Raphael Graybill*
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

Tanis M. Holm
Edmiston & Colton Law Firm
310 Grand Ave.
Billings, Montana 59101
(406) 259-9986
tholm@yellowstonelaw.com

Peter Im**
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., N.W., Suite 300
Washington, D.C. 20005
(202) 803-4096
peter.im@ppfa.org

Dylan Cowit**
Planned Parenthood Federation of America, Inc.
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
dylan.cowit@ppfa.org

Attorneys for Plaintiffs Planned Parenthood of Montana and Samuel Dickman, M.D.
**Additional Counsel Listed on Next Page*

MONTANA FIRST JUDICIAL DISTRICT COURT,
COUNTY OF LEWIS AND CLARK

PLANNED PARENTHOOD OF MONTANA; ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; SAMUEL DICKMAN, M.D.; and HELEN WEEMS, APRN-FNP, on behalf of themselves and their patients Plaintiffs, vs. STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services Defendants.	Cause No. ADV 2023-299 Hon. Mike Menahan **VERIFIED AMENDED COMPLAINT AND PETITION FOR DECLARATORY RELIEF, PERMANENT INJUNCTION, PRELIMINARY INJUNCTION, AND TEMPORARY RESTRAINING ORDER**

Erin M. Erickson
Bohyer, Erickson, Beaudette,
and Tranel P.C.
283 West Front St., Suite 201
Missoula, MT 59802
(406) 532-7800
erickson@bebtlaw.com

Akilah Deernose
Alex Rate
ACLU of Montana
PO Box 1986
Missoula, MT 59806
(406) 203-3375
deernosea@aclumontana.org
ratea@aclumontana.org

Hillary Schneller**
Jen Samantha D. Rasay**
Adria Bonillas**
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org
jrasay@reprorights.org
abonillas@reprorights.org

Attorneys for Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Helen Weems, APRN-FNP

***Applications for admission*
pro hac vice *pending*

Plaintiffs Planned Parenthood of Montana ("PPMT"); All Families Healthcare ("All Families"); Blue Mountain Clinic ("Blue Mountain"); Samuel Dickman, M.D.; and Helen Weems, APRN-FNP (collectively, "Plaintiffs") bring this Verified Amended Complaint on behalf of themselves and their patients against the State of Montana; the Montana Department of Public Health and Human Services ("DPHHS"); and Charlie Brereton, in his official capacity as Director of DPHHS, and in support thereof state the following:

PRELIMINARY STATEMENT

1. Plaintiffs challenge an administrative rule and two statutes: a DPHHS rule amending Mont. Admin. R. 37.82.102 and 37.86.104, which was proposed at Montana Administrative Register ("MAR") Notice 37-1024 and adopted as proposed in the April 28, 2023, edition of the MAR ("the Rule"); 2023 House Bill 544 ("HB 544"), which Governor Greg Gianforte signed on May 15, 2023, and will take effect on July 1, 2023; and 2023 House Bill 862 ("HB 862"), which Governor Gianforte signed on May 16, 2023, and will take effect on July 1, 2023. *See* Notice of Public Hearing on a Proposed Amendment (attached hereto as Exhibit A); Notice of Amendment (attached hereto as Exhibit B);[1] HB 544, 2023 Leg. Reg. Sess. (Mont. 2023) (to be codified in Mont. Code Ann. tit. 53, ch. 6, pt. 1) (attached hereto as Exhibit C); HB 862, 2023 Leg. Reg. Sess. (Mont. 2023) (to be codified in Mont. Code Ann. tit. 17) (attached hereto as Exhibit D).
2. The Rule, HB 544, and HB 862 each have the purpose and effect of preventing low-income Montanans from accessing abortions. The Rule and HB 544 both prevent

[1] The Notice of Amendment, which was published in the MAR on April 28, 2023, provides that the Rule will be adopted as proposed and therefore does not include a new final version of the Rule. Thus, the proposed rule in Exhibit A is the final version of the Rule.

Medicaid patients[2] from accessing abortions by narrowing the definition of medical necessity for abortions and by imposing onerous and medically unnecessary administrative requirements. HB 862 goes even further, banning altogether Medicaid coverage of medically necessary abortions except in cases involving rape, incest, or risk of death to the pregnant person. Because it is extremely rare for an abortion covered by Medicaid to fall into either of these categories, HB 862 would effectively end Medicaid coverage of abortions in Montana.

3. The Rule, HB 544, and HB 862 each clearly violate the Montana Constitution and legal precedent of this Court and the Montana Supreme Court. *See 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 abortions); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (restrictions on abortion access trigger strict scrutiny, and ban on physician assistants providing abortions does not withstand strict scrutiny); *Weems v. State* ("*Weems I*"), 2019 MT 98, 395 Mont. 350, 440 P.3d 4 (physician and physician assistant-only law violates strict scrutiny); and *Weems v. State* ("*Weems II*"), 2023 MT 82, ___ Mont. ___, ___ P.3d ___, 2023 WL 3400808 (same). The Rule also violates the Montana Administrative Procedure Act ("MAPA").

4. Montana has a comprehensive health coverage scheme for its low-income residents. Through its medical assistance program, Montana Medicaid, the State funds all covered services. And for nearly twenty years, DPHHS has included medically

[2] References to "Medicaid patients" or "Montanans on Medicaid" herein are intended to include all Montanans eligible for Medicaid, including not only Montanans currently enrolled in Medicaid, but all low-income people who are eligible to enroll.

necessary abortion services among those covered services, as required by *Jeannette R.*

5. The Rule and HB 544 impose several onerous and medically unnecessary additional restrictions on this most vulnerable patient population. They ban Medicaid coverage for abortions provided by advanced practice clinicians ("APCs") such as physician assistants and nurse practitioners, even though APCs currently provide a majority of abortions in the state. This directly contravenes *Armstrong*, *Weems I*, and *Weems II*, which held that barring Montanans from accessing abortions from APCs violates the Montana Constitution.
6. The Rule and HB 544 require prior authorization from DPHHS before an abortion can be provided to Medicaid patients—a process that, despite the time-sensitive nature of abortion, is not time-bound and imposes a de facto waiting period on access to care. They also require Medicaid patients to undergo an in-person physical examination before getting an abortion. As a result, the Rule and HB 544 will eliminate access to abortion via direct-to-patient telehealth for Medicaid-eligible Montanans and force patients who already face significant economic hardship to make an unnecessary in-person visit to a clinic. As this Court recognized when it granted a preliminary injunction in *Planned Parenthood of Montana v. State by & through Knudsen*, No. DV-21-0999, 2021 WL 9038524 (13th Jud. Dist., Oct. 7, 2021), which was affirmed by the Montana Supreme Court in *Planned Parenthood of Montana v. State by & through Knudsen* ("*PPMT v. State*"), 2022 MT 157, 409 Mont. 378, 515 P.3d 301, laws that require patients to make an unnecessary in-person visit to receive a physical exam—thereby also imposing a ban on direct-to-patient

telehealth for abortion and a de facto waiting period—violate the Montana Constitution.

7. In contravention of *Jeannette R.*, the Rule imposes on abortions a new and narrow definition of "medically necessary service," singling out for differential treatment low-income Montanans seeking abortions and their providers. HB 544 contains a definition of "medically necessary service" for abortions that is even narrower than the definition contained in the Rule.
8. HB 862 goes even further, altogether banning Medicaid coverage of medically necessary abortions except in cases involving rape or incest or risk of death to the pregnant person. This also directly contravenes *Jeannette R.*
9. Montanans impacted by the Rule, HB 544, and HB 862 are by definition low-income, and for most of them, the denial of coverage is tantamount to a ban. The Rule and the statutes will thus force the most vulnerable in the state to continue their pregnancies and give birth, with all of the emotional, physical, and life-altering consequences this entails. Even those eligible for reimbursement who manage to reach one of the few physicians whom Medicaid will continue to reimburse for abortions—and who also manage to go through the prior authorization process—will be able to do so only after facing significant logistical and financial challenges and delay, during which they will be forced to continue to experience the symptoms and risks of pregnancy.
10. At a time when abortion access in Montana and throughout the nation is in peril, the Rule, HB 544, and HB 862 single out the poorest Montanans for denial of access to medically necessary abortions.

11. The Rule was adopted on April 28, 2023 and would have taken effect on May 1, but was blocked by this Court. Ex. B at 18. HB 544 and HB 862 were signed on May 15 and 16, 2023, respectively, and will take effect on July 1. Ex. C at 4, Ex. D at 1.

12. Undersigned counsel for Plaintiffs twice asked DPHHS to consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule to allow Plaintiffs time to seek judicial relief in an orderly, non-emergency fashion; both times, the agency refused. *See* Jan. 23, 2023 Letter to DPHHS (attached hereto as Exhibit E); Jan. 25, 2023 Email from Paula Stannard (attached hereto as Exhibit F); April 21, 2023 Letter to DPHHS (attached hereto as Exhibit G); April 26, 2023 Letter from Paula Stannard (attached hereto as Exhibit H).

PARTIES

13. Plaintiff PPMT is a not-for-profit corporation organized under the laws of Montana. It is headquartered in Billings and operates five health centers: two in Billings (Planned Parenthood Heights and Planned Parenthood West), one in Missoula, one in Great Falls, and one in Helena. Planned Parenthood Heights is temporarily closed because of flooding damage.

14. PPMT provides a wide array of clinical, educational, and counseling services. It is the largest provider of reproductive health care in Montana, serving more than 11,000 people annually. PPMT provides a wide array of medical services, including abortion. It provides medication abortions (both in person and via telehealth) through 11 weeks, as measured from the first day of the last menstrual period ("LMP"), and procedural abortions through 21 weeks and 6 days ("21.6 weeks") LMP.

15. Providing low-income Montanans with access to sexual and reproductive health services is a critical part of PPMT's mission, and a significant portion of PPMT's patient population is low-income. Of all abortions provided at PPMT in 2022, 45% were covered by Medicaid.

16. Plaintiff Samuel Dickman, M.D., is a Medicaid-enrolled physician licensed to practice medicine in Montana. At PPMT, Dr. Dickman provides medication abortions through 11 weeks LMP and procedural abortions through 21.6 weeks LMP.

17. Plaintiff All Families is a for-profit corporation and a sexual and reproductive health clinic in Whitefish that provides LGBTQ+ care and gender-affirming care for transgender people, gynecological exams, diagnosis and treatment of sexually transmitted infections, contraception, and abortion care. All Families has been serving the Flathead Valley and patients across Montana since it opened in 2018 and serves approximately 600 patients annually, accounting for nearly 2,000 patient visits. All Families provides medication abortions (in person and via telehealth) up to 11 weeks LMP and procedural abortions up to 12.6 weeks LMP. More than half of patients seeking abortions at All Families are insured through Medicaid.

18. Plaintiff Helen Weems is a Medicaid-enrolled certified nurse practitioner licensed to practice in Montana with over 20 years of clinical experience. She owns All Families and is its sole clinician. Ms. Weems is also the sole abortion provider in the Flathead Valley.

19. Plaintiff Blue Mountain is a not-for-profit family practice in Missoula. Blue Mountain Women's Clinic first opened in 1977 as the first and only abortion clinic in Montana. In 1991, Blue Mountain expanded its health services to include comprehensive family

medical care to better serve its community. Blue Mountain serves 3,500 patients annually, accounting for 7,000 visits. It provides care across the lifespan, from pediatric care to elder care, including wellness exams, contraception, abortion care, and gynecological care. Blue Mountain provides medication abortions (in person and via telehealth) up to 11 weeks LMP and procedural abortions up to 21.6 weeks LMP. Almost 40% of patients seeking abortion care at Blue Mountain are insured through Medicaid.

20. Plaintiffs participate in the Montana Medicaid program and receive reimbursement for medically necessary medication abortions using mifepristone up to 10 weeks LMP and medically necessary procedural abortions up to 21.6 weeks LMP that they provide to Montanans on Medicaid. Plaintiffs sue on their own behalf; on behalf of their current and future clinicians, servants, officers, and agents; and on behalf of their patients.

21. Defendant State of Montana is a governmental entity subject to suit for injuries to persons. Mont. Const. art. II, § 18.

22. Defendant DPHHS is a governmental entity subject to suit for injuries to persons. Mont. Const. art. II, § 18. DPHHS administers the Montana Medicaid program, including prior authorization and coverage for medical care. DPHHS promulgated and would enforce the Rule, HB 544, and HB 862 unless restrained by this Court.

23. Defendant Charlie Brereton is the Director of DPHHS. He oversees DPHHS's role in Montana Medicaid and will be responsible for enforcing the Rule, HB 544, and HB 862 unless restrained by this Court. Director Brereton is sued in his official capacity.

JURISDICTION AND VENUE

24. Jurisdiction is conferred on this Court by article VII, section 4 of the Montana Constitution and § 3-5-302, MCA.

25. Plaintiffs' claims for declaratory and injunctive relief are authorized by § 27-8-101 *et seq.*, MCA, as well as the general equitable powers of this Court.

26. Plaintiffs' claims for judicial review are authorized by MAPA, §§ 2-4-101 *et seq.*, MCA.

27. Venue is appropriate pursuant to §§ 25-2-126, 25-2-117, MCA, because the State of Montana is a Defendant and PPMT operates a health center in Helena, County of Lewis and Clark, that provides abortions to Montanans eligible for Medicaid.

STANDING

28. Plaintiffs have standing to bring the claims asserted in this Verified Amended Complaint because the challenged Rule and statutes infringe on the rights of Plaintiffs' patients under the Montana Constitution and state law.

29. "[W]hen '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." *Weems I*, ¶ 12 (quoting *Armstrong*, ¶¶ 8–13).

30. Plaintiffs also have standing to bring their own claims because the challenged provisions directly infringe on Plaintiffs' rights under the Montana Constitution. *See id.* at ¶ 14 (holding that abortion provider plaintiffs who "are impacted by the statute" have standing to challenge it). But for the challenged provisions, Plaintiffs would provide abortion services to Medicaid-eligible Montanans and would make decisions regarding the medical necessity of those services according to their own medical

judgments, rather than DPHHS's, as they have properly done since 1995 in accordance with *Jeannette R*.

FACTUAL ALLEGATIONS

A. Abortion

31. Abortion, by medication or procedure, is safe and common.

32. 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. Pregnancy-related complications are also more common among people having a live birth than those who get an abortion.

33. Abortion is time-sensitive health care. It is safe throughout pregnancy, but the risk increases incrementally as a pregnancy progresses.

34. Medication abortion is typically provided via a two-drug regimen, which consists of one dose of mifepristone followed up to 72 hours later by one dose of misoprostol; it can also be provided using misoprostol alone. The medication causes the person to pass the pregnancy in a process similar to a miscarriage.

35. Aspiration abortion is the most common technique for early procedural abortions. A clinician dilates the patient's cervix, inserts a thin tube into the uterus, and evacuates the pregnancy. Aspiration abortion usually takes less than ten minutes to complete.

36. For procedural abortions beginning at approximately 15 weeks LMP, clinicians often perform a dilation and evacuation procedure, which involves dilation of the cervix, followed by removal of the pregnancy using a combination of aspiration and instruments, and typically takes less than 30 minutes.

37. Both types of procedural abortion take place in an outpatient setting and are comparable to other reproductive health care procedures, including insertion and removal of intrauterine devices (a long-acting, reversible method of birth control). Miscarriage management is also nearly identical to abortion care, and can be provided through the same medication or procedures.

38. Plaintiffs also all provide medication abortion via telehealth. All three provide direct-to-patient telehealth medication abortion, in which a provider meets with a patient via a telehealth visit, confirms that the patient is eligible for medication abortion, and obtains informed consent. The medications are then mailed to the patient at a Montana address. In addition, PPMT provides "site-to-site" telehealth medication abortions, in which a patient at one health center connects via teleconference with an abortion provider at another PPMT health center.

B. Advanced Practice Clinicians

39. For years, APCs have provided safe and effective abortions in Montana, including for Montanans insured through Medicaid.

40. Plaintiffs rely heavily on APCs to provide abortions to their patients.

41. Helen Weems is a nurse practitioner, not a physician. She is the only clinician at All Families and provides all of the abortions sought by its patients. In 2022, more than half of All Families' abortion patients were insured through Medicaid.

42. Blue Mountain has one full-time physician and two physician assistants who provide abortion care. Blue Mountain also has one contract physician who provides abortion care infrequently. In 2022, the physician assistants at Blue Mountain provided

approximately 24% of all the abortions covered by Medicaid, including 42% of the medication abortions covered by Medicaid.

43. In 2022, approximately 85% of abortions covered by Medicaid at PPMT were provided by APCs.

44. Montana courts have repeatedly held that restricting the provision of abortion to only physicians violates Montanans' individual right to access abortion from a chosen provider—including a chosen APC. *See Armstrong*, (holding unconstitutional statute that restricted provision of abortion to physicians only); *Weems I* (affirming preliminary injunction against statute that restricted provision of abortion to physicians and physician assistants only); *Weems II* (affirming permanent injunction against same statute).

C. Medicaid in Montana

45. Montana provides medical assistance to low-income residents through Medicaid, which is jointly funded by the state and federal governments. Section 53-6-101 *et seq.*, MCA.

46. The Montana Medicaid program was "established for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." Section 53-6-101(1), MCA. When considering changes in Medicaid policy, DPHHS is required to consider the "funding principle" of "protecting those persons who are most vulnerable and most in need, as defined by a combination of economic, social, and medical circumstances." Section 53-6-101(2)(a), MCA.

47. Since the mid-1970s, Congress has adopted versions of the Hyde Amendment restricting federal funding for abortions. Today, federal Medicaid coverage is only

available for abortions if the pregnancy results from rape or incest or if the abortion is necessary to save the pregnant person's life. DPHHS receives federal Medicaid dollars for its coverage of such abortions.

48. Despite restrictions on the use of federal Medicaid funding for abortions, state Medicaid programs may use state funds to reimburse abortion care. Before 1995, Montana's Medicaid program did not cover abortions beyond those permitted by the Hyde Amendment.

49. In *Jeannette R.*, this Court held that the pre-1995 administrative restrictions on Medicaid's coverage of abortions, which were similar to the restrictions at issue here, violated the Montana Constitution's guarantees of privacy and equal protection. It also held that imposing such restrictions via regulation exceeded the agency's authority. As required by the holding in *Jeannette R.*, DPHHS currently reimburses Plaintiffs for medically necessary abortion services using only state funds.

50. DPHHS is authorized to "make rules, *consistent with state and federal law*, establishing the amount, scope, and duration of services to be provided to recipients of public assistance," § 53-2-201(2)(c), MCA (emphasis added), including rules governing the Medicaid program, *see* § 53-6-113, MCA.

51. DPHHS regulations currently define a "medically necessary service" as

> a service or item reimbursable under the Montana Medicaid program, as provided in these rules . . . [w]hich is reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient which:
>
> (i) endanger life;
>
> (ii) cause suffering or pain;
>
> (iii) result in illness or infirmity;

(iv) threaten to cause or aggravate a handicap; or

(v) cause physical deformity or malfunction.

Mont. Admin. R. 37.82.102(18). This rule applies generally to all medical care covered by Medicaid.

52. Currently, for every abortion covered by Medicaid, the provider completes a certification known as the "MA-037" form, on which the provider indicates (1) if the abortion was necessary to save the patient's life, (2) if the pregnancy resulted from rape or incest, or (3) if the abortion was medically necessary but the patient's life was not in danger. If the third category is selected, the provider includes an explanation for why the abortion is medically necessary. DPHHS does not currently require any additional documentation of medical necessity for abortion or for any other gynecological care sought by Medicaid patients.

53. The vast majority of abortions fall into the third category of medically necessary abortions. It is extraordinarily rare for an abortion covered by Medicaid to be reported as necessary to save the patient's life or to terminate a pregnancy that was the result of rape or incest. According to the State's declarant in connection with their opposition to Plaintiffs' application for a preliminary injunction, during the 10-year period from July 2011 to June 2021, there were only six abortions that were reported as falling into these categories. Randol Aff. ¶ 15.

D. Procedural History of the Rule

54. DPHHS certified the proposed version of the Rule to the Secretary of State on December 13, 2022, and the proposed rule was published at MAR Notice 37-1024 on December 23, 2022.

55. On January 12, 2023, DPHHS held a public hearing on the Rule via teleconference. The only proponent of the Rule was a representative of the Montana Family Foundation. In contrast, over two dozen affected community members offered testimony in opposition, addressing the devastating consequences of erecting barriers to, and effectively banning, access to abortion for most Medicaid-eligible Montanans. Dr. Dickman, Ms. Weems, and Nicole Smith (Executive Director of Blue Mountain) spoke in opposition to the Rule on behalf of PPMT, All Families, and Blue Mountain, respectively.

56. On January 19, 2023, Martha Fuller (President and CEO of PPMT) and Dr. Dickman submitted joint written comments opposing the adoption of the Rule. On January 20, 2023, Ms. Weems and Ms. Smith submitted written comments on behalf of All Families and Blue Mountain, respectively.

57. DPHHS received dozens of written comments regarding the Rule. *See generally* Ex. B.

58. On January 23, 2023, undersigned counsel asked the agency to consider delaying the Rule's effective date to 90 days after publication of the adoption notice or stipulating to a stay of enforcement. *See* Ex. E. The agency refused. *See* Ex. F.

59. On April 18, 2023, DPHHS certified a Notice of Amendment to the Secretary of State. *See* Ex. B. Despite the numerous comments, DPHHS stated that the final version of the Rule amends Mont. Admin. R. 37.82.102 and 37.86.104 "as proposed." Pursuant to Mont. Admin. R. 1.2.419(1), the Rule was published in the April 28, 2023, edition of the MAR. Had the Court not issued a temporary restraining order, the Rule would have taken effect on May 1, 2023. Ex. B at 18.

60. The Notice of Amendment also included DPHHS's responses to the comments it received regarding the Rule. *See generally id.*

61. On April 19, 2023, after learning that DPHHS had certified a final version of the Rule to the Secretary of State and submitted it for publication, undersigned counsel contacted Paula Stannard, Chief Legal Counsel for DPHHS, and requested a copy of the Rule, citing the Public Records Act, § 2-6-1002, MCA, and the Montana Constitution's guarantee of the right to observe agency deliberations, Mont. Const. art. II, § 18. *See* April 19, 2023 Letter to DPHHS (attached hereto as Exhibit I).

62. On April 20, 2023, Stannard responded, flatly refusing to provide a copy of the final version of the Rule and asserting that the publication of the Rule in the MAR one business day before it becomes effective "satisfies the constitutional and statutory public records/public information requirements." *See* April 20, 2023 Letter from DPHHS (attached hereto as Exhibit J).

63. On April 21, 2023, undersigned counsel contacted Stannard, explaining that the single business day between publication and the effective date of the Rule does not give abortion providers enough time to undertake the planning necessary to comply with the Rule, in particular any changes that could have been made to the Rule made since it was proposed. Counsel requested that DPHHS consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule pending a court ruling on Plaintiffs' request for relief. *See* Ex. G. Stannard refused. *See* Ex. H.

E. The Rule

64. The Rule provides that abortions reimbursed by Medicaid "must be performed by a physician as defined in 37-3-102, MCA," Ex. A at 2355, which defines physician, in relevant part, as "a person who holds a degree as a doctor of medicine . . . and who has a valid license to practice medicine . . . in this state," Section 37-3-102(12), MCA. The Rule therefore categorically bars Medicaid coverage for abortions provided by APCs, including physician assistants, nurse practitioners, and nurse midwives.

65. The Rule also requires Medicaid-eligible Montanans seeking abortions to get prior authorization from DPHHS. If an abortion is either necessary to prevent endangerment to the life of the pregnant person or is medically necessary, the Rule requires the provider to submit extensive supplemental documentation, including highly personal information such as, *inter alia*, an extensive medical history, the results of a physical exam, images of ultrasounds, and "documentation that the diagnosis of the physical or psychological condition leading to the medical necessity determination has been made by a medical professional qualified by education, training, and/or experience to make such diagnosis and that the woman is receiving care for such condition." Ex. A at 2354–55.

66. Prior authorization is not required for "treatments for incomplete abortions, miscarriages, or septic abortions." *Id.*

67. The Rule provides no limitation on the amount of time that DPHHS may take to decide whether Medicaid will approve or deny coverage for an abortion.

68. The Rule narrows the generally applicable definition of "medically necessary service" in Mont. Admin. R. 37.82.102(18)(a) for abortions but for no other services. It provides:

> Abortion is a medically necessary service and eligible for coverage under the Montana Medicaid program when:
>
> (a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or
>
> (b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from:
>
> > (i) a physical condition that would, as certified by a physician, be significantly aggravated by the pregnancy; or
> >
> > (ii) a psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy.

Ex. A at 2354.

69. This redefinition applies only to abortion, meaning that Medicaid-eligible Montanans whose care is medically necessary under the general definition of the term could be denied coverage solely because they are seeking an abortion and not another type of medical care.

70. To justify these restrictions, the Rule states that, at the request of the Montana Legislature, DPHHS hired a contractor to conduct a review of abortion claims paid by Montana Medicaid. The contractor found 100% compliance with the requirement to certify that abortions covered by Medicaid are medically necessary. The contractor did not find any claims for abortions that it did not believe were medically necessary.

71. Nonetheless, DPHHS concluded that the MA-037 forms used to certify the medical necessity of abortion care covered by Medicaid "lack[ed] sufficient information to support medical necessity" because certain medical conditions were "routinely indicated." Ex. A at 2357. DPHHS noted that some MA-037 forms included additional documentation beyond the form's required "brief narrative." *Id.* Counterintuitively, on this basis, DPHHS concluded that compliant forms that did *not* include additional, non-required information could be inaccurate. In other words, despite perfect compliance with its own requirements, DPHHS used the fact that some forms had provided additional information to conclude that more regulatory burdens were necessary.

F. HB 544

72. HB 544 was enacted by the Legislature on April 25, 2023, and signed by the Governor on May 15, 2023. It is entitled "An Act Providing Requirements for Coverage of Physician Services for Abortion Under the Medicaid and Children's Health Insurance Programs; Providing for Prior Authorization; Providing that Only Abortion Services Provided by a Physician are Covered Services; Amending Section 53-4-1005, MCA; and Providing an Effective Date."

73. HB 544 includes a physician-only requirement and a prior authorization requirement that are functionally identical to those in the Rule.

74. HB 544 contains an even narrower definition of medical necessity than the Rule:

> a physician shall certify that, although the woman is not in danger of death unless an abortion is performed, the woman suffers from:
> (a) a physical condition that would be significantly aggravated by the pregnancy; or
> (b) a severe mental illness or intellectual disability that would be significantly aggravated by the pregnancy.

Ex. C at 1. In particular, this definition further restricts Medicaid coverage for abortions needed for mental health reasons, replacing "psychological condition" in the Rule's definition with "a severe mental illness or intellectual disability."

75. HB 544 also amends § 53-4-1005, MCA, regarding benefits under the Montana's Children's Health Insurance Program ("CHIP"), also known as the Healthy Montana Kids Plan, Mont. Admin. R. 37.79.101, to require CHIP to comply with the requirements of HB 544.

76. In a fiscal note accompanying HB 544, the State estimates the cost of implementing the prior authorization requirement. *See* Fiscal Note to HB 544 (attached hereto as Exhibit K). It states that, "[b]ased on an informal quote from a vendor, it is estimated enhanced documentation and prior authorization costs will be $965 per case," *id.* at 2, which far exceeds the typical cost of an abortion.

G. HB 862

77. HB 862 was enacted by the Legislature on April 25, 2023, and signed by the Governor on May 16, 2023. It is entitled "an Act Prohibiting the Use of Public Funds for Abortion; Providing Exceptions; Providing an Appropriation; and Providing an Effective Date."

78. HB 862 provides that "[p]ublic funds or money may not be expended for an abortion" unless "the pregnancy is the result of an act of rape or incest" or if "a woman suffers from a physical disorder, physical injury, or physical illness . . . that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." Ex. D at 1. It includes no exception for medically necessary abortions.

H. The Impacts of the Medicaid Abortion Restrictions

79. The restrictions will deny access to abortion for Medicaid-eligible Montanans, who make up a large share of Plaintiffs' abortion patients. In 2022, 45% of abortions at PPMT were covered by Medicaid. That same year, over 50% of patients for whom All Families provided abortion care were insured through Medicaid. And approximately 40% of the abortion care provided at Blue Mountain was for Medicaid patients.

80. Denying access to abortion has severe consequences for pregnant Medicaid patients. In addition to the cost of the care itself, many Montanans travel significant distances to obtain abortions, particularly procedural abortions, thus incurring additional costs for transportation and sometimes lodging. At PPMT, for example, it is not unusual for patients to drive upwards of five hours to access care.

81. Absent state assistance, low-income pregnant people face great difficulty paying for abortions and related expenses and will be forced to draw on limited financial resources that they need for food, rent, clothing, and other essentials to pay for an abortion. Many will have to delay the abortion to raise the money.

1. Impact of the Physician-Only Requirements[3]

82. Access to safe and timely abortions from a qualified provider of the patient's choosing is an important component of public health and is a fundamental right under the Montana Constitution. *Armstrong*, ¶ 66.

83. The Rule and HB 544 severely limit the providers available to Medicaid-eligible Montanans by effectively banning APCs from providing abortions to them,

[3] Because the Rule and HB 544 include functionally identical physician-only and prior authorization requirements and similar redefinitions of "medically necessary service," their impacts are addressed jointly.

notwithstanding decisions by this Court and the Montana Supreme Court that prohibit the State from banning qualified APCs from providing that care. *Weems I*; *Weems II.* PPMT, All Families, and Blue Mountain—which represent all of the in-person abortion providers operating in Montana—employ a total of two full-time physicians and two part-time contract physicians between them. These physicians provide abortions only in Helena and Missoula, so all Medicaid-eligible abortion patients will be forced to travel to Helena or Missoula to access care.

84. At All Families, Ms. Weems, a nurse practitioner, is the *only* abortion provider, so the Rule and HB 544 will prevent Medicaid patients from accessing abortion care at All Families, full stop. All Families is in Whitefish and is the only provider in the Flathead Valley.

85. Moreover, without Medicaid coverage for abortion care, which makes up a substantial part of All Families' practice, the Rule and HB 544 may force All Families to close. The Flathead Valley would once again be without any abortion provider, and the community would also lose critical access to safe and confidential contraception, STI testing, and LGBTQ+ care.

86. PPMT employs only one physician full-time—Dr. Dickman—and he only provides abortions two days per month. PPMT also employs a contract physician who provides abortions one day per month. The physician-only requirement will dramatically decrease abortion access for patients at PPMT.

87. PPMT *physicians* only provide abortions in Helena and Missoula. The Rule and HB 544's physician-only provisions will thus end abortion access in Billings and Great

Falls, where PPMT operates the only abortion clinics and relies on APCs to provide abortion services to patients.

88. Blue Mountain has one physician who regularly provides abortions. That physician also maintains a full family practice. The physician-only requirement will dramatically decrease access to abortion care for Blue Mountain and also impact its family practice patients, for whom there is already a considerable wait.

89. DPHHS has designated 52 of Montana's 56 counties as health professional shortage areas.[4] Given the shortage of abortion providers in the state, it would be logistically and financially infeasible for Plaintiffs to hire more full-time physicians to meet the increased need for physicians if the Rule and HB 544 were to take effect.

90. The Rule and HB 544 will therefore severely limit availability for abortions for Medicaid patients and force patients outside of Helena and Missoula to travel much farther to receive care. It will also prevent Medicaid patients from receiving care from their trusted and qualified chosen providers.

91. In response to a comment about the physician-only requirement, DPHHS states that the "rules do not preclude advanced practice nurses and physician assistants from performing abortions if they are otherwise legally entitled to do so," Ex. B at 10, suggesting that the Rule is not a categorical bar because APCs can provide abortions for Medicaid recipients without getting reimbursed. But barring Medicaid reimbursement for services provided by APCs is in effect the same as barring Medicaid-eligible Montanans from accessing those services from APCs, and it

[4] *Montana Health Professional Shortage Area (HPSA) Designations*, Mont. Dep't of Pub. Health & Hum. Servs., https://dphhs.mt.gov/ecfsd/primarycare/shortageareadesignations.

infringes on their right to get an abortion from their chosen provider as recognized in *Armstrong*, *Weems I*, and *Weems II*.

2. Impact of the Prior Authorization Requirements

92. The prior authorization requirements in the Rule and HB 544—including the onerous and medically unnecessary in-person physical exam—effectively ban the provision of medication abortion via direct-to-patient telehealth for Medicaid patients. Telehealth improves access for rural patients, patients with disabilities, and patients with limited access to transportation. Over half of the abortions that All Families provides are via telehealth. In 2022, 28% of the abortions PPMT provided that were covered by Medicaid were provided via telehealth.

93. The Montana Supreme Court recently affirmed a preliminary injunction against another attempt by the State to ban medication abortion services via telehealth, recognizing that such restrictions are unconstitutional. *See PPMT v. State*, ¶ 51. DPHHS cannot circumvent this preliminary injunction by issuing a rule banning telehealth for Montanans eligible for Medicaid, and the Legislature cannot circumvent it by enacting a statute doing the same thing.

94. The prior authorization process involves onerous and invasive paperwork requirements and a physical examination that is not in line with the standard of care.

95. In the Notice of Amendment, DPHHS states that its contract with its Medicaid utilization review contractor requires completion of the prior authorization review "within three working days, considering the submission of timely and accurate documentation" and characterizes this delay as "add[ing] only minimal time to the process." Ex. B at 4–5. But even if a third-party contract requires the process to be

completed in three working days, the Rule itself contains no such requirement. And the three-day clock does not even begin to run until all information is submitted—a clerical error could mean the information is incomplete, or the reviewer could arbitrarily seek additional information, causing further delay.

96. Three working days could also stretch to five or more calendar days when there is an intervening weekend or long weekend. Because of the time-sensitive nature of abortion and the increased risks and costs of care as pregnancy progresses, *any* delay for a patient waiting for an abortion is significant.

97. Indeed, if the entire prior authorization process—including approval or denial—takes longer than one day (or even if it is provided in one day but takes too long for the abortion to be provided that same day), then it will delay the abortion and force patients to endure the continuing symptoms and risks of pregnancy. DPHHS does not even assert that it will try to complete the prior authorization process in one day.

98. Thus, the Rule and HB 544's prior authorization requirements impose a de facto waiting period for Medicaid patients seeking abortions.

99. Further, the requirement for a physical examination during the prior authorization process will force Medicaid patients seeking abortions to make an additional visit to a health center. Medicaid patients who now do not need to make a single in-person visit because they receive medication abortion via direct-to-patient telehealth will be forced to make a medically unnecessary in-person visit. Similarly, patients who can now receive an abortion in one in-person visit will be forced to visit the clinic yet another time beforehand to complete the required physical examination and other prior authorization requirements.

100. Additional-trip requirements have been shown to have devastating effects on access to abortion, including preventing some patients from accessing care entirely. This is especially true for those who may have inflexible work schedules or caretaking responsibilities, do not have reliable access to transportation, or are victims of intimate partner violence.

101. The interaction between the prior authorization requirements and physician-only requirements will further delay abortions for Medicaid-eligible Montanans. At PPMT for example, because of limited physician availability and scheduling issues, the time between physician appointments can be from one to three weeks. Even if DPHHS approves a prior authorization request in three business days, a second appointment with a physician may not be available for another one to three weeks. And if DPHHS does not approve the request by the next available physician appointment, a patient could have to wait yet another one to three weeks. These delays will increase risks to patients.

102. If DPHHS denies a request for prior authorization, the Rule and HB 544 provide no indication of how long the appeal process may take. Again, because abortion is time-sensitive, any delay resulting from an administrative appeal would impose additional medical risks on patients. A delay could also push a patient beyond the window during which they can obtain care.

103. Under the Rule and HB 544, a patient can be denied coverage because of their inability to comply with the paperwork requirements or because a bureaucrat—or a third-party contractor—second-guesses their health care provider's medical judgment.

104. The Rule provides that "[i]f prior authorization is not obtained, due to an emergency situation or otherwise, a claim for payment for such physician services will undergo post-service, prepayment review." Ex. A at 2354. In the Notice of Amendment, DPHHS points to this provision in response to multiple commenters' concern that the Rule will force Medicaid-eligible Montanans to delay their abortions unnecessarily. Ex. B at 4. To the extent that this provision permits Plaintiffs to provide abortions before receiving prior authorization, it forces them to choose between (1) delaying abortions for Medicaid-eligible Montanans to wait for a prior authorization that the Rule states is "require[d]," Ex. A at 2354, or (2) providing care without knowing whether they will be reimbursed for it.

105. HB 544 similarly provides that "[i]f prior authorization is not obtained because of an emergency, a claim for payment must undergo post-service, prepayment review." Ex. C at 1. HB 544 does not state that post-service, prepayment review is ever available in situations other than emergencies.

3. Impact of the Redefinition of "Medically Necessary"

106. Under *Jeannette R.*, the Montana Constitution requires DPHHS to cover medically necessary abortions and forbids singling out for differential treatment low-income Montanans seeking abortions. DPHHS cannot circumvent this constitutional requirement by narrowing the definition of medical necessity solely for abortions.

107. The Rule and HB 544 narrow the definition of "medically necessary" for abortions alone. This will deny Medicaid-eligible Montanans access to abortions that a health care provider has deemed medically necessary under the definition of medical necessity that applies for every other medical procedure.

108. For example, the redefinition of medical necessity excludes abortions in cases involving lethal fetal conditions or diagnoses. In response to several comments raising this concern, DPHHS confirmed that under the Rule, Medicaid coverage would not be available in these cases if the abortion does not separately meet the narrow new definition of medical necessity. Ex. B at 17.

109. The Rule and HB 544's requirements will result in needless delays for Medicaid-eligible Montanans seeking an abortion: delays caused by forcing patients to wait for an appointment with a physician when a qualified APC would otherwise have been available; by forcing them to undergo an in-person, medically unnecessary physical examination when they could have been seen via telehealth; by forcing them to wait for prior authorization for a procedure that their health care provider has already deemed medically necessary; and if the prior authorization is eventually denied, by forcing them to raise money for an abortion.

4. Impact of HB 862

110. HB 862 denies Medicaid coverage for medically necessary abortions in Montana that are not the result of rape or incest and do not create a risk of death to the pregnant person. Between July 2011 and June 2021, only six abortions covered by Medicaid were reported as falling into these categories in the entire state.

111. Under HB 862, Medicaid would not cover abortions that severely endanger the health of the pregnant person but do not rise to the level of creating a risk of death. This will leave Medicaid patients suffering from serious harm to their health unable to get abortions that they need.

112. Under HB 862, Medicaid also would not cover abortions in cases of lethal fetal conditions or diagnoses, in some cases forcing Medicaid-eligible Montanans to carry pregnancies to term even if there is no chance the fetus will survive.

****

113. The inevitable result of these unnecessary and unjustified hurdles will be to force many Medicaid patients to carry a pregnancy to term, even though an abortion was medically necessary in the judgment of their health care provider.

114. The State of Montana, DPHHS, and Director Brereton are aware that the Rule violates the Montana Constitution and decisions of this Court and the Montana Supreme Court and have elected to promulgate the Rule anyway. Numerous commenters raised the Rule's constitutional infirmities, Ex. B at 1, but the agency has chosen to proceed undeterred and adopt the Rule unchanged. And the Legislature has enacted HB 544 and HB 862 despite their unconstitutionality.

115. The effect of the Rule, HB 544, and HB 862 is to prevent Montanans with low incomes from accessing abortion.

CLAIMS FOR RELIEF

First Claim
Violation of the Right to Privacy
Of Article II, Section 10 of the Montana Constitution

116. Plaintiffs hereby reaffirm and re-allege each and every allegation made in the preceding paragraphs as if set forth fully herein.

117. Article II, section 10 of the Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This right includes the

fundamental "right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14.

118. Violations of these rights are subject to strict scrutiny by the Court. The State must show "a compelling interest in and obligation to legislate or regulate 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.* at ¶ 59.

119. The Rule, HB 544, and HB 862 each violate the right to privacy of Medicaid patients seeking abortions in Montana. The restrictions have no bona fide health justification and are not narrowly tailored to effectuate a compelling State interest, in violation of article II, section 10 of the Montana Constitution.

120. The Rule and HB 544 also each violate Plaintiffs' patients' right to informational privacy because they unnecessarily require them to divulge sensitive and unnecessary medical information to DPHHS.

Second Claim
Violation of the Right to Equal Protection of the Laws
Of Article II, Section 4 of the Montana Constitution

121. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

122. Article II, section 4 of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws."

123. The Rule, HB 544, and HB 862 each violate equal protection because they create several classifications that burden the fundamental right to abortion without being narrowly tailored to effectuate a compelling State interest. *See Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (strict scrutiny applies if distinctions drawn by a law affect fundamental rights).

124. The Rule, HB 544, and HB 862 each discriminate against pregnant Medicaid patients seeking to exercise their fundamental right to abortion, as compared to pregnant Medicaid patients not seeking abortions, including those who decide to continue their pregnancies and give birth.

125. The Rule, HB 544, and HB 862 each discriminate against pregnant Medicaid patients seeking to exercise their fundamental right to abortion, as compared to pregnant Medicaid patients seeking miscarriage management. Miscarriage management involves nearly identical care to abortion, but it is specifically excepted from the Rule and HB 544; under HB 862, Medicaid will continue to cover medically necessary miscarriages but will only cover medically necessary abortions if the abortion is sought because of rape or incest or because there is a risk of death to the pregnant person.

126. The Rule, HB 544, and HB 862 each discriminate based on suspect classes, including based on sex, because they have a disproportionate impact on women with low incomes and are based on impermissible stereotypes about decision making by women, pregnant people, and people with the capacity for pregnancy.

127. The Rule, HB 544, and HB 862 each discriminate against Medicaid providers who provide abortions, as compared to those who provide care for pregnant people not seeking abortions.

128. The Rule and HB 544 each discriminate against Medicaid patients seeking abortions who seek care from an APC, as compared to Medicaid patients seeking abortions who seek care from a physician.

129. The Rule and HB 544 each discriminate against APCs, as compared to physicians.

Third Claim
Violation of the Montana Administrative Procedure Act,
§ 2-4-101, *et seq.*, MCA

130. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

131. MAPA allows for judicial review of agency action, and courts may enjoin enforcement of an administrative rulemaking for certain enumerated reasons, including that it "impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff" or that it "was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent." Section 2-4-506(1)–(2), MCA; *see also* § 2-4-704(2)(a)(i), MCA (courts may reverse administrative decision if it is "in violation of constitutional or statutory provision").

132. The Rule violates § 2-4-506(1), MCA, because it violates the constitutional rights of Plaintiffs and their patients.

133. The Rule violates § 2-4-506(1), MCA because it violates the rights of Plaintiffs and their patients under §§ 53-6-104, 49-3-205, MCA.

134. The Rule violates §§ 2-4-506, § 2-4-305(6), MCA, because its narrowing of the definition of "medically necessary," which applies only to abortions, exceeds the scope of DPHHS's authority. *See also* § 2-4-704(2)(a)(ii), MCA (courts may reverse administrative decision if it is "in excess of the statutory authority of the agency").

135. The Rule is arbitrary and capricious in violation of §§ 2-4-305(6), 2-4-506(2), because it violates the legislature's stated intention to provide medically necessary care to Medicaid-eligible Montanans and to provide care in a manner that is cost-effective.

136. The Rule violates §§ 2-4-305(6)(b), 2-4-506, MCA, because the onerous requirements it imposes are not reasonably necessary to ensure compliance with Montana law, especially in light of the report DPHHS commissioned that found 100% compliance with existing rules. *See also* § 2-4-704(2)(a)(v), MCA (courts may reverse administrative decision if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record").

137. The Rule violates § 2-4-506, MCA, because it grants DPHHS officials unrestricted discretion to grant or deny prior authorization for abortions.

138. The Rule violates § 2-4-506, MCA, because it is impermissibly vague and will lead to arbitrary results.

Fourth Claim
Violation of the Freedom of Provider Choice Provisions
Of § 53-6-104, MCA

139. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

140. DPHHS must "provide reasonable freedom of choice to recipients of medical aid to select the . . . provider of medical care [or] services." Section 53-6-104, MCA.

141. DPHHS must also "provide for professional freedom of those licensed practitioners who provide medical assistance" through Medicaid. *Id.*

142. The Rule and HB 544 each violate these provisions of § 53-6-104, MCA, because they restrict Medicaid-eligible Montanans seeking abortions, including Plaintiffs' patients, from selecting an advanced practice clinician provider of their choice.

143. The Rule and HB 544 each violate these provisions of § 53-6-104, MCA, because they restrict the professional freedom of APCs to provide abortions.

Fifth Claim
Violation of the Inalienable Right to Seek Safety, Health, and Happiness
Of Article II, Section 3 of the Montana Constitution

144. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

145. Article II, section 3 of the Montana Constitution provides that all Montanans have the "[i]nalienable rights" to "seek[] their safety, health and happiness in all lawful ways."

146. The Rule, HB 544, and HB 862 each violate the right of Plaintiffs and their patients to seek "safety, health and happiness in all lawful ways" because they infringe on Montanans' right to abortion, which is a constitutionally protected procedure, and on the provider-patient relationship, in violation of article II, section 3 of the Montana Constitution.

Sixth Claim
Violation of the Right to Individual Dignity
Of Article II, Section 4 of the Montana Constitution

147. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

148. Article II, section 4 of the Montana Constitution provides that all Montanans have the right to individual dignity.

149. The Rule, HB 544, and HB 862 each violate the right to individual dignity of Plaintiffs and their patients in violation of article II, section 4 of the Montana Constitution.

Seventh Claim
Violation of the Montana Governmental Code of Fair Practices, § 49-3-205, MCA

150. Plaintiffs hereby reaffirm and reallege each and every allegation made in the preceding paragraphs as if set forth fully herein.

151. The Montana Governmental Code of Fair Practices requires that government services be made available or performed without discrimination based on sex. Section 49-3-205, MCA.

152. The Rule, HB 544, and HB 862 each impermissibly discriminate against women.

INJUNCTIVE RELIEF

153. The Rule, HB 544, and HB 862 each subject Plaintiffs' patients to irreparable harm and violate fundamental rights guaranteed by the Montana Constitution. Plaintiffs are entitled to a permanent injunction enjoining the Rule, HB 544, and HB 862. Section 27-19-101, MCA.

154. Plaintiffs are entitled to preliminary injunctive relief under §§ 27-19-201(1), (2), MCA enjoining the Rule, HB 544, and HB 862. Plaintiffs have established that they are likely to succeed on the merits of their claims under the Montana Constitution, that they and their patients will suffer irreparable injury if the Rule, HB 544, and HB 862 are enforced during the pendency of the litigation, and that the public interest and balance of the equities weigh in favor of granting preliminary relief.

155. Plaintiffs are entitled to a temporary restraining order enjoining the enforcement of the Rule until such time as this Court can set a hearing and consider Plaintiffs' application for a preliminary injunction, filed concurrently herewith. On these verified pleadings, the concurrently filed brief in support of application for preliminary injunction and temporary restraining order, and accompanying affidavits,

"it clearly appears . . . that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition." Section 27-19-315(1), MCA. Absent a temporary restraining order, an unconstitutional rule would go into effect on Monday, May 1, 2023.

156. Further, Plaintiffs, through the undersigned counsel, "certify to the court in writing the efforts . . . that have been made to give notice and the reasons supporting the [Plaintiffs'] claim that notice should not be required." Section 27-19-315(2), MCA. As described above, undersigned counsel twice asked DPHHS to consider delaying the effective date of the Rule to 90 days after publication of the adoption notice or stipulating to a stay of enforcement of the Rule, but the agency refused both times. Exs. E--J. Undersigned counsel also provided a copy of these filings to the Attorney General's Office simultaneous with their filing with the Court and will serve the Director of DPHHS with conformed copies of the filings and a summons as soon as possible.

WRIT OF PROHIBITION

157. Plaintiffs are entitled to a writ of prohibition pursuant to § 27-27-101, MCA. Because the Rule is clearly unlawful, Plaintiffs request that the Court issue a writ of prohibition directing Defendants to refrain from enforcing it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue:

1. A declaration that (1) the Rule amending Mont. Admin. R. 37.82.102 and 37.86.104 proposed at Montana Administrative Register Notice 37-1024 and adopted in the April 28, 2023, edition of the MAR, 2023 House Bill 544, and 2023 House Bill 862 violate Plaintiffs' patients' constitutional rights to privacy, equal protection, and dignity; their right to seek safety, health, and happiness; their statutory rights under the Montana Governmental Code of Fair Practices; and Plaintiffs' equal protection rights; (2) the Rule and HB 544 violate Plaintiffs' and their patients' statutory rights under the Freedom of Provider Choice Provisions of § 53-6-104, MCA; and (3) the Rule violates the Montana Administrative Procedure Act;
2. A temporary restraining order prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the Rule until such time as the Court can conduct a hearing and rule on the merits of Plaintiffs' application for a preliminary injunction and request for a writ of prohibition;
3. A preliminary injunction prohibiting Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the Rule, HB 544, and HB 862 during the pendency of this litigation;
4. A writ of prohibition directing Defendants and their agents, employees, appointees, and successors not to enforce, threaten to enforce, or otherwise apply the Rule during the pendency of this litigation;

5. A permanent injunction prohibiting Defendants and their agents, employees, appointees, and successors from enforcing, threatening to enforce, or otherwise applying the Rule, HB 544, and HB 862;
6. An order awarding Plaintiffs attorney's fees and costs pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine; and
7. Such further relief as may be just and proper.

Respectfully submitted this 18th day of May, 2023.

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
rgraybill@silverstatelaw.net

Tanis M. Holm
Edmiston & Colton Law Firm
310 Grand Ave.
Billings, Montana 59101
(406) 259-9986
tholm@yellowstonelaