abortion by APRNs. *See* Goodman Aff. ¶ 25.

APRNs, including Plaintiffs, provide patient care that is comparable to or more complex and carries more significant risks than abortion. Like other health care providers, APRNs with prescriptive authority and a U.S. Drug Enforcement Authority ("DEA") license may prescribe potentially dangerous and addictive drugs, and medications that carry far more risk than the medications used in a medication abortion. Weems Aff. ¶¶ 14, 22. Additionally, APRNs perform

intrauterine contraceptive device ("IUD") insertions, aspiration for miscarriage management, endometrial biopsies, and deliver babies. Goodman Aff. ¶¶ 15, 21-22; Banks Aff. ¶ 4; Weems Aff. ¶¶ 11-16. The complexity of these health care services (among many others provided by APRNs) is equal to or greater than that of early abortion, and childbirth poses far greater risks. Goodman Aff. ¶¶ 15, 21-22. Indeed, APRNs can and do care for patients experiencing miscarriage using techniques that are identical to early abortion care. Goodman Aff. ¶ 23.

Competence in these procedures is a strong foundation for becoming competent to provide early abortion. Weems Aff. ¶ 13; *see also* Goodman Aff. ¶ 21. Competence is a baseline for safe, independent practice and is not necessarily tied to a clinician's educational credentials. Goodman Aff. ¶ 18. Instead, it is based on clinical knowledge, hands-on training, and physical and counseling skills. Goodman Aff. ¶ 18. Accordingly, as with other procedures APRNs incorporate into their practice over the course of their careers, APRNs, like physicians and physician assistants, can become competent in abortion by training alongside an experienced abortion provider. *See* Goodman Aff. ¶ 18; Weems Aff. ¶¶ 17-21, 23.

Research and experience uniformly establish that, with training, APRNs can provide early abortion with the same safety and efficacy as physicians and physician assistants. Goodman Aff. ¶ 16. For example, a 2013 study of aspiration abortions compared over 5,000 procedures performed by physicians with over 5,000 procedures performed by APRNs and physician assistants. Goodman Aff. ¶ 17. It concluded that complications were rare among both groups of clinicians, and "were clinically equivalent between newly trained [nurse practitioners, certified nurse midwives, and physician assistants] and physicians." Goodman Aff. ¶ 17. This confirmed existing evidence that the provision of both medication and aspiration abortion by APRNs is safe, and on par with provision by physicians and physician assistants. Goodman Aff. ¶¶ 17, 19.

Consistent with the findings from this research and experience, a broad array of leading medical and public health authorities support APRNs as safe and effective independent abortion providers, including the American College of Obstetricians and Gynecologists, the American Public Health Association, the American Association of Reproductive Health Professionals, the Society of Family Planning, and the World Health Organization. Goodman Aff. ¶ 24. Likewise, the United States Food and Drug Administration ("FDA") recognizes that qualified health care providers acting within their scope of practice may provide medication abortion as allowed under state law. Goodman Aff. ¶ 20. In fact, APRNs legally provide medication and aspiration abortion

in several states. *E.g.*, Cal. Bus. & Prof. Code § 2253(b)(2) (physician assistants, certified nurse midwives, and nurse practitioners may provide early abortion); Att'y Gen. Op., 2005-1, 2005 WL 6083035, (Vt. Mar. 14, 2005) (same); *see also* Jennifer Templeton Dunn & Lindsay Parham, *After the Choice: Challenging California's Physician-Only Abortion Restriction Under the State Constitution*, 61 U.C.L.A. L. Rev. Discourse 22, 29 (2013) (noting that advanced practice clinicians also provide abortion in New Hampshire and Oregon).

III. Impact of the APRN Restriction

The APRN Restriction keeps willing and qualified APRNs, like Ms. Weems, from expanding abortion services in the state and forces individuals who seek this care to endure burdens that would otherwise be alleviated. In February 2018, Ms. Cahill and Ms. Weems will open All Families, which will restore abortion services to the five-county catchment area surrounding Whitefish, with a population of nearly 170,000, and which includes the Blackfeet and Flathead Reservations.[3] Weems Aff. ¶ 6. While Ms. Weems, a certified nurse practitioner with more than 15 years' clinical experience, will be able to serve this community by providing a wide range of health services, the Restriction bars her from using those same skills to provide medication and aspiration abortions. Weems Aff. ¶¶ 4, 22-25.

