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**Application for admission pro hac vice forthcoming*

MONTANA FIRST JUDICIAL DISTRICT COURT,
COUNTY OF LEWIS & CLARK

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; AND HELEN WEEMS MSN APRN-FNP, on behalf of themselves, their employees, and their patients Plaintiffs, vs. STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services Defendants.	Cause No. DV-23-592 Judge: Christopher Abbott **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs All Families Healthcare ("All Families"); Blue Mountain Clinic ("Blue Mountain"); and Helen Weems, APRN-FNP (collectively, "Plaintiffs") are health care providers that offer reproductive health care, including abortion care, in Montana. Plaintiffs seek a temporary restraining order and preliminary injunction to prevent enforcement of Montana House Bill 937 ("HB 937" or the "Act") (attached as Exhibit A to the Complaint).

HB 937 is yet another legislative effort to target abortion care for unique and additional restriction. Although Plaintiffs have been providing abortion care in Montana for years, the Act attempts to create a new licensing scheme that applies solely to Plaintiffs and other abortion providers. It adds "abortion clinic" to the definition of "health care facility" and directs Defendant Department of Public Health and Human Services ("DPHHS") to promulgate regulations about the process and requirements across 15 categories for "abortion clinic" licensure. DPHHS has yet to even propose regulations under HB 937, which takes effect October 1, 2023, making compliance with the Act by its effective date impossible. HB 937 is also vague as to whether Plaintiffs *must* become licensed as "abortion clinics" or whether they may continue to provide that care under the laws to which they and similar clinics are currently subject.

Absent injunctive relief, HB 937 threatens to end or disrupt Plaintiffs' provision of abortion care, and indeed, their ability to provide any health care services to their communities and Montanans across the State. HB 937 was passed despite there being *no* threat to patient health and safety. All Families has provided abortion care from the same physical location since it opened in 2018. Blue Mountain has provided abortion care since it opened in 1977, as the first and only abortion clinic in the State; it has provided abortion care from its current location since 1995—almost 30 years. Plaintiffs have been, and will continue to be, subject to generally applicable State, federal, and professional oversight and regulation. As mainstream medical authorities have repeatedly concluded, there is no valid reason to target abortion care for additional regulation.

Plaintiffs are likely to succeed on the merits of their claims that HB 937 is unconstitutional. *See infra* ARGUMENT § I. The Act violates Plaintiffs' patients' rights to abortion and equal protection, as well as Plaintiffs' own equal protection rights. It directly contravenes controlling precedent, which has repeatedly blocked efforts to restrict Montanans' right to access abortion from their chosen provider. *See, e.g.*, *Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798 (2023) ("*Weems II*") (law restricting provision of abortion to only physicians and physician

assistants held unconstitutional); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999) (restrictions on abortion trigger strict scrutiny and ban on physician assistants providing abortion held unconstitutional). Just this year, this Court enjoined multiple abortion restrictions from taking effect because they threaten similar irreparable harm. *See, e.g.*, *Planned Parenthood of Mont. v. State*, No. ADV-2023-299 (1st Jud. Dist., Jul. 11, 2023) ("*PPMT II*") (entering preliminary injunction against DPHHS regulations and HB 544 and HB 862 which restricted Medicaid coverage of abortion); *Planned Parenthood of Mont. v. State*, No. ADV-2023-231 (1st Jud. Dist., Jul. 11, 2023) ("*PPMT III*") (entering preliminary injunction against HB 721, a ban on telehealth abortion and HB 575, a ban on a common method of second-trimester abortion). *See infra* ARGUMENT §§ I.A & B. HB 937 is also unconstitutionally vague because it is uncertain whether HB 937 *requires* licensure for Plaintiffs; it grants considerable discretion to DPHHS, risking discriminatory enforcement; and DPHHS has created no process or requirements for licensure, and insufficient time to become licensed. *See infra* ARGUMENT § I.C.

In an effort to avoid these emergency proceedings, Plaintiffs and their undersigned counsel requested clarification from State attorneys, including whether HB 937 requires separate licensure for "abortion clinic[s]"; whether and when DPHHS intends to promulgate regulations; and whether DPHHS would stipulate to a stay of enforcement until 90 days after final regulations are published. *See* Exhibit 1 (Weems and DPHHS Correspondence); Exhibit 2 (ACLU MT and State Correspondence).[1] DPHHS responded that licensure for "abortion clinics" is required and that it was engaged in rulemaking without providing further details or a timeline. Exhibit 1. Attorneys for the State indicated only that HB 937 would take effect on October 1. Exhibit 2.

To prevent irreparable harm, *see infra* ARGUMENT § II.A, and to preserve the status quo, this Court should enter a temporary restraining order and/or preliminary injunction.

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[1] Attached as Exhibit 1 is email correspondence between Plaintiff Weems and Tara Wooten, Healthcare Facility Program Manager of the Licensure Bureau of DPHHS regarding whether DPHHS intends to engage in the rulemaking process in advance of HB 937's effective date and whether DPHHS understands HB 937 to require licensure for abortion clinics.

Attached as Exhibit 2 is email correspondence between Alex Rate, counsel for Plaintiffs, and attorneys for the State regarding whether DPHHS intended to engage in the rulemaking process in advance of HB 937's effective date; whether the State would consider delaying the effective date of HB 937 until after final regulations are published; and whether the State understands HB 937 to require licensure for abortion clinics.

BACKGROUND

I. Abortion Access in Montana.

Abortion is common and safe healthcare. Abortion is safer than carrying a pregnancy to term; the risk of death associated with childbirth is approximately 13 times higher than that associated with abortion. Banks Aff. ¶ 17. Although abortion is safe throughout pregnancy, the risk increases incrementally as pregnancy progresses. Weems Aff. ¶ 30. Thus, delays in accessing abortion care cause unnecessary risks for patients. Evidence demonstrates that people denied a wanted abortion are more likely to experience economic insecurity and that there are long-term economic consequences for their children as well. *Id.* And expert, mainstream medical authorities have concluded that there is no reason to regulate abortion differently than identical or comparable care, including care related to miscarriage. Banks Aff. ¶ 6.

All Families is a sexual and reproductive health clinic and is the only clinic providing abortion care in Northwest Montana. Weems Aff. ¶ 2. Blue Mountain is a medical clinic that fully integrates family medicine, mental health counseling, and reproductive and sexual health care into its medical practice. Smith Aff. ¶ 16.

All Families and Blue Mountain both offer medication abortion. Weems Aff. ¶ 12; Smith Aff. ¶ 21. Medication abortion is typically provided via a two-drug regimen, which consists of one dose of mifepristone taken in tandem with misoprostol. Banks Aff. ¶ 10. The medication causes the patient to pass the pregnancy in a process similar to a miscarriage, and the same medications are used to manage a spontaneous miscarriage. *Id.* ¶¶ 20-21.

Both clinics offer medication abortion in person or via direct-to-patient telehealth. Smith Aff. ¶ 23; Weems Aff. ¶ 13. For telehealth, a provider consults with a patient remotely, provides relevant counseling, confirms that the patient is eligible for medication abortion, and obtains informed consent. Smith Aff. ¶ 22; Weems Aff. ¶ 13. The medications are then mailed to the patient at a Montana address. Smith Aff. ¶ 22; Weems Aff. ¶ 13. Medication abortion makes up the vast majority of abortion care that All Families provides and is largely provided via telehealth. Weems Aff. ¶¶ 13, 15. Telehealth provides flexibility and discretion, particularly for those who cannot take time off from work, find childcare, or whose privacy would be jeopardized by making an in-person visit. It is also ideal for the many patients who live in the remote, rural regions of Montana, which can be hours from the nearest clinic. *Id.* ¶ 15.

Both clinics also offer procedural abortion. Procedural abortion involves a two-step process in which the provider first partially dilates the patient's cervix and then evacuates the uterus using suction aspiration, instruments, or a combination. Banks Aff. ¶ 14. A procedural abortion is essentially identical to the procedure performed to manage a spontaneous miscarriage and is comparable in skill, risk, and/or technique to other gynecological procedures, including other procedures that Plaintiffs perform, such as insertion and removal of intrauterine devices ("IUD(s)," a long-acting, reversible method of birth control), loop electrosurgical excision procedures ("LEEPs") (a procedure to diagnose and treat abnormal cervical tissue), and endometrial biopsies. *Id.* ¶ 22.

Plaintiffs' patients seek abortion care for a variety of reasons: some lack the financial means to raise a child; others are not ready to become a parent; many have physical and emotional health issues that would be exacerbated by continuing a pregnancy; and some have become pregnant as a result of incest or rape. Smith Aff. ¶ 25. The availability of abortion care enables patients not to forego educational and economic opportunities due to unplanned childbirth; to provide care to existing family members; to avoid raising children with an absent, unwilling, or abusive partner; and to prevent health harms, pain, and suffering that can arise from carrying pregnancies to term and giving birth. *Id.* ¶ 26.

II. Montana's Regulation of Health Care Providers.

Health care providers in Montana, including Plaintiffs, are subject to generally applicable State, federal, and professional regulation. For example, like other providers in Montana, Plaintiffs are subject to licensure, regulation, and oversight by State professional boards (e.g., Board of Medical Examiners, Board of Nursing). §§ 37-3, 37-8, 37-20, 37-27, MCA. The Montana Department of Labor and Industry and the professional and occupational licensing boards are charged with investigating complaints about licensees and imposing discipline. *See How to File a Complaint,* Montana Dep't of Labor & Indus., https://bsd.dli.mt.gov/filing-complaint (last visited Aug. 17, 2023). Plaintiffs are also subject to regulation, including inspection, by the Board of Pharmacy. *See* Weems Aff. ¶ 18 (Ms. Weems is registered with the Board of Pharmacy as a medical practitioner dispenser); Smith Aff. ¶ 17 (Blue Mountain is licensed as a limited-service pharmacy); Admin. R. M. 24.174.1802, 1803 (medical practitioner dispensers are subject to inspection); Admin. R. M. 24.174.830(7) (licensed pharmacy inspection). Plaintiffs are also subject to DPHHS oversight and regulation through the Clinical Laboratory Improvement

Amendments ("CLIA") and State abortion-reporting laws. Weems Aff. ¶ 18; Smith Aff. ¶ 17. Furthermore, Plaintiffs meet the clinical standards, quality assurance guidelines, and certification requirements set by the National Abortion Federation ("NAF"), the professional organization for abortion providers. Weems Aff. ¶ 18; Smith Aff. ¶ 17.

Montana separately authorizes the DPHHS to set minimum standards for "health care facilities" and to license such facilities. *See* §§ 50-5-103(1), 50-5-204(3), MCA. "Health care facilities" licensed by DPHHS include hospitals, outpatient centers for surgical services, outpatient centers for primary care, long-term care facilities, and mental health centers, among others. "Health care facility" *does not* include "offices of private physicians, dentists, or other physical or mental health care workers regulated under Title 37 [of the Montana Code]." § 50-5-101(26)(b), MCA. Plaintiffs, like other clinicians' offices, are thus not licensed by DPHHS as "health care facilities." Weems Aff. ¶ 24; Smith Aff. ¶ 7; Mayo Aff. ¶ 3.

DPHHS has previously made clear that clinicians licensed under Title 37 may continue to practice without additionally licensing the facilities in which they practice and indicated that facility licensure is not necessary for health and safety. Instead, DPHHS's primary reason for providing a path for facility licensure was to enable facilities to charge facility fees. For example, in 2011, in response to a concern that facility licensure for outpatient facilities for primary care would require all nurse-managed centers and private nurse practitioner run clinics to be licensed as facilities, and comply with regulations requiring a physician to supervise the facility, *see* 37-526 Mont. Admin. Reg. 7 (Apr. 14, 2011) (Comment #1), DPHHS dismissed that concern, stating,

> [I]f a practitioner is already licensed to practice medicine they may open a private practice or clinic without having to license as a health care facility. Any licensed practitioner can sign up and bill Medicare/Medicaid for professional services rendered. . . . If a licensed healthcare practitioner additionally wants to bill for a facility fee (such as for a birthing center) a health care facility license must be acquired; hence the rule for licensing 'outpatient facilities for primary care.' The health care facility standards are only applicable to those healthcare professionals who would seek and qualify for a healthcare facility license, in addition to their professional credentials.

37-526 Mont. Admin. Reg. 7 (Apr. 14, 2011) (Response #1).

DPHHS had previously indicated that its prior facility licensure requirements were spurred by providers' interest in charging insurance programs a facility fee. In 2010, DPHHS proposed regulations for outpatient facilities for primary care to include birth centers, stating:

> Currently, birth centers can operate under the independent scope of practice of the health care professional and these professionals are seeking facility licensure under the existing outpatient center for primary care authority. Birth centers have sought a facility license for purposes of Medicaid reimbursement.

37-526 Mont. Admin. Reg. 22 (Nov. 26, 2010).

Accordingly, today, licensed clinicians may practice in office and clinic settings without facility licensure from DPHHS. In fact, there are only 25 licensed outpatient centers for surgical services in the entire State; and only 13 licensed outpatient centers for primary care.[2] Other outpatient clinics—from primary care and gynecological clinics to dental and dermatology offices to birth centers, where pregnant people labor and give birth—operate without mandatory facility licensure. *See* Banks Aff. ¶¶ 27-28; Mayo Aff. ¶¶ 13-14. People may also birth at home, where, of course, no facility licensure exists. *See* Banks Aff. ¶ 28.

III. HB 937.

Representative Lola Sheldon-Galloway introduced HB 937 on March 27, 2023. Proponents of the bill cited no health and safety incidents concerning any Montana clinicians who provide abortion care or at any Montana facility that provides abortions.

HB 937 adds "abortion clinic" to the definition of "health care facility," and makes it unlawful to operate or advertise an "abortion clinic" in the State without a valid license issued by DPHHS pursuant to HB 937. HB 937 § 1, 2. The penalty for operating a "health care facility" without a license, or for violating any licensure regulation, is up to $1,000 per day of violation. § 50-5-111, MCA. "Abortion clinic" means a facility that performs any "surgical abortion procedures" or prescribes, administers, or dispenses an "abortion-inducing drug" to five or more patients per year. HB 937 § 1, 1(a), (2)(a). "Abortion clinic" does not include a facility that provides an "abortion-inducing drug" for a purpose other than abortion. *Id.* § 1 (2)(c). "Abortion clinic" also does not include facilities licensed as hospitals, critical access hospitals, or outpatient centers for surgical services. *Id.* § 1(b).

However, HB 937 does not alter existing law, which provides that "health care facility" "*does not* include offices of private physicians, dentists, or other physical or mental health workers regulated under Title 37." § 50-5-101(26)(b), MCA (emphasis added). Accordingly, although the

[2] *See* DPHHS, Public Facility Search Information, https://mt reports.com/portal/SearchFacility .aspx.

term "health care facility" now includes the term "abortion clinic," it appears to continue *not* to include private clinicians' offices. DPHHS has nonetheless said that clinics that provide abortion care *must* become licensed to continue to provide that care. *See* Exhibit 1. It is thus unclear whether private clinicians' offices that offer abortion care—like Plaintiffs—must obtain health care facility licenses as "abortion clinics," or whether they may continue to provide abortion care as private clinicians' offices, as they have for years.

To the extent HB 937 requires Plaintiffs to become licensed, Section 2(2) provides that an applicant for licensure must apply for a license on a form prescribed by DPHHS. DPHHS has not made that form available. Weems Aff. ¶¶ 7, 25; Smith Aff. ¶¶ 7, 28, 36. Additionally, Section 3 of HB 937 directs DPHHS to adopt regulations, and license and regulate "abortion clinics" consistent with those regulations. DPHHS has not proposed regulations across any of the more than 15 categories HB 937 lists, including:

- requirements for
  - sanitation,
  - staff qualifications,
  - necessary emergency equipment,
  - providing emergency care,
  - monitoring patients after administration of anesthesia,
  - providing follow-up care,
  - quality assurance,
  - infection control,
  - the architecture or layout of the "abortion clinic,"
  - providing patients with a hotline number to assist "women who are coerced into an abortion or who are victims of sex trafficking,"
  - obtaining annual training by law enforcement on "identifying and assisting women who are coerced into an abortion or who are victims of sex trafficking;"
- establishing operating procedures for maintaining medical records;
- establishing procedures for the issuance, renewal, denial, and revocation of licenses, including the form and content of the license and collection of an annual $450 fee;
- establishing procedures and standards for inspections; and
- establishing procedures for addressing any violations.

Section 4 of HB 937 requires that DPHHS inspect each "abortion clinic" at least once per year. DPHHS may conduct additional investigations "as needed" to respond to complaints.

Governor Gianforte signed HB 937 on May 16, 2023. As of September 1, 2023—more than three months later and just one month before the law is to take effect—DPHHS has not

proposed any regulations. Plaintiffs and their undersigned counsel made multiple requests asking whether DPHHS understands HB 937 to require "abortion clinics" to be licensed; whether and when DPHHS intends to engage in the rulemaking process before HB 937's effective date; and whether the State would consider delaying the effective date of the Bill to 90 days after final regulations are published. *See* Exhibit 1; Exhibit 2. Attorneys for the State did not reply to the undersigned's first request. *See* Exhibit 2. In response to the second request, an attorney for the State indicated only that HB 937 would go into effect October 1. *Id*. DPHHS responded to Plaintiff Weems' request for additional information, stating that HB 937 requires abortion clinics to be licensed, and that DPHHS is currently "engaged in the rulemaking processes for licensure of abortion clinics" as of August 18, 2023. *See* Exhibit 1. DPHHS also referenced potential variances or waivers but provided no further information. *Id*.

IV. Impact of HB 937 of Abortion Providers and Their Patients.

The uncertainty caused by whether HB 937 even requires Plaintiffs to obtain facility licensure threatens to disrupt the safe and effective abortion care they provide. Weems Aff. ¶ 11; Smith Aff. ¶ 11. Unlike any other health care practice in the State, Plaintiffs are unsure from one day to the next whether they will be able to provide abortion care, or whether they will have to upend their practices or end abortion care entirely. Weems Aff. ¶¶ 11, 21-23; Smith Aff. ¶¶ 11, 28, 34, 37. As October 1 approaches, the uncertainty will cause patients to be unsure whether their appointments can proceed as scheduled. Weems Aff. ¶¶ 23-24; Smith Aff. ¶¶ 34-35. The shifting law and policy landscape disrupts Plaintiffs' practices and places enormous strain on their clinicians, staff, and patients. Weems Aff. ¶ 22; Smith Aff. ¶¶ 34-35. And, to the extent HB 937 *requires* Plaintiffs to obtain facility licensure, it threatens to impose unnecessary, extra regulation on Plaintiffs' small health care practices and their patients—to which no similar practice is subject.

Additionally, the absence of even proposed regulations about the process and requirements for licensure a month before HB 937's October 1 effective date makes it impossible for Plaintiffs to comply with the Act. They cannot even apply for a license to operate and provide abortion care—threatening to eliminate patients' access to abortion care. Weems Aff. ¶ 25; Smith Aff. ¶ 28. Even if DPHHS is able to propose, hold a public comment period for, and finalize rules under HB 937 before October 1, 2023, HB 937 provides for over 15 categories of requirements for licensure, which will undoubtedly take time for Plaintiffs to assess and implement. Weems Aff. ¶ 26; Smith Aff. ¶ 36. It will take additional time for the DPHHS to review and approve any

application. Even under the most ideal circumstances, assuming that there are no delays or issues with an application, there will necessarily be a period during which HB 937 prohibits abortion care at clinics that do not obtain additional licensure, and during which licenses are not issued—all through no fault on the part of All Families or Blue Mountain.

Any disruption in Plaintiffs' ability to provide abortion care to its patients interferes with patients' access to abortion, delaying some and denying others access to this time-sensitive care. Weems Aff. ¶ 30; Smith Aff. ¶ 38. This could have life-altering health and financial consequences for Montanans who have made the decision to end a pregnancy. Moreover, to the extent HB 937 requires abortion clinics to be licensed and All Families obtains no such license, HB 937 may force it to close, as abortion care makes up a substantial part of its practice. Weems Aff. ¶¶ 11, 32. The Flathead Valley would once again be without any abortion provider, and the community would lose critical access to safe and confidential contraception, STI testing, and 2S-LGBTQIA+ care. *Id.* ¶ 2. Blue Mountain, too, would be forced to stop providing the abortion care it has offered for more than four decades to continue its family practice, which includes provision of care that is identical or comparable to abortion care. Smith Aff. ¶ 38.

Absent a temporary restraining order or preliminary injunction, All Families and Blue Mountain will be forced to cease providing abortion care. Weems Aff. ¶ 29; Smith Aff. ¶ 38. If implemented, HB 937 jeopardizes access to abortion for the most vulnerable Montanans and threatens access to a wide range of other health care services Plaintiffs offer.

LEGAL STANDARD

Pursuant to recent legislation (2023 Senate Bill 191 or "SB 191"), as of March 2, 2023, "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." SB 191, 2023 Leg. Reg. Sess. (Mont. 2023) (amending §27-19-201, MCA); *see also Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard," and "closely follow United States supreme court case law." SB 191, § 1. The two standards now operate on the same four-part, federal-style test. *See id.* §§ 1, 3.

The federal standard—now also the Montana standard—in the Ninth Circuit follows a "sliding scale" approach where "a stronger showing of one element may offset a weaker showing

of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). When the "balance of hardships tips sharply" in favor of a plaintiff, the plaintiff need only show "serious questions going to the merits" as long as the plaintiff can also show that "there is a likelihood of irreparable injury, and that the injunction is in the public interest." *Id.* at 1135. "Serious questions" are "questions which cannot be resolved one way or the other at the hearing on the injunction and . . . are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (citation omitted).

Plaintiffs satisfy each element of the sliding scale standards for a temporary restraining order and preliminary injunction. Because Plaintiffs are in fact likely to succeed on the merits and the balance of hardships tips sharply in their favor, they certainly satisfy the lower standard and establish serious questions going to the merits.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Under *Armstrong*, *Weems I*, *Weems II*, and *Planned Parenthood of Montana v. State*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301 (2022) ("*PPMT I*"), the Act violates Plaintiffs' patients' rights to privacy and equal protection under the Montana Constitution. Because HB 937 infringes on Montanans' fundamental right to abortion, it is subject to strict scrutiny, which it cannot withstand. Further, under Article II, Section 17 of the Montana Constitution, HB 937 is void for vagueness because it fails to give "a person of ordinary intelligence fair notice." Regulations cannot cure HB 937's defects.

A. HB 937 violates Plaintiffs' patients' right to abortion.

HB 937 violates Plaintiffs' patients' fundamental rights to privacy and procreative autonomy under the Montana Constitution. Article II, section 10 of the Montana Constitution guarantees each individual the right to access abortion, including "from a health care provider of her choosing." *Armstrong*, ¶ 2; *see also id.* ¶ 34 ("Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States."). The State constitution safeguards an individual's right to decide whether to continue or terminate a pre-viability pregnancy "in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation." *Id.* ¶ 49. Few matters, the Court stressed, more directly implicate personal autonomy and individual privacy than medical judgments affecting the course of one's life, bodily integrity, and health. *Id.*

¶¶ 45, 53, 72. In a challenge to an abortion law, the State must show that the law is necessary and narrowly tailored to "preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bona fide* health risk." *Id.* ¶¶ 34, 59 (emphasis added). A narrowly tailored law is "the least onerous path that can be taken to achieve the state objective." *Weems II*, ¶ 44 (quoting *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174). "Subject to this narrow qualification, however, the legislature 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 by the state." *Armstrong*, ¶ 59.

To the extent HB 937 requires Plaintiffs to obtain abortion-specific facility licensure, it violates Montanans' right to access abortion from their chosen health care provider. As this Court and the Montana Supreme Court have repeatedly concluded, singling out abortion care for unique and additional regulation infringes individuals' fundamental right to abortion. *See, e.g.*, *Armstrong*, ¶¶ 58-59, 63-64 (restricting provision of abortion to physicians unconstitutional); *Weems II*, ¶¶ 42-43 (restricting provision of abortion to physicians or physician assistants unconstitutional). That is precisely what HB 937 does. All Families has been providing abortion care for years, and Blue Mountain for decades—subject to oversight and regulation by State authorities, including the Boards of Nursing, Medical Examiners, and Pharmacy, and DPHHS itself, among others. Weems Aff. ¶ 18; Smith Aff. ¶ 17. Yet HB 937 mandates Plaintiffs obtain facility licensure and subjects them to (as yet-unknown) regulation across more than 15 categories *solely* because they provide abortion care. It layers that additional regulatory scheme on top of generally applicable regulation to which Plaintiffs are already subject. HB 937 bars Montanans from accessing abortion care from Plaintiffs who, although they are subject to existing regulation, are not licensed as "abortion clinics."

There is no valid reason why the State's current regulation is inadequate to protect Montanans' health and safety, especially given that abortion is one of the safest forms of health services available in the United States. Weems Aff. ¶ 28; Smith Aff. ¶ 41. Mainstream medical authorities have concluded that abortion is safely provided in outpatient settings, like Plaintiffs' clinics, and have condemned laws like HB 937 that single out abortion care for unique and additional regulation under the pretext of health and safety. Banks Aff. ¶ 28. And courts have struck down similar efforts to subject abortion providers to further regulation on top of generally

applicable regulation under similar or less-protective constitutional standards than Montana's. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Texas laws that imposed unique and additional regulatory scheme on abortion facilities held unconstitutional under undue burden standard), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Hodes & Nauser v. Norman*, No. 2011-CV-1298, 2021 WL 7906942 (Kan. Dist. Ct. Dec. 03, 2021) (targeted regulatory scheme for abortion facilities violated Kansas Constitution's protection for rights to abortion and equal protection, and state failed to justify scheme under strict scrutiny). Like those laws, the Act undermines rather than promotes health and safety by threatening to interfere with patients' access to abortion care from their chosen providers.

HB 937 is also poorly tailored to advance any alleged health and safety interest. It is both under- and over-inclusive. It is under-inclusive because it does not apply to all settings in which abortion care is provided; to the provision of identical or similar care provided for purposes other than to induce an abortion; or to care that generally carries more risk than abortion. For example, HB 937 applies to clinics that provide abortion care but not to clinics that provide miscarriage care. Indeed, HB 937 explicitly *exempts* from the definition of "abortion clinic," and thus from facility licensure, clinics that provide the *same* medications used to induce an abortion when used for another purpose. HB 937 §1(2)(c). HB 937 applies to no other pregnancy care, including childbirth, despite evidence that continued pregnancy and childbirth carry greater risk than abortion. Banks Aff. ¶ 28. DPHHS makes *optional* licensure available for birth centers—freestanding clinics where pregnant people labor and deliver. *See* 37-526 Mont. Admin. Reg. 7 (Apr. 14, 2011) (path to licensure for birth centers created so that licensed centers can bill facility fees). No facility licensure applies to homes, where people may also labor and give birth. Banks Aff. ¶ 28. HB 937 also does not apply to settings in which fewer than five abortions are provided, per Section 1(1)(iv), or to hospitals, critical access hospitals, or outpatient centers for surgical services, other settings where abortion care may be provided. HB 937 § 1(1).

HB 937 is also over-inclusive because it applies indiscriminately to abortion care with no regard for the patient's circumstances, the type of abortion (procedural or medication), the point in pregnancy when abortion care is being provided, or the type of sedation or anesthesia offered (if any). Although abortion is safe throughout pregnancy, these are factors that can impact the relative safety of health services generally. Weems Aff. ¶ 30; Smith Aff. ¶ 41. For example, HB 937 requires facility licensure for clinics that provide abortion care even though many patients

obtain that care via medication, which involves ingesting pills outside the clinic setting. Weems Aff. ¶ 28; Smith Aff. ¶ 22. Indeed, some of Plaintiffs' patients never even set foot in Plaintiffs' clinics because they access medication abortion via telehealth. Weems Aff. ¶ 28; Smith Aff. ¶ 22. Yet, it appears that pursuant to HB 937, absent facility licensure, Plaintiffs must cease providing *all* abortion care—even for these patients.

Like numerous other Montana abortion laws, HB 937 is a solution in search of a problem. Abortion is legal in Montana and protected as a fundamental right under the Montana Constitution. Nonetheless, abortion has been subject to numerous efforts to restrict it, and Montana courts have blocked every one of these recent efforts. *Weems II,* 2023 MT 82, 412 Mont. 132, 529 P.3d 798, (2023) (restricting provision of abortion to physicians and physician assistants only is unconstitutional); *Planned Parenthood of Mont. v. State*, No. DV-21-0999, 2021 WL 9038524 (13th Jud. Dist., Oct. 7, 2021) (granting preliminary injunction against laws imposing mandatory delay period and banning telehealth for abortion), *aff'd by PPMT I*, 2022 MT 157, 409 Mont. 378, 515 P.3d 301 (2022); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999) (ban on physician assistants providing abortions does not withstand strict scrutiny); *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 WL 17959705 (1st Jud. Dist. May 22, 1995) (Medicaid may not exclude coverage for medically necessary abortion care); *PPMT II*, No. ADV-2023-299 (1st Jud. Dist., Jul. 11, 2023) (granting motion for preliminary injunction enjoining DPHHS regulations and HB 544 and HB 862 which restricted Medicaid coverage of abortion); *PPMT III*, No. ADV-2023-231 (1st Jud. Dist., Jul. 11, 2023) (granting motion for preliminary injunction enjoining HB 721 which prohibited telehealth abortion care and HB 575 which prohibited a common method of second-trimester abortion). HB 937 is no different and fails the exacting strict scrutiny standard the Montana Constitution demands.

B. <u>HB 937 violates Plaintiffs and their patients' equal protection rights.</u>

HB 937 is also unconstitutional because it violates Montana's equal protection guarantee. Montana Const. art. II, § 4. When considering an equal protection challenge, Montana courts first "identify the classes involved and determine whether they are similarly situated." *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456. "A law or policy that contains an apparently neutral classification may violate equal protection if in reality it constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445 (internal quotation marks and alterations

omitted). Second, courts determine the appropriate level of scrutiny to apply. *Id.* ¶ 17. If a suspect class or fundamental right is affected, courts employ strict scrutiny, meaning that "the legislation [at issue] must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶ 34.

HB 937 infringes on Plaintiffs' patients' rights to equal protection because it creates two similarly situated classes: pregnant Montanans seeking abortion from Plaintiffs (who provide abortion care in clinicians' offices) and pregnant Montanans seeking abortion care from licensed facilities (facilities that either become licensed as "abortion clinics" or are exempt from "abortion clinic" licensure under HB 937). HB 937 bars the former group, but not the latter, from exercising their fundamental right to access abortion from their chosen provider. HB 937 also creates a distinction between Montanans who decide to terminate their pregnancy and those who access other pregnancy care, such as miscarriage care or care for continued pregnancy and childbirth. Montanans who exercise their fundamental right to personal and procreative autonomy by deciding to continue their pregnancies may continue to access care from their chosen provider without the interference of HB 937. In fact, Montanans who seek identical care to manage a miscarriage can continue to access that care from their chosen providers, including Plaintiffs.

The State cannot meet its heavy burden under strict scrutiny to show that this discrimination is narrowly tailored to serve a compelling interest. For the reasons discussed *supra*, there is no health-protective—or any other—rationale for the State to discriminate against pregnant Montanans who seek abortion care from Plaintiffs. Likewise, there is no valid reason to discriminate against patients who seek abortion care by imposing unique requirements that only apply to clinicians that provide abortion care, when patients who seek identical miscarriage care, or other reproductive health care, such as care for continued pregnancy and childbirth, can access such care from providers who are not subject to separate licensure and regulations. Indeed, it is irrational for DPHHS to require facility licensure for clinics that offer abortion care but not clinics where pregnant people may labor and give birth. HB 937's differential treatment based on Montanans' exercise of their fundamental right to procreative and personal autonomy simply cannot be squared with the equal protection guarantee.

HB 937 additionally infringes on Plaintiffs' own equal protection rights. Where a classification does not affect a fundamental right or suspect class, rational basis review applies. *In re S.L.M.* (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371. Under rational basis review, the Court

must make "[a] careful inquiry . . . into . . . the rationality of the connection between the legislative means and purpose [and] the exercise of alternative means for effectuating the purpose." *In re C.H.* (1984), 210 Mont. 184, 198, 683 P.2d 931, 938 (internal citations omitted).

To the extent HB 937 requires licensure of "abortion clinics," it distinguishes between Plaintiffs, who provide abortion care in clinicians' offices subject to regulation under Title 37 of the Montana Code, and clinicians who provide identical or more complex care in clinicians' offices also subject to regulation under Title 37. There is no credible connection between HB 937's different treatment of clinicians that is rationally related to any valid State interest. As discussed *supra*, HB 937 has no impact on Plaintiffs' provision of miscarriage care, which is identical to abortion care. And DPHHS does not mandate licensure for facilities involved in care that carries more risk than abortion, including for continued pregnancy and during childbirth. It is also irrational to bar Plaintiffs from offering *any* abortion care absent a *facility* license when much of that care involves prescribing medications that some patients access solely via telehealth. Barring Plaintiffs from providing abortion care simply because it is abortion care lacks any rational basis.

C. HB 937 is unconstitutionally vague.

HB 937 is unconstitutionally vague in at least three ways: (1) it is unclear whether the law applies to Plaintiffs, and to the extent the law does apply to Plaintiffs, (2) on its face, the Act suffers from numerous vague terms and conditions, and (3) DPHHS has failed to promulgate rules or regulations. Regardless, regulations cannot cure the vagueness in the Act.

To preserve due process, laws must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *State v. Woods* (1983), 716 P.2d 624, 627. Further, "laws must provide explicit standards for those who apply them." *State v. Stanko*, 1998 MT 321, ¶ 23, 974 P.2d 1132 (1998). Based on those legal tenets, Montana courts employ a two-part inquiry to determine whether a law is void for vagueness: (1) whether the statute provides actual notice to the average person of ordinary intelligence, and (2) whether it provides minimal guidelines to govern law enforcement and prevent arbitrary or discriminatory application of the law. *State v. Christensen*, 2020 MT 237, ¶ 131, 472 P.3d 622 (2020). HB 937 fails to satisfy either prong of this test.

First, HB 937 is too vague to provide "fair notice" as to what the Act intends to regulate. HB 937 adds "abortion clinic" to the definition of "health care facility" but does not alter existing law under § 50-5-101(26)(b), MCA. *See supra* BACKGROUND § IV. Montana law thus continues

to provide that "health care facility" "does *not* include offices of private physicians, dentists, or other physical or mental health workers regulated under Title 37." § 50-5-101(26)(b), MCA (emphasis added). Accordingly, DPHHS has not mandated facility licensure for other clinicians' offices, such as birth centers. *See, e.g.*, 37-526 Mont. Admin. Reg. 7 (Apr. 14, 2011). DPHHS has nonetheless indicated that HB 937 requires clinicians' offices that provide abortion care and meet the definition of "abortion clinic" to be licensed as such. *See* Exhibit 1. DPHHS's response is inconsistent with the statutory text and with its treatment of other clinics, for which facility licensure is optional. *See, e.g.*, 37-526 Mont. Admin. Reg. 7 (Apr. 14, 2011). As a result of these competing interpretations, the Act is too vague for Plaintiffs, and those similarly situated, to determine whether they fall under the Act's purview. Regulations cannot cure this ambiguity, which emerges from the statutory text itself.

Second, the Act is riddled with vague terms and conditions. For example, HB 937 requires that a person operating an abortion clinic provide an attestation that the applicant is "of reputable and responsible character" but does not provide any guidance on what this would entail. HB 937 § 2(2)(a). HB 937 also fails to provide any guidelines to govern enforcement of the Act and thereby prevent its application in an arbitrary or discriminatory manner. Instead, HB 937 leaves much of the licensure and operation of abortion clinics to the discretion of DPHHS through rulemaking authority. HB 937 § 3(2). Without critical guidelines in the statute itself, there is substantial risk that DPHHS, empowered by HB 937 with both rulemaking and enforcement authority, will promulgate rules that are then applied in an arbitrary or discriminatory manner. Regulations also cannot cure this defect.

Third, DPHHS has failed to propose or promulgate any rules regarding the process or requirements for licensure and operation of abortion clinics. Without any way to apply for licensure or to know the requirements necessary to maintain their ability to provide abortion care, it is impossible for Plaintiffs to comply with the Act. HB 937 requires that DPHHS promulgate rules for various vague categories including: "sanitation standards," "staff qualifications," "necessary emergency equipment," "quality assurance," "infection control," and "the architecture or layout of an abortion clinic." HB 937 § 3(2). By failing to promulgate any rules, HB 937 does not provide notice to Plaintiffs or those similarly situated as to what is required to comply with the Act, including what is required beyond what Plaintiffs already do.

II. THE REMAINING FACTORS WEIGH IN FAVOR OF IMMEDIATE RELIEF.

A. HB 937 will cause Plaintiffs and their patients irreparable injury.

Absent a temporary restraining order and preliminary injunction preventing HB 937 from taking effect, Plaintiffs and their patients will be irreparably harmed. The Act infringes on Montanans' right to an abortion under the State constitution's guarantees of privacy, equal protection, and due process. These constitutional violations themselves constitute irreparable harm and justify preliminary relief. *See, e.g.*, *PPMT I*, ¶ 60 ("[T]he loss of a constitutional right constitutes an irreparable injury.") (citation omitted).

Beyond the constitutional harm, HB 937 threatens to have devastating consequences for Montanans seeking abortion care. Should HB 937 take effect and require facility licensure from Plaintiffs that they are unable to obtain before October 1, it threatens to delay or deny patients' access to care by their chosen provider, or at all. Existing appointments may need to be rescheduled or patients may need to be referred elsewhere, including out of State. *See* Smith Aff. ¶ 35. All Families may be forced to cease providing abortion care. Weems Aff. ¶ 29. Delays may result in limiting patients' options as to available abortion care, including making patients ineligible for medication abortion. *See id.* ¶ 30. Obstacles and delays in obtaining abortion care force patients to remain pregnant, possibly to term, and thereby experience the symptoms, risks, and costs that come along with pregnancy, childbirth, and parenthood. *Id.*; *see also* Smith Aff. ¶ 35. Unnecessary and unwarranted medical risk, arbitrarily imposed on patients seeking abortion care by HB 937, is an archetypal example of irreparable harm, and Plaintiffs are entitled to preliminary relief.

Abortion is also a critical part of Plaintiffs' health care practices. Weems Aff. ¶¶ 5, 13; Smith Aff. ¶¶ 24, 30. Imposing unique and extra regulation on Plaintiffs simply because they provide abortion care harms their ability to practice and interferes with their relationship with their patients. *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 care providers).

B. The balance of the equities and public interest weigh in favor of Plaintiffs.

The remaining factors—the balance of the equities and the public interest— "merge into one inquiry when the government opposes a preliminary injunction." *Porrettu v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). Plaintiffs and their patients face immediate irreparable harm

absent preliminary relief, whereas the State will not be harmed by the issuance of an injunction that preserves the status quo.

As an initial matter, the State has no need to implement HB 937. Plaintiffs are already subject to licensure, regulation, and oversight. There is no health and safety purpose to require clinics that provide abortion care to meet different or additional regulations than clinics that offer identical, comparable, or even more risky care—as mainstream medical authorities have repeatedly concluded. *See, e.g.*, Banks Aff. ¶ 6; Mayo Aff. ¶ 7.

Further, the State has no legitimate interest in enforcing an unconstitutional law. *See Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) ("The government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented.") (citation and internal quotation marks omitted). The status quo protects the ability of Plaintiffs and their patients to make evidence-based health decisions free from unwarranted government intervention, consistent with the values of privacy, bodily autonomy, and individual dignity secured by the Montana Constitution's Declaration of Fundamental Rights. *Armstrong*, ¶ 56 ("[T]he right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is deeply rooted in this Nation's history and tradition.") (internal quotation marks and citation omitted). The State, by contrast, loses nothing by way of immediate relief preserving the status quo, given that the Montana Constitution requires the State not to interfere with the right to abortion and that Plaintiffs remain subject to State licensure, oversight, and regulation, as they have been for years.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to grant Plaintiffs' application for a temporary restraining order and preliminary injunction prohibiting the Defendants and their agents, employees, appointees, and successors from enforcing, threatening to enforce, or otherwise applying HB 937.

Respectfully submitted this 1st day of September, 2023.

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** Application for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Notice - Memorandum in Support to the following on 09-01-2023:

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