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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0308

DA 18-0308

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 98

HELEN WEEMS and JANE DOE,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through Timothy C. Fox, in his official capacity as Attorney General, and TRAVIS R. AHNER, in his official capacity as the County Attorney for Flathead County,[1]

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV-2018-73
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Timothy C. Fox, Montana Attorney General, Rob Cameron, Deputy Attorney General, Patrick M. Risken, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

For Appellees:

Alex Rate, Elizabeth K. Ehret, ACLU of Montana, Missoula, Montana

Hillary Schneller, Hailey Flynn, Center for Reproductive Rights, New York, New York

[1] We have substituted the current Flathead County Attorney pursuant to M. R. Civ. P. 25(d).

For Amicus Montana Public Health Association:

Simona G. Strauss, Simpson Thacher and Bartlett LLP, Palo Alto, California

Lindsay Beck, Beck, Amsden and Stalpes, PLLC, Bozeman, Montana

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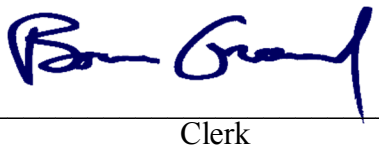
Submitted on Briefs: January 30, 2019

Decided: April 26, 2019

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Twenty years ago, this Court held that a statute preventing a woman from obtaining a lawful medical procedure—a pre-viability abortion—from a health care provider of her choosing unconstitutionally infringed her right to individual privacy under Montana's Constitution. *Armstrong v. State*, 1999 MT 261, ¶¶ 2, 75, 296 Mont. 361, 989 P.2d 364. We used the term "health care provider"

> to refer 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.

Armstrong, ¶ 2, n.1. Six years later, the Montana Legislature amended § 50-20-109(1)(a), MCA, to restrict the performance of pre-viability abortions to licensed physicians and physician assistants-certified. 2005 Mont. Laws, ch. 519, § 27. Plaintiffs, a Certified Nurse Practitioner (CNP) and Certified Nurse Midwife (CNM), filed this action in 2018, seeking a declaratory judgment that the statute violates Montana's constitutional right of privacy, equal protection, and dignity. They moved for a preliminary injunction. Both parties submitted affidavits, and neither requested an evidentiary hearing. After considering the affidavits and legal arguments presented by all parties, the District Court granted that relief on April 4, 2018. Pursuant to M. R. App. P. 6(3)(e), the State appeals on the alternative grounds that the District Court:

1. lacked jurisdiction because the Plaintiffs do not have standing to seek relief on their claims; or

2. improperly issued an advisory opinion on claims that were not ripe for a preliminary injunction, did not establish irreparable harm, and did not seek to preserve the status quo.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Plaintiff Jane Doe is a CNM and women's health nurse practitioner who practices midwifery in Montana and is proceeding in this matter under a pseudonym by leave of court. Plaintiff Helen Weems is a CNP in Montana who has been board certified in family practice by the American Nurses Credentialing Center since 1999 and re-certified every five years since.[2] Weems co-owns a primary care clinic in Whitefish that offers comprehensive health services for men and women, including reproductive health care services. The other owner is Susan Cahill, a licensed physician's assistant (PA), who performs early-term abortions as part of her practice. Both Plaintiffs allege that the performance of early-term abortions[3] is within their scope of practice and that they could perform such services but for Montana's statutory restriction.

¶3 In support of their motion for preliminary injunction, Plaintiffs presented evidence that APRNs routinely perform procedures within their scope of practice that are similar in skill to or more complex than early-term abortions and that carry comparable or greater

[2] Both CNPs and CNMs are Advanced Practice Registered Nurses (APRN). *See* Admin. R. M. 24.159.1413.

[3] The procedures Plaintiffs seek to provide are aspiration and medication abortions, both of which are carried out in the early stages of pregnancy. Medication abortion is available up to ten weeks, and aspiration abortion is an outpatient procedure used throughout the first trimester.

risk. Plaintiff Weems described her experience with inserting and removing Intra-Uterine Devices (IUDs), dilating the cervix, and performing endometrial biopsy, a procedure that involves inserting instruments into the uterus to remove a tissue sample from the uterine lining. She described these procedures as comparable to those used in an aspiration procedure for abortion. She also attested that she has prescription authority from the Board of Nursing and a U.S. Drug Enforcement Authority (DEA) license, which permits her to prescribe schedules II through V controlled substances. Weems attested to her experience, prior to moving to Montana, with independently dispensing mifepristone and misoprostol for medication abortions—drugs that are not controlled substances and that carry less danger than controlled substances.

¶4 Plaintiffs also presented evidence to show that early abortion safety, efficacy, and patient acceptability is the same as between physicians and physician assistants, nurse practitioners, and certified nurse midwives. Finally, they offered evidence of the limited access to abortion services in Montana and the impact the restriction on authorized providers has on the availability of those services.

¶5 The State submitted as its evidence a chart from the Montana Board of Nursing identifying and listing websites for the relevant national organizations that set standards for nurse practitioners and certified nurse midwives. It also submitted a one-page description of the scope of practice for nurse practitioners from the American Association of Nurse Practitioners and a one-page summary definition of midwifery and scope of practice of certified nurse-midwives and certified midwives from the American College of Nurse Midwives. The State pointed out that abortion is not listed within the scope of

practice in these documents, nor is it included in the Montana Board of Nursing's administrative rules governing APRN standards and practice.

¶6 The District Court held that Plaintiffs were entitled to a preliminary injunction under § 27-19-201(2), MCA, because they had made a showing that enforcement of § 50-20-109(1)(a), MCA, prior to the conclusion of litigation would cause irreparable injury.

STANDARDS OF REVIEW

¶7 We review the grant or denial of a preliminary injunction for manifest abuse of discretion. *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73. A manifest abuse of discretion is one that is "obvious, evident, or unmistakable." *Davis*, ¶ 10 (quoting *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912). "The grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Davis*, ¶ 10 (citing *Shammel*, ¶ 11; *Walker v. Warner*, 228 Mont. 162, 166, 740 P.2d 1147, 1149-50 (1987)). To the extent the ruling is based on legal conclusions, "we review the district court's conclusions of law to determine whether the interpretation of the law is correct." *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201. Issues of justiciability, such as standing and ripeness, also are questions of law, for which our review is de novo. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455.

DISCUSSION

¶8 *1. Do Weems and Doe have standing to challenge the statute?*

¶9 Courts have power to resolve actual cases or controversies, requiring a plaintiff to show, "at an irreducible minimum," that she "has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action." *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831 (internal quotations omitted). "A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." *Mitchell v. Glacier County*, 2017 MT 258, ¶ 11, 389 Mont. 122, 406 P.3d 427 (citing *Schoof*, ¶ 23).

¶10 The State argues that neither Weems nor Doe has standing to challenge § 50-20-109(1)(a), MCA, because abortion is outside their scope of practice. Irrespective of the statute, the State maintains that "[a]s of the issuance" of the District Court's preliminary injunction order, the harm posited by the Plaintiffs was conjectural and hypothetical. The State maintains that the Plaintiffs have not presented an actual case or controversy because their scope of practice—with or without the statute—does not extend to abortion procedures.

¶11 The State's standing argument is conjoined with its argument that the Plaintiffs' request for a preliminary injunction was not ripe for adjudication. Standing and ripeness are separate but related inquiries within a court's justiciability analysis:

> To meet the constitutional case-or-controversy requirement for standing, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action. Note that standing may rest not only on past or present injury, but also on *threatened* injury. Ripeness and

> mootness, in turn, can be seen as "the time dimensions of standing." Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication, whereas mootness asks whether an injury that has happened is too far beyond a useful remedy.

Reichert, ¶ 55 (internal citations omitted). "Whether framed as an issue of standing or ripeness, the [constitutional] inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract." *Reichert*, ¶ 56 (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)) (alteration in original).

¶12 We address below the ripeness argument as it relates to the request for preliminary injunction. We have little trouble concluding, however, that Weems and Doe have standing to bring their complaint. We held in *Armstrong* that when "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. *Armstrong*, ¶¶ 8-13. We concluded that the plaintiff health care providers had 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*, ¶ 13.

¶13 The Plaintiffs' Complaint presents the same issue. The central dispute between the parties, discussed further below, is whether § 50-20-109(1)(a), MCA, is the regulatory barrier that prevents Weems and Doe from performing aspiration and medication abortion procedures, or whether the Board of Nursing must act first to authorize such procedures within the Plaintiffs' scope of practice before the statute comes into play. That issue presumably will be front and center as the litigation proceeds toward

resolution on the merits. For standing purposes, however, the Complaint includes sufficient allegations that, but for the existence of the statutory restriction, Weems and Doe would be able to include medication and aspiration abortion procedures within their competency training and independent practices. Plaintiffs allege that APRNs are independent and autonomous health care practitioners, authorized to provide services within the scope of practice to which they are trained. The Complaint further alleges that the Montana Board of Nursing does not identify specific procedures that APRNs may or may not perform. Rather, the Board's regulations provide that APRNs have "full practice authority." The Complaint alleges that the Board "charges APRN licensees to know their own role and population focus using the standards of their professional organization." The Complaint alleges that "Montana law does not single out any health service as beyond an APRN's scope of practice, except abortion."

¶14 The State's standing argument is circular: it maintains that Plaintiffs cannot challenge the statute unless they are licensed to perform the procedure in question, but acknowledges that the statute prevents them from seeking such licensure. Weems and Doe plainly are impacted by the statute; as it stands, the law precludes the "appropriate medical examining and licensing authority" from making a determination that they are competent to perform the medical procedures at issue. *Armstrong,* ¶ 2, n.1. The Complaint's allegations are sufficient to show a "concrete," rather than an abstract or hypothetical, injury that allows Weems and Doe to have their claims adjudicated in the courts of Montana. *See Schoof*, ¶¶ 12-23 (concluding that individual alleging interest in county's fiscal decisions had standing to pursue claim that county violated constitutional

and statutory right to know and public participation requirements); *Gryczan v. State*, 283 Mont. 433, 443-46, 942 P.2d 112, 118-120 (1997) (granting lesbian and gay plaintiffs standing to challenge constitutionality of statute criminalizing same-sex sexual conduct despite lack of prosecution, because they were "precisely the individuals against whom the statute is intended to operate"); *Lee v. State*, 195 Mont. 1, 7, 635 P.2d 1282, 1285 (1981) (holding that Uniform Declaratory Judgments Act allows a plaintiff to "test the constitutional validity of a statute directly affecting him").

¶15 *2. Did the District Court manifestly abuse its discretion or commit an error of law in granting preliminary injunctive relief?*

¶16 The State argues that the District Court's preliminary injunction constituted an advisory opinion because neither Weems nor Doe presently is adequately trained to perform abortion procedures. The State maintains that the court made speculative assumptions in granting Plaintiffs the preliminary relief they requested. Because women seeking abortions "do not have a currently existing right" to have Weems or Doe perform that procedure, which the State argues would require additional action by the Montana Board of Nursing, the injunction will have no practical effect. The court's injunction prevents no harm, the State suggests, because there are no patients who could have abortion services provided by Weems or Doe irrespective of the statute. Finally, because Weems and Doe "have not been expressly authorized by their licensing authority to perform abortions," the State argues that the District Court's action upends the status quo, contrary to the purposes of a preliminary injunction.

¶17 Section 27-19-201, MCA, provides for issuance of a preliminary injunction on several enumerated grounds, only one of which need be met for an injunction to issue. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 14, 395 Mont. 160, ___ P.3d ___; *Davis*, ¶ 24; *Shammel*, ¶ 15; *Sweet Grass Farms, Ltd. v. Bd. of Cty. Comm'rs of Sweet Grass Cty.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825; *Stark v. Borner*, 226 Mont. 356, 359-60, 735 P.2d 314, 317 (1987). The District Court relied on subsection (2), allowing a preliminary injunction "when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant[.]" Section 27-19-201(2), MCA. An applicant for preliminary injunction must make "some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures*, ¶ 16.

¶18 When considering whether to grant or deny a preliminary injunction, the trial court "should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had." *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995) (citing *Porter v. K & S P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981)). An applicant need only establish a prima facie case, not entitlement to final judgment. *City of Whitefish*, ¶ 25 (citing *Kundson*, 271 Mont. at 65, 894 P.2d at 298, and *Porter*, 192 Mont. at 183, 627 P.2d at 840). The court does not determine the underlying merits of the case in resolving a request for preliminary injunction. *BAM Ventures*, ¶ 7 (citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81). In the context of a constitutional

challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt, but "must establish a prima facie case of a violation of its rights under" the constitution. *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251 (1997).[4] "Prima facie" means literally "at first sight" or "on first appearance but subject to further evidence or information." *Prima facie*, *Black's Law Dictionary* (10th ed. 2014).

¶19 Our cases make clear that Montana's constitutional right to privacy is implicated when a statute infringes on a person's ability to obtain a lawful medical procedure. *Armstrong*, ¶ 62; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 27, 366 Mont. 224, 286 P.3d 1161. But not every restriction on medical care impermissibly infringes that right. *Wiser v. State*, 2006 MT 20, ¶ 15, 331 Mont. 28, 129 P.3d 133. "*Armstrong* did not hold that there is a right to see a health care provider who is not licensed to provide the services desired." *Wiser*, ¶ 16. The right to health care instead is the

> fundamental privacy right to obtain a particular lawful medical procedure from a health care provider [who] has been determined by the medical community to be competent to provide that service and who has been licensed to do so.