This is so even though Ms. Weems has provided medication abortion to her patients in Washington State, and the FDA agrees that medication abortion can be provided safely by health professionals with prescriptive authority, like Ms. Weems. *See* Goodman Aff. ¶ 20; Weems Aff. ¶¶ 9, 15, 22. Moreover, Ms. Weems has the authority to prescribe dangerous drugs, including narcotic and stimulants that carry a high risk for addiction and abuse, none of which is true of the medications used in a medication abortion. Weems Aff. ¶¶ 8, 14.

The APRN Restriction also prevents Ms. Weems from providing aspiration abortion, despite her considerable experience performing procedures that require the same skills. Weems Aff. ¶ 12. For example, Ms. Weems has performed hundreds of IUD insertions and trained hundreds of physicians and advanced practice clinicians to do so. Weems Aff. ¶¶ 11, 16. Like in an aspiration procedure, placing an IUD requires inserting instruments through the cervix and

[3] Mont. Dep't of Public Health & Hum. Servs., Pub. Health & Safety Div., *2015 Mont. Vital Statistics*, Table P-1: Resident Population by County, Montana, 2002-2015 (Feb. 2017), http://dphhs.mt.gov/Portals/85/publichealth/documents/Epidemiology/VSU/2015MTVitalStatisticsReport.pdf (based on 2015 population data from Flathead, Glacier, Lake, Lincoln, and Sanders counties).

into the uterine cavity, and sometimes involves dilating (opening) the cervix. Weems Aff ¶ 12; Goodman Aff ¶ 21. Additionally, Ms. Weems has experience performing cervical blocks (an injection of a painkiller along the cervix), which may be done prior to an aspiration procedure, and endometrial biopsies, which involve manipulation of the cervix and insertion of instruments into the uterine cavity. Weems Aff. ¶ 12; Goodman Aff. ¶ 21. Ms. Weems is also competent to manage uterine perforation and hemorrhage, two of the very rare complications associated with aspiration abortion. Weems Aff. ¶ 16; Goodman Aff. ¶¶ 13-14. Ms. Weems has built on this strong foundation by progressing through a training plan in aspiration abortion, as she would with any new procedure she incorporates into her practice. Weems Aff. ¶¶ 16-17.

Because of the APRN Restriction, however, Ms. Weems cannot complete a necessary step in her training in abortion: completing aspiration procedures. Weems Aff. ¶¶ 20-21. The APRN Restriction also bars her from dispensing the medications for a medication abortion to her patients, and from providing aspiration procedures once trained. Weems Aff. ¶¶ 22-24. When All Families opens, Ms. Cahill will provide abortion services to their patients on the two days per week she will provide care. Weems Aff. ¶ 19. Once trained, Ms. Weems would provide abortion services during the four days All Families will be open each week, tripling the number of appointments for abortion patients All Families could offer. Weems Aff. ¶ 24.

Each day the APRN Restriction is in effect is a day Ms. Weems, like other APRNs, is impeded in incorporating abortion into her practice. Lifting the Restriction would increase the number of locations and days abortion is available, and thereby reduce the considerable barriers, including great distances individuals must travel, to access abortion. Banks Aff. ¶¶ 27-33; *see also* Weems Aff. ¶¶ 24-26. Continuing to exclude APRNs like Ms. Weems from the pool of abortion providers worsens those burdens and prevents one solution to Montana's abortion access problem. Banks Aff. ¶ 33.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction when, as here, "it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act;" "it appears that commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant," or when "the adverse party is doing or threatens or is about to do or is producing or suffering to be done some act in violation of the applicant's rights." Mont. Code Ann. § 27-19-

201; *see also Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224, 228, 286 P.3d 1161, 1165 ("These requirements are in the disjunctive, meaning that findings that satisfy one subsection are sufficient.").

An applicant for a preliminary injunction "need not make a case that would entitle him or her to relief at a trial on the merits; an applicant must prove only a probable right and a probable danger that such right will be denied absent injunctive relief." *M.H., Jr. v. Mont. High Sch. Assoc.*, 280 Mont. 123, 136, 929 P.2d 239, 247. In determining whether to issue an injunction, the Montana Supreme Court has held that a court should consider:

> (1) [T]he likelihood that the movant will succeed on the merits of the action; (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction; (3) [whether] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and (4) [whether] the injunction, if issued, would not be adverse to the public interest.

Van Loan v. Van Loan, 271 Mont. 176, 182, 895 P.2d 614, 617 (1995).

As discussed below, Plaintiffs are likely to ultimately prevail on the merits of this case and Plaintiffs and their patients seeking abortions will suffer irreparable harm if the injunction is not granted, including the violation of Plaintiffs' constitutional rights and those of their patients. A preliminary injunction would not cause any harm to the State, nor would it be adverse to the public interest. The Court should therefore grant Plaintiffs' motion for a preliminary injunction.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that the APRN Restriction Violates Their Rights and the Rights of Their Patients Under the Montana Constitution.

Plaintiffs are likely to establish that the APRN Restriction violates their patients' fundamental rights to privacy and procreative autonomy under the Montana Constitution, which gives Montanans "one of the most stringent protections of its citizens' right to privacy in the United States." *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 373, 989 P.2d 364, 374. Plaintiffs are also likely to demonstrate that the Restriction violates their rights and the rights of their patients to equal protection, for which the Montana Constitution likewise "provides for even more individual protection than does the federal equal protection clause." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 166, 104 P.3d 445, 457 (internal citation and quotation marks omitted).

A. Plaintiffs Are Likely to Succeed in Showing that the APRN Restriction Violates Their Patients' Rights to Privacy and Procreative Autonomy.

Article II, section 10 of the Montana Constitution provides: "The 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." Mont. Const. art. II, § 10. In *Armstrong v. State*, the Montana Supreme Court held that this fundamental right of privacy "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider, free from government interference." 1999 MT 261, ¶ 14, 296 Mont. 361, 367, 989 P.2d 364, 370. The Court has also made clear that this right encompasses an individual's rights to personal and procreative autonomy, including "the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice."[4] *Id*. That case, in which the Court struck down a law restricting the provision of abortion to physicians only, *id.*, sets the applicable constitutional standard here, a test the APRN Restriction fails for the same reasons the physician-only law failed as applied to physician assistants in *Armstrong*.

Infringements on the right to privacy, including the right to abortion, are subject to strict scrutiny, and have repeatedly been struck down under that exacting test. *See id*., ¶¶ 34, 43, 65-66, 75 (holding unconstitutional law barring health professionals except physicians from performing abortions); *Planned Parenthood of Missoula v. State*, No. BDV-95-722 (1st Jud. Dist., judgment entered Dec. 29, 1999) (entering judgment declaring unconstitutional state-mandated counseling and delay scheme for abortion); *Wicklund v. State*, No. ADV 97-671 (1st Jud. Dist., summary judgment entered Feb. 11, 1999) (holding unconstitutional law mandating parental notification prior to abortion); *Jeannette R. v. Ellery*, No. BDV-94-811 (1st Jud. Dist., summary judgment entered May 19, 1995) (holding unconstitutional regulation prohibiting Medicaid coverage for abortion).[5]

Under the applicable strict scrutiny standard applied in *Armstrong*, the Restriction "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that

[4] The Montana Supreme Court also noted that the rights of personal and procreative autonomy are protected by other provisions of the Declaration of Rights. *Armstrong*, ¶¶ 71-72.

[5] All unpublished decisions and orders referenced herein are provided in the accompanying Appendix.

compelling interest." *Armstrong*, ¶ 34; *accord Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). To rise to the level of "compelling," a state interest must be "at a minimum, some interest of the highest order and . . . not otherwise served." *Armstrong*, ¶ 41 n.6 (internal citation and quotation marks omitted). The Restriction cannot withstand this exacting scrutiny.

While in *Armstrong* the Court addressed a law that targeted physician assistants, the decision went well beyond that group of health care professionals. In holding that an individual has the right to make medical judgments affecting her or his bodily integrity, including about abortion, the Court explained that its

> use [of] the generic term "health care provider" [] refer[red] to any physician, physician assistant-certified, nurse, nurse-practitioner, or other professional who has been determined by the appropriate medical examining and licensing authority to be competent by reason of education, training or experience, to perform the particular medical procedure or category of procedures at issue or to provide the particular medical service or category of services which the patient seeks from the health care provider.

Id., ¶ 2 n.1. *Armstrong* thus expressly contemplated APRNs when it held that the Montana Constitution protects the fundamental right of an individual to access abortion from a qualified health provider of their choice. By barring Plaintiffs' patients from obtaining abortion care from qualified APRNs like Plaintiffs, the Restriction denies them the fundamental right to obtain abortion from a health professional of their choosing.

Because it interferes with the fundamental rights of Plaintiffs' patients, the Restriction can only be justified by a compelling government interest. As the Court explained:

> [E]xcept 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.

Id., ¶ 62. None of these narrow circumstances exist here.

The State licenses APRNs, grants them prescriptive authority, and permits them broad authority to independently provide care within their scope of practice—unless that care is abortion. Accordingly, as in *Armstrong* with respect to physician assistants, the State permits APRNs based on their "education, training and experience" to perform certain procedures and prescribe medication within their scope of practice. *See id.*, ¶ 63; *see also* Weems Aff. ¶¶ 12, 22-23. Likewise, the State bars APRNs from performing abortions, "yet [makes] no attempt to

prohibit [them] from performing other more risky medical procedures such as uncomplicated deliveries of babies, inserting IUDs, and prescribing and administering most drugs." *Armstrong*, ¶ 64; Weems Aff. ¶¶ 22-23; Goodman Aff. ¶¶ 15, 21-23.

Moreover, the State bars APRNs from providing abortion in the face of broad consensus in the medical community that they are competent, safe, and effective early abortion providers, on par with physicians and physician assistants. Goodman Aff. ¶¶ 24-27. That consensus comes from documented evidence in the medical literature, which concludes that complications from abortion are low among APRNs, physicians, and physician assistants, and that there is no discernable difference in complications among those providers. Goodman Aff. ¶¶ 17, 19. Indeed, the very same evidence and consensus that shows physician assistants are competent, safe, and effective abortion providers, including in Montana, supports the provision of abortion by APRNs. *See* Goodman Aff. ¶¶ 16-17, 19; *Armstrong*, ¶ 22. There is thus no "medically-acknowledged, *bona fide* health risk" related to APRNs performing abortions that could justify the Restriction. To the contrary, it is clear that APRNs are equally safe and effective abortion providers as physicians and physician assistants. *See Armstrong*, ¶ 62.

Just like the physician-only law struck down in *Armstrong*, the APRN Restriction serves no health or safety interest. *Id*., ¶ 64. Indeed, it is "not justified by any constitutionally legitimate interest of the State, compelling or otherwise." *Id*. Instead, limiting the pool of providers against a backdrop of a severe scarcity of abortion providers in the state worsens the barriers pregnant people face when seeking abortion services. With so few providers, people seeking abortion care must travel great distances to their nearest abortion provider; endure delays that can make abortion more expensive and comparatively riskier, or forgo a procedure that would have been best for them. They must also arrange for missed work, transportation, and childcare around providers' limited availability, each of which carries financial costs. Banks Aff. ¶¶ 6, 27-33; Goodman Aff. ¶¶ 7, 28-29. By affirmatively preventing the expansion of abortion services, the Restriction perpetuates these ongoing harms and risks to patient health that would otherwise be ameliorated. Banks Aff. ¶¶ 27-33. Because the APRN Restriction harms, rather than promotes, Montanans' health, as in *Armstrong*, the State "has neither a legitimate presence nor voice in the

patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement." *Armstrong*, ¶ 59. [6]

Because the APRN Restriction denies Plaintiffs' patients their fundamental rights to privacy and procreative autonomy without advancing any compelling interest in a narrowly tailored way, Plaintiffs have established a likelihood of success on the merits of this claim.

B. Plaintiffs Are Likely to Succeed on Their Claims that the APRN Restriction Violates Their Rights, and the Rights of Their Patients, to Equal Protection.

In addition to infringing on individuals' rights to privacy and procreative autonomy, the APRN Restriction denies both Plaintiffs and their patients the right to equal protection. Article II, section 4 of the Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "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 Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 470, 29 P.3d 992, 998.

In evaluating an equal protection claim, a court first identifies whether there are similarly situated classes that are being treated differently. *Snetsinger*, ¶ 16. If there are, the court must then decide the appropriate level of scrutiny. "Strict scrutiny applies if a suspect class or fundamental right is affected[]" and requires that the State show that the law "is narrowly tailored to serve a compelling government interest." *Id.*, ¶ 17 (citation omitted); *see also Mont. Envtl. Info. Ctr. v. Dep't of Env. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, 225, 988 P.2d 1236, 1245 (strict scrutiny requires State to establish that the discrimination advances a compelling state interest, is closely tailored to advance only that interest, and is "the least onerous path that can be taken to achieve the state objective"). Even where classifications do not affect fundamental or important constitutional rights or burden a suspect class, the law "must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19.

The APRN Restriction violates the Montana guarantee of equal protection under two separate analyses. First, it classifies based on the fundamental right to obtain health care, and

[6] There is no compelling reason justifying the APRN Restriction, so the Court need not consider whether it is narrowly tailored. Nonetheless, the Restriction fails the close means-to-ends fit the Court requires. *See Armstrong*, ¶ 34. For instance, it is under-inclusive because it does not bar APRNs from providing equally or more dangerous procedures and medications. There is simply no narrowly tailored medical or public health rationale for singling out abortion as the only health service APRNs cannot provide.

more specifically, abortion, from a qualified provider of one's choice, and cannot survive strict scrutiny. Second, it discriminates between qualified health providers without any rational basis.

1. The APRN Restriction Violates Plaintiffs' Patients Equal Protection Rights.

As discussed above, the right to "make medical judgments affecting . . . bodily integrity and health," including abortion, "in partnership with a chosen health care provider" is a fundamental right protected under the Montana Constitution. *Armstrong*, ¶ 39. By prohibiting individuals from obtaining abortion from APRNs, the Restriction discriminates against individuals based on the manner in which they exercise this fundamental right to privacy and procreative autonomy. Because this classification infringes on a fundamental right, the State must show that the classification "is narrowly tailored to serve a compelling government interest." *Snetsinger*, ¶ 17 (citation omitted).

Montanans may obtain a broad range of health services from APRNs, care that is comparable in skill and risk to, or more complex and more risky than, early abortion. Because they are afforded the same fundamental right of privacy and personal autonomy, regardless of the health care they seek, Montanans seeking abortions are similarly situated to all others accessing health care with respect to the exercise of that right.

Likewise, Montanans seeking abortion are similarly situated to those seeking other reproductive health care, such as contraceptive or pregnancy care, regarding their exercise of the more specifically-defined fundamental right to procreative autonomy. *See Armstrong*, ¶ 49 (suggesting that individuals who "choose[] to terminate [a] pre-viability pregnancy" are similarly situated to those who "cho[o]se to carry the fetus to term"); *see also id.*, ¶ 47 (discussing right to procreative autonomy as encompassing access to contraceptives). Patients seeking contraceptive or pregnancy-related care within Plaintiffs' scope of practice can receive it; when patients choose abortion, however, they cannot.

The State has no interest, let alone a compelling one, in treating people differently based on how they decide to exercise their rights to privacy and procreative autonomy. As *Armstrong* recognized: "the State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term." *Id.*, ¶ 49. Further, the State has no interest in allowing Montanans to obtain health services even beyond reproductive health

care, including dangerous and potentially addictive medications, from APRNs, but prohibiting them from accessing abortion care that is less risky and requires comparable skill.[7]

Because the Restriction draws a distinction based on how individuals exercise their fundamental rights supported by no compelling interest, Plaintiffs are likely to succeed on their claim that the Restriction violates their patients' equal protection rights.

2. The APRN Restriction Violates Plaintiffs' Equal Protection Rights.

The Restriction also discriminates between health providers without any rational basis. *See In re S.L.M.*, 287 Mont. 23, 32, 951 P.2d 1365, 1371 (1997) (rational basis applies where classification does not affect a fundamental or important constitutional right or suspect class). Under rational basis review, the Court must make "[a] careful inquiry . . . into . . . the rationality of the connection between legislative means and purpose [and] the existence of alternative means for effectuating the purpose." *In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984).

APRNs are similarly situated to physicians and physician assistants as to their ability to provide safe and effective early abortion care, but only APRNs are prohibited from providing abortion within their scope of practice. Additionally, the APRN Restriction discriminates among APRNs based on whether they provide abortion care versus contraceptive and pregnancy care, even when the latter is comparable, identical, or more complex and carries greater risk.

The State has no legitimate reason to discriminate between qualified health care providers in this way. First, there is no rational basis on which to discriminate between APRNs on the one hand, and physicians and physician assistants on the other, when the same evidence and experience demonstrate that physicians, physician assistants, and APRNs provide early abortion with the same safety and efficacy.

Second, there is no reason to permit APRNs like Plaintiffs to provide care that is comparable in skill and risk to early abortion, but prohibit those same APRNs from providing abortion care simply because it is abortion. The State can certainly have no reason to permit APRNs, such as certified nurse midwives, to provide miscarriage care but prohibit them from

[7] Because the State's interests are not compelling, the Court need not consider whether the law is narrowly tailored, but here too, the APRN Restriction would fail. As noted above, the Restriction is under-inclusive because it does not encompass equally or more dangerous procedures. Striking down the APRN Restriction merely puts people seeking abortions in the same position as other patients, enabling them to access health care from a qualified APRN of their choosing.

providing that same care, involving identical interventions, when it is for early abortion. And, the State can have no rational basis for allowing certified nurse midwives to manage labor and delivery, but prevent them from providing early abortion care, which is less complex and carries far less risk than childbirth. Selectively barring APRNs from providing early abortion contravenes the purpose underlying Montana laws enabling APRNs to practice, which otherwise grant APRNs broad authority to practice independently within their scope.

Because the APRN Restriction lacks even a rational basis, Plaintiffs have established a likelihood of success on their claim that it violates their equal protection rights.

II. Plaintiffs and Their Patients Seeking Abortions Will Suffer Irreparable Harm if the APRN Restriction is Not Enjoined.

Plaintiffs and their patients will suffer ongoing irreparable harm if the APRN Restriction is not preliminarily enjoined, including ongoing violations of their constitutional rights, a harm that is *per se* irreparable. *See Mont. Cannabis Indus. Ass'n*, ¶ 15 (finding that "court properly concluded that the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued"). In particular, the harm that results from denial of the right to procreative autonomy "is as irreparable as any that can be imagined: not only does it flow from the deprivation of constitutional rights, but it also creates a situation which is irreversible and not compensable." *Pilgrim Med. Grp. v. N.J. State Bd. of Med. Exam'rs,* 613 F. Supp. 837, 848-49 (D.N.J. 1985) (issuing preliminary injunction against requirement that abortions be performed in hospitals).

Moreover, the APRN Restriction limits abortion access. The availability of abortion is tied to the availability of abortion providers, and each day the APRN Restriction is in place is a day Ms. Weems is prevented from expanding abortion services in Montana. As explained above, the impact of even one additional abortion provider in Montana would have a substantial impact on access, enabling Montanans seeking abortion to better access this care in their communities; ameliorate burdens associated with arranging travel and abortion care around work, school, and/or childcare; and access abortion earlier and with less expense than they otherwise would be able to. Banks Aff. ¶¶ 27-33. Keeping the number of abortion providers in Montana artificially low forces Montanans to continue to endure these burdens, which threaten their health and impose irreparable harm. *Cf. Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F. Supp. 2d 1012, 1021-22 (D. Idaho 2005) (finding irreparable harm where abortion restriction, "in combination with certain circumstances, will likely threaten health" of people seeking abortion).

Further, abortion is an important part of Plaintiffs' practice as APRNs. Weems Aff. ¶¶ 25-26. Barring APRNs like Plaintiffs from practicing to the full extent of their training and licensure devalues their nursing practice and interferes with their relationship with their patients. Those harms are likewise irreparable. *See Chalk v. U. S. Dist. Ct.*, 840 F.2d 701, 709-10 (9th Cir. 1988) (finding irreparable harm based on interference with teacher's profession); *Am. Med. Ass'n v. Weinberger*, 522 F.2d 921, 925–26 (7th Cir. 1975) (finding irreparable harm where regulations undermined patient confidence in health providers).

III. The Balance of Equities Tips in Plaintiffs' Favor and Preliminary Injunctive Relief Serves the Public Interest.

In contrast to the harms that Plaintiffs and their patients will suffer if the APRN Restriction is not preliminarily enjoined, Defendants will not be harmed by an injunction. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011) (threat of "irreparabl[e] los[s]" to plaintiff tips "the balance of hardships between the parties . . . sharply in favor of [the plaintiff]"). Accordingly, the balance of equities tips in Plaintiffs' favor. Issuing a preliminary injunction also serves the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir 2012) (citations omitted) (reviewing cases); *see also Armstrong*, ¶ 75 (holding physician-only abortion law violated fundamental rights of plaintiffs and their patients).

IV. Plaintiff Should Not Be Required to Post a Bond.

This Court should exercise its discretion pursuant to Mont. Code Ann. § 27-19-306(1) not to require a bond in conjunction with issuance of a preliminary injunction. Although such a bond may be required "for the payment of costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," that may be waived in the interests of justice. Mont. Code Ann. § 27-19-306(1). Here, no bond should be required because Defendants stand to suffer no pecuniary harm as a result of a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' application for a preliminary injunction to prohibit Defendants from enforcing Mont. Code Ann. § 50-20-109(1) (the APRN Restriction), as well as Mont. Code Ann. § 50-20-110; the Montana Parental Notification Measure, LR-120 (to be codified at Mont. Code Ann. § 50-20-221 *et seq*.); and Mont. Code Ann. § 50-20-501 *et seq*., to the extent they limit the provision of abortion by APRNs.

Respectfully submitted on this 30th day of January, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction by First Class Mail, postage prepaid, addressed to the following:

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