



1 Attorney General Timothy C. Fox, Rob Cameron, and Patrick Risken represent  
2 the State.

### 3 **STATEMENT OF FACTS**

4 Plaintiffs challenge the constitutionality of a Montana statute which  
5 restricts the provision of abortion care to licensed physicians or physician  
6 assistants. Weems is an advanced practice registered nurse (APRN) and certified  
7 family nurse practitioner, licensed by the Montana Board of Nursing, who  
8 provides reproductive health services in Flathead County. Doe is a certified  
9 nurse midwife (CNM). APRNs and CNMs are registered professional nurses  
10 with advanced education and training. Plaintiffs brought this lawsuit on behalf of  
11 themselves and their patients to challenge the constitutionality of certain  
12 provisions of the Montana Abortion Control Act, Montana Code Annotated  
13 § 50-20-109(1)(a), which provides that only licensed physicians and physician  
14 assistants may perform an abortion within the state of Montana.

15 In February 2018, Weems opened All Families Healthcare, a primary  
16 care clinic in Whitefish, Montana. Weems currently sees patients and provides  
17 medical services including splinting, mole biopsies, ultrasounds, intravenous  
18 injections or blood draws, insertion of intrauterine contraceptive devices and  
19 contraceptive skin implants, and endometrial biopsies. Weems is currently  
20 obtaining training to enable her to perform abortions under the requirements  
21 adopted by the Board of Nursing.

### 22 **PRINCIPLES OF LAW**

23 The Court may issue a preliminary injunction “when it appears that  
24 the commission or continuance of some act during the litigation would produce a  
25 great or irreparable injury to the applicant.” Mont. Code Ann. § 27-19-201(2).



1 of the Board of Nursing and is operating within her scope of practice. For the  
2 purposes of argument, and for clarity, the remainder of this Order assumes the  
3 Board of Nursing will conclude Weems and other APRNs may provide abortion  
4 care as within their scope of practice.

5 “Article II, Section 10, [the Right of Privacy enumerated in the  
6 Montana Constitution,] protects a woman’s right of procreative autonomy--i.e.,  
7 here, the right to seek and to obtain a specific lawful medical procedure, a pre-  
8 viability abortion, from a health care provider of her choice.” *Armstrong v. State*,  
9 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364. In the present matter,  
10 enforcement of Montana Code Annotated § 50-20-109(1)(a) could prevent a  
11 woman from obtaining an otherwise legal and constitutionally protected abortion  
12 by threatening prosecution of the medical professional who performed the  
13 abortion, even if the provider was otherwise licensed to administer the procedure.  
14 “[T]he loss of a constitutional right constitutes irreparable harm for the purpose  
15 of determining whether a preliminary injunction should be issued.” *Mont.*  
16 *Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d  
17 1161. Accordingly, the Court must determine whether failing to enjoin  
18 enforcement of Montana Code Annotated § 50-20-109(1)(a) would result in  
19 irreparable injury.

20 At the outset, the Court must first conclude the restriction in Montana  
21 Code Annotated § 50-20-109(1)(a) perpetuates ongoing irreparable harm to the  
22 Plaintiffs and their patients. When deciding to issue a preliminary injunction, a  
23 district court may conclude the “loss” of a constitutional right constitutes  
24 irreparable harm. *Mont. Cannabis*, ¶ 15. The Montana Supreme Court has  
25 determined that “since the right of privacy is explicit in the Declaration of Rights

1 of Montana’s Constitution, it is a fundamental right.” *Armstrong*, ¶ 34, *Gryczan*  
2 *v. State*, (1997), 283 Mont. 433, 449, 942 P.2d 112, 122. Because the right of  
3 privacy is perhaps one of the most important rights guaranteed to the citizens of  
4 this state, “legislation infringing the exercise of the right of privacy must be  
5 reviewed under a strict-scrutiny analysis--i.e., the legislation must be justified by  
6 a compelling state interest and must be narrowly tailored to effectuate only that  
7 compelling interest.” *Armstrong*, ¶ 34. Accordingly, this Court will evaluate the  
8 statute under a strict scrutiny standard.<sup>1</sup>

9 At this initial stage, the Court is not persuaded the State has a  
10 compelling interest to infringe upon a patients’ fundamental right to privacy. The  
11 State argues it has a compelling interest in preserving the health of women  
12 undergoing abortions. To allow APRNs to perform abortions would endanger  
13 the health of these women. The State distinguishes *Armstrong* noting the  
14 physician assistants therein were required to practice under the supervision of a  
15 licensed physician, whereas APRNs are not. The State concludes “[t]his material  
16 difference provides obvious compelling justification for distinctions in the scope  
17 of authorized practice between PAs and APRNs, and renders *Armstrong*  
18 materially distinguishable.”

19 This Court agrees. Portions of the *Armstrong* opinion may be  
20 distinguishable on these grounds, but this does not answer the question posed  
21 herein – does the State have a compelling interest to prohibit a trained and  
22 qualified APRN from providing abortion care when authorized to practice  
23 independently under the Board of Nursing? At oral argument, the State offered  
24 an article from the *American Journal of Public Health* which analyzed the

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25 <sup>1</sup> To be clear, this analysis is purely for the purpose of the preliminary injunction motion. The parties will have an opportunity to fully argue the strict scrutiny issue as litigation proceeds.

1 complication rate of aspiration abortions performed by physicians versus those  
2 performed by newly trained nurse practitioners, certified nurse midwives, and  
3 physician assistants. According to the results therein, 0.9% of physician attended  
4 abortions develop a complication, compared to 1.8% for newly trained nurse  
5 practitioners, certified nurse midwives, and physician assistants. The State  
6 maintains these results demonstrate the potential danger of allowing APRNs to  
7 perform abortions. Nonetheless, this article also fails to demonstrate the State  
8 has a compelling interest in prohibiting APRNs from performing abortions. In its  
9 abstract, the article contains the following: “*Conclusions.* Abortion  
10 complications were clinically equivalent between newly trained NPs, CNMs and  
11 PAs and physicians, supporting the adoption of policies to allow these providers  
12 to perform early aspirations to expand access to abortion care.” Furthermore, the  
13 study notes that of the 152 reported complications, 146 were “minor” and the 6  
14 “major” complications were split evenly between the two study groups. This  
15 article does not support the State’s contention that Montana Code Annotated  
16 § 50-20-109(1)(a) is necessary to preserve the health of Montana women seeking  
17 abortion care. This Court concludes, at this stage of litigation, the State has not  
18 met its burden of showing a compelling state interest in restricting Montana  
19 women’s fundamental right to privacy.

20           The State further argues public policy concerns mandate denial of the  
21 injunction. According to the State, enjoining the enforcement of the APRN  
22 restriction in Montana Code Annotated § 50-20-109(1)(a) would result in  
23 unqualified APRNs performing abortions. In its brief, the State raises this  
24 question: “[i]s an APRN Certified Registered Nurse Anesthetist qualified and  
25 trained to perform abortions? Likely not, but she or he would be legally able to



1 IT IS HEREBY FURTHER ORDERED the State is enjoined from  
2 enforcing any laws that presume physician or physician assistant involvement in  
3 abortion care, including Montana Code Annotated § 50-20-110 and Montana  
4 Code Annotated § 50-20-501, *et seq.*, to the extent they impermissibly restrict  
5 Weems and Doe's ability to provide abortion care, pending a final disposition in  
6 this litigation.

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

9 DATED this 4<sup>th</sup> day of April 2018.

10  
11   
12 MIKE MENAHAN  
13 District Court Judge

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