Wiser, ¶ 15 (quoting *Armstrong*, ¶ 62). *Armstrong* leaves no doubt that early-term abortion is a "lawful medical procedure" that may be performed for a consenting patient by a provider "determined by the appropriate medical examining and licensing authority

[4] The moving party's burden to defeat the presumptive constitutionality of a statute thus arises in litigating the merits of the complaint; a plaintiff is not required to sustain that ultimate burden to obtain a preliminary injunction.

to be competent [to provide that service]." *Armstrong*, ¶ 2, n.1, ¶ 62. The issue for ultimate resolution in this case is whether the Board of Nursing must approve APRNs, or Doe and Weems in particular, to conduct such procedures, or whether they could obtain competency to do so as part of an independent or collaborative practice but for the statutory restriction. Because Weems and Doe presently are not providing abortion services and are not expressly licensed to do so, the State argues that their request for preliminary injunctive relief is not ripe for adjudication.

¶20 Weems testified by affidavit that, without the statutory restriction, her DEA license presently would permit her to prescribe and dispense the medications for a medication abortion. Weems also attested that there is no list of services that determines what is in her scope of practice; rather, the scope includes care in which she trains and builds her skills under supervision sufficient to become a proficient provider.

¶21 This characterization finds support in the standards referred to in the State's exhibits. According to the American Association of Nurse Practitioners, APRNs are independent practitioners whose autonomous practice "requires accountability to the public for delivery of high-quality health care."[5] Materials referenced in the Board of Nursing chart[6] the State submitted include core competencies for Family Nurse

[5] Am. Ass'n of Nurse Practioners, *Scope of Practice for Nurse Practitioners*, AANP (Winter 2015), https://storage.aanp.org/www/documents/advocacy/position-papers/ScopeOfPractice.pdf [https://perma.cc/MV68-Q96H].

[6] Mont. Dep't of Labor & Indus., *Montana Board of Nursing Recognized National Professional Organizations (NPO) for APRN Scope and Standards of Practice*, DLI (Aug. 2018), http://boards.bsd.dli.mt.gov/Portals/133/Documents/nur/aprn_sop_documents.pdf [https://perma.cc/K3SJ-8YDH].

Practitioners (FNPs), stating that the FNP "is prepared to care for individuals and families across the lifespan," including women's reproductive health and performance of gynecology procedures.[7] Women's health nurse practitioners are expected to have "knowledge of legal/ethical issues and regulatory agencies relevant to gender-specific issues," within which they are to provide "culturally appropriate reproductive and primary care for women of all ages" and prescribe medications "within [their] scope of practice." NONPF, *Competencies*, *supra*, at 82-84. "Independent practice" "[r]ecognizes independent licensure of nurse practitioners who provide autonomous care and promote implementation of the full scope of practice." NONPF, *Competencies*, *supra*, at 87.

¶22 The State's Exhibit C defines midwifery to encompass "a full range of primary health care services for women from adolescence beyond menopause."[8] The Standards for Practice of Midwifery, referenced in the Board of Nursing chart, indicate that the practice "is the independent management of women's health care, focusing particularly on pregnancy, childbirth, the post-partum period, care of the newborn, and the family planning and gynecologic needs of women."[9] The core competencies in gynecologic care

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[7] Nat'l Org. of Nurse Practitioner Faculties, *Population-Focused Nurse Practitioner Competencies*, NONPF 9 (2013), https://c.ymcdn.com/sites/www.nonpf.org/resource/resmgr/competencies/populationfocusnpcomps2013.pdf [https://perma.cc/H2NE-VFTN] [hereinafter NONPF, *Competencies*]

[8] Am. Coll. of Nurse-Midwives, *Definition of Midwifery and Scope of Practice of Certified Nurse-Midwives and Certified Midwives*, ACNM (Dec. 2011), http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000266/Definition%20of%20Midwifery%20and%20Scope%20of%20Practice%20of%20CNMs%20and%20CMs%20Feb%202012.pdf [https://perma.cc/ASK9-EAWB].

[9] Am. Coll. of Nurse-Midwives, *Standards for the Practice of Midwifery*, ACNM 1 (Sept. 24, 2011), http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/

"include but are not limited to . . . [c]ounseling, *clinical interventions*, and/or referral for unplanned or undesired pregnancies[.]"[10] The midwife must be "in compliance with the legal requirements of the jurisdiction where the midwifery practice occurs." ACNM, *Standards*, *supra*, at 1.

¶23 Administrative Rules of the Montana Board of Nursing recognize APRN practice as "an independent and/or collaborative practice" and provide that a licensed APRN "may only practice in the role and population focus in which the APRN has current national certification." Admin. R. M. 24.159.1406(1). The rules allow an APRN who is granted prescriptive authority to "prescribe, procure, administer, and dispense legend and controlled substances pursuant to applicable state and federal laws and within the APRN's role and population focus." Admin. R. M. 24.159.1461(1). The Board of Nursing's rules do not identify a specific list of medications the APRN may or may not prescribe. Weems's established prescriptive authority and prior experience prescribing and dispensing drugs for medication abortion comprise prima facie evidence that, but for the statute, she could do so in Montana as well. The record has not been developed regarding the Board of Nursing's position, if any, on the regulatory limits of APRN practice when it comes to aspiration abortion. Materials referenced in the Affidavit of Suzan Goodman, M.D., submitted by Plaintiffs, indicate that "there is a decades-long

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000000000051/Standards_for_Practice_of_Midwifery_Sept_2011.pdf [https://perma.cc/RFK5-4C2Y] [hereinafter ACNM, *Standards*].

[10] Am. Coll. of Nurse-Widwives, *Core Competencies for Basic Midwifery Practice*, ACNM 5 (Dec. 2012), http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000050/Core%20Comptencies%20Dec%202012.pdf [https://perma.cc/N78R-K5ML] (emphasis added).

history of [APRNs, CNMs, and PAs] providing first trimester aspiration abortions in collaborative settings and training doctors in abortion care in states where physician-only restrictions do not exist."[11, 12] On review of the preliminary injunction record, we conclude that Plaintiffs presented adequate evidence to justify their claim for preliminary relief on the ground that the statute presents a barrier to their ability to develop competencies for and perform the lawful medical procedures of early-term abortion.

¶24 The State asserts that Plaintiffs nonetheless did not demonstrate irreparable harm because, as the District Court recognized, Weems has not completed her training in abortion care and Doe currently practices in a health care system that does not permit

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[11] Am. Pub. Health Ass'n, *Provision of Abortion Care by Advanced Practice Nurses and Physician Assistants*, APHA (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/16/00/provision-of-abortion-care-by-advanced-practice-nurses-and-physician-assistants [https://perma.cc/8JZ7-8QXS].

[12] The California rule the Dissent cites shows that APRNs may be qualified by training to perform an abortion by aspiration techniques. Importantly, California does not have a statute prohibiting such practice; on the contrary, it allows APRNs to perform medication and aspiration abortions, the latter subject to "standardized procedures developed" by the Board of Registered Nursing. Cal. Bus. & Prof. Code §§ 2253, 2725.4 (LexisNexis 2019). According to Dr. Goodman's affidavit, the California law resulted from a six-year project evaluating the safety and efficacy of advanced practice clinicians providing early abortion. California, unlike Montana, has detailed statutes addressing many different medical procedures and prohibitions. *See e.g.*, Cal. Bus. & Prof. Code, div. 2, ch. 5 art. 12. Montana, by and large, leaves such matters to rulemaking by the appropriate licensing boards. *See* § 37-3-203, MCA (authorizing Board of Medical Examiners to adopt rules to carry out regulatory responsibilities for practice of medicine, podiatry, acupuncture, physician assistant practice, and nutritionist practice); § 37-8-202, MCA (prescribing rulemaking authority of Board of Nursing, including rules regarding authorization for prescriptive authority of advanced practiced registered nurses and educational requirements and other qualifications applicable to recognition of advanced practice registered nurses); § 37-8-409, MCA (requiring Board of Nursing to issue APRN certificates upon verification of "board-approved national certifying body appropriate to the specific field of advance practice registered nursing" and "other qualification requirements that the board prescribes"). Though largely unhelpful to the analysis, the California example lends support to the ripeness of Plaintiffs' claim that § 50-20-109(1)(a), MCA, poses a barrier to any such review by this State's Board of Nursing.

abortions to be performed. Because of their own circumstances, the State posits that the Plaintiffs' request for preliminary injunctive relief was not ripe for adjudication.

¶25 We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction. *City of Billings*, 218 Mont. at 231, 935 P.2d at 253; *Mont. Cannabis Indus. Ass'n*, ¶ 15. Though not every constitutional infringement may support a finding of irreparable harm, federal courts most commonly recognize privacy and First Amendment violations as causing irreparable injuries. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976) (plurality); *Nelson v. NASA*, 530 F.3d 865, 881-82 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134, 131 S. Ct. 746 (2011); *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Plaintiffs' evidence of injury included affidavits that the statute prevents APRNs "from even being trained in abortion care in this State," including the "hands-on training [Weems] need[s] to complete [her] training." Weems also attested that, in the few weeks her clinic had been open, she had seen several patients eligible for a medication abortion who would have elected that method, but who were in the clinic when Cahill was unavailable and were unable to obtain the medication. Weems testified that delay can mean a patient becomes ineligible for a medication abortion or may have difficulty missing work or school and arranging transportation for a subsequent appointment, particularly when traveling from out of town. Without the statutory restriction, Weems's DEA license would allow her imminently to provide the lawful

dispensation of the necessary medication.[13] The District Court did not manifestly abuse its discretion in finding that this evidence established that enforcement of the statute prior to the conclusion of litigation would cause irreparable injury.

¶26 Finally, the State argues that the District Court wrongly issued a preliminary injunction to reverse, instead of to preserve, the status quo. Unlike the plaintiff in *Armstrong*, the State urges, the Plaintiff providers have not been "engaged in the practice of providing abortions" and are not "expressly authorized by their licensing authority to perform abortions." Status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Porter*, 192 Mont. at 181, 627 P.2d at 839; *see also Davis*, ¶ 24. That a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it. *See*, *e.g.*, *Gryczan*, 283 Mont. at 443-44, 942 P.2d at 118-19. Weems and Cahill opened their clinic in February 2018. The State's argument misses the point that the condition the Plaintiffs contest is the bar posed to their practice by the physician/PA restriction and whether they otherwise would need express authorization from their licensing authority to engage in the independent practice of providing abortion services. The rights "preserv[ed] . . . in status quo," *Knudson*, 271 Mont. at 65, 894 P.2d at 298, by the District Court's injunction are the rights of women patients to obtain the lawful medical procedure recognized in *Armstrong*. The Complaint contests the later-enacted statute's alleged infringement of

[13] The Dissent does not address this prima facie evidence that, but for the statute, Weems imminently could provide her patients with the medication required for this procedure. It recognizes that whether APRNs safely and competently can provide abortions is "a question for the Montana Board of Nursing," Dissent, ¶ 32, but overlooks that the Board's rules authorize Weems to dispense medication without restriction.

those rights. Weems and Doe presented sufficient evidence at this stage of the proceedings to support their claim that the statute bars their ability to perform the lawful medical procedures of medication or aspiration abortion and to complete appropriate training for the aspiration procedure. Given the fundamental right at issue, that showing was sufficient to establish that their claim for preliminary injunction was not "too contingent or remote to support present adjudication," *Reichert*, ¶ 55, and that enforcement of the statute prior to conclusion of the litigation would cause irreparable harm. The State has not shown an error of law or manifest abuse of discretion in the District Court's ruling.

CONCLUSION

¶27 The District Court's April 4, 2018 preliminary injunction is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON

Justice Jim Rice, dissenting.

¶28 I would conclude the record is insufficiently developed at this stage of the litigation to support enjoinment of a statute that has been in effect without challenge for over 10 years, and constitutes the status quo in the matter. Indeed, the inadequacy of the record at this point in the proceeding is significant enough to raise the justiciability

concern of ripeness. The undeveloped state of the law requires the Court, in order to affirm the injunction, to enter what is essentially a prospective declaratory judgment on the scope of practice of APRNs, without any guidance from the regulatory body qualified and authorized to make such medically-based judgments, which will inevitably taint that question, both before the Board of Nursing and before the District Court in this litigation.

¶29 The Court relies upon *Armstrong*, ¶¶ 2, 75, but the state of the record there stands in stark contrast to the record here. In that case, brought by a physician's assistant who had been performing abortions in Montana for more than 20 years, this Court enjoined a newly-passed law that restricted non-physicians from performing abortions. *Armstrong*, ¶¶ 22, 75. The Court relied on the fact that the Board of Medical Examiners had determined that the physician's assistant was competent to perform certain types of abortions. *Armstrong*, ¶ 63. In fact, the record showed that the physician assistant had been "performing abortions with the approval of the Montana Board of Medical Examiners since 1983." *Armstrong*, ¶ 64. The Court's decision was premised upon the fact that the health provider was "*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[.]" *Armstrong*, ¶ 2, n.1 (emphasis added); *see also Wiser*, ¶ 15 (the privacy right is "'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'") (quoting *Armstrong*, ¶ 62) (emphasis added).[14]

¶30 Here, the District Court issued its injunction upon hypothetical grounds. It first made an assessment about future regulatory actions, assuming that "the Board of Nursing *will conclude* . . . APRNs may provide abortion care as within their scope of practice." (Emphasis added.) Then, it made assumptions about the Plaintiffs, concluding that, at some future point, they would complete the necessary training "to be competent to provide abortion services[.]" The court therefore reasoned there was "no harm in proactively applying a preliminary injunction to protect Weems from prosecution *in the event* she satisfies the competency requirements of the Board of Nursing and is operating within her scope of practice." (Emphasis added.) Thus, upon the assumptions that (1) the regulatory agency will conclude in the future that abortion services fall within the Plaintiffs' scope of practice, and (2) that Plaintiffs will complete necessary competency training, the statute has been "proactively" enjoined so that it will not be an obstacle "in the event" these assumptions come to pass. In my view, a more concrete injury must be demonstrated to justify a court's enjoinment of a longstanding statute. At this stage of

[14] Indeed, the *Armstrong* Court saw its decision as being about "who" should decide medical competencies, which it concluded should be determined "by the medical community in the exercise of its collective professional expertise and judgment, acting through the state's medical examining and licensing authorities, and after taking into consideration the education, training, experience and skills of the health care provider and the patient's health interests[.]" *Armstrong*, ¶ 15.

the proceeding, the alleged injury "is too contingent or remote to support present adjudication[.]" *Reichert*, ¶ 55.[15]

¶31 The tentativeness in the District Court's order is a consequence of the weaknesses in the proof offered so far in the proceedings by the Plaintiffs. Although the Court credits the Plaintiffs' "evidence," this consisted of three untested affidavits—one from Weems herself, and two from doctors who perform abortions. No testimony has been tested by the Rules of Evidence and cross examination. None of the affidavits aver that the Montana Board of Nursing has determined that abortions can currently be provided by the Plaintiffs pursuant to their current licensure, or that the Board intends to approve of the procedures under those licenses. Nor did Plaintiffs provide any regulatory statement from the Montana Board of Nursing regarding these issues, which the Court recognizes: "[t]he record has not been developed regarding the Board of Nursing's position, if any, on the regulatory limits of APRN practice when it comes to aspiration abortion." Opinion, ¶ 23.[16] Indeed, the ongoing uncertainty of this legal issue is underscored by the

[15] To support Plaintiffs' standing, the Court offers *Gryczan*, 283 Mont. at 443-46, 942 P.2d at 118-20, where we found that lesbian and gay plaintiffs had standing to challenge the constitutionality of a statute criminalizing same-sex sexual conduct, despite lack of prosecution, because the plaintiffs were "precisely the individuals against whom the statute is intended to operate." Opinion, ¶ 14. However, the statute there created a concrete injury because it clearly applied to the plaintiffs without any further determination or action by a court or regulatory authority. Conversely, the statute here does not, on its face, demonstrate a concrete injury because Plaintiffs have not yet established that they are able to perform abortions under their current licensure, an issue for the Montana Board of Nursing. *See* §§ 37-8-102(1); -202(2)(b); -409(1), MCA. Thus, further action by the proper regulatory authority—the Montana Board of Nursing—is necessary here before it can be established that the statute creates a concrete injury.

[16] For example, in contrast, rulemaking undertaken by the California Board of Registered Nursing on this issue explained:

District Court's acknowledgement of the possibility that Weems could provide abortion services outside of APRN scope of practice, which would then subject her to "discipline from the regulatory board charged with overseeing APRNs—the Montana Board of Nursing."

¶32 Rather than providing evidence from the Board of Nursing, one of Plaintiffs' main arguments is that APRNs can provide some types of abortions as safely and competently as doctors, and that prohibiting them from doing so violates equal protection and a woman's right to privacy and procreative autonomy in Mont. Const. art. II, § 10.[17] However, the determination of whether APRNs can safely and competently provide abortions is clearly a question for the Montana Board of Nursing, who govern the practice of APRNs in Montana, *see* §§ 37-8-102(1); -202(2)(b); -409(1), MCA, and have the requisite medical training and knowledge to make such a determination. In contrast, the court lacks both the authority and the proper medical knowledge and training to decide this issue. As the District Court correctly noted, "[a]uthority to set and enforce

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> In order to perform an abortion by aspiration techniques pursuant to Section 2253 and 2725.4 of the Business and Professions Code (Section 2725.4), a person with a license or certificate to practice as a nurse practitioner or a certified nurse-midwife shall complete training recognized by the Board. The proposed regulatory action will set forth parameters in order to comply with Section 2725.4.

Board of Registered Nursing Initial Statements of Reasons (Amended) 1, https://www.rn.ca.gov/pdfs/regulations/isor14635-a.pdf (last visited Apr. 3, 2019).

[17] Similarly, Plaintiff Weems argues she can safely and competently distribute mifepristone and misoprostol, drugs used for medication abortions, because she has prescription authority from the Board of Nursing and a U.S. Drug Enforcement Authority (DEA) license. Weems attested that she could independently distribute mifepristone and misoprostol prior to moving to Montana, and that mifepristone and misoprostol are not controlled substances and carry less danger than controlled substances. However, these assertions are premised upon Weems' opinions. Instead, for purposes of litigation, they should be determined by the proper regulatory authority.

competency requirements for APRNs has been delegated by the legislature to the Board of Nursing." Thus, the Board of Nursing is the proper authority to determine whether APRNs may perform abortions in Montana.

¶33 The law governing this issue is as follows. The State of Montana has "police power by which it can regulate for the health and safety of its citizens." *Wiser*, ¶ 19; *see also State v. Skurdal*, 235 Mont. 291, 293-94, 767 P.2d 304, 306 (1988). Accordingly, in order to "safeguard life and health," a person practicing or offering to practice either professional nursing or practical nursing in Montana must "submit evidence that the person is qualified to practice and is licensed[.]" Section 37-8-101(1)-(2), MCA. In Montana, the licensing requirements, competency requirements, and scope of practice for nurses is determined by the Montana Board of Nursing. Sections 37-8-102(1); -202(2)(b); -409(1), MCA. The general scope of practice for APRNs in Montana is governed by Mont. Admin. R. 24.159.1406. This regulation provides, in relevant part, that "[t]he APRN licensed in Montana may only practice in the role and population focus in which the APRN has current national certification[,]" and also provides a listing of general medical services that APRNs can provide. Whether this listing includes abortion services, and what kinds of abortion services, is clearly debatable.

¶34 Given that the Legislature has enacted specific legislation regarding abortion services, courts should not have to guess about whether licensure through the Board of Nursing authorizes the services, and it is incumbent upon the Plaintiffs to demonstrate that their practice has been legally restricted. Having yet failed to do so, the Plaintiffs are aided by the Court. Going beyond the District Court's conjecture that the Board of

Nursing will conclude in the future that abortion services can be provided pursuant to their licensure, the Court concludes that Plaintiffs have "just[ified] their claim" of what the law is, simply on the basis of the "allegations" in their Complaint and affidavits. Opinion, ¶¶ 13, 23. Although the Court cites subsection (2) of § 27-19-201, MCA, as the basis for the preliminary injunction, that provision does not authorize enjoinment of a statute in prevention of "irreparable injury" before the parties establish as a matter of law that the challenged statute applies to them, or by merely "justify[ing] their claim." Opinion, ¶ 23. Preliminary injunctions are to be issued to "preserve the *status quo* and to minimize the harm to all parties pending full trial[.]" *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185 (citing *Porter v. K & S Partnership*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981) (emphasis in original). Despite the Plaintiffs not yet establishing that abortion procedures are authorized by their licensure, the Court here overturns the status quo and enjoins longstanding, lawfully enacted legislation, which is entitled to a presumption of constitutionality.

¶35 It seems the Court has not considered that "[t]he constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action . . ." *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 (citing *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 506, 508-09 (1993)). "Every possible presumption must be indulged in favor of the constitutionality of a legislative act. . . . The *party challenging a statute*

bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." *Powell*, ¶ 13 (emphasis added). I do not believe the showing made so far by the Plaintiffs is sufficient to support the relief they seek by preliminary injunction—enjoining a presumably constitutional statute.

¶36 In my view, the Court has effectively entered a declaratory judgment on a medical issue that should fall under the regulatory expertise of the Board of Nursing. *See* §§ 37-8-102(1); -202(2)(b); -409(1), MCA. Consequently, there is little need to further litigate an issue the Court has determined, upon minimal proceedings and record, to weigh in on. I believe the Court has done so by mischaracterizing the State's interest as broadly restricting "the rights of women patients to obtain the lawful medical procedure recognized in *Armstrong*[,]" Opinion, ¶ 26, when the interest the State seeks to protect is much narrower, that is, ensuring that the proper regulatory authority affirmatively determines that individuals offering the medical procedures in question are both licensed and competent to provide that type of care in order to "safeguard life and health." Section 37-8-101, MCA.

¶37 I would reverse the entry of the preliminary injunction in favor of further proceedings.

/S/ JIM RICE

Justice Laurie McKinnon and Justice James Jeremiah Shea join in the dissenting Opinion of Justice Rice.

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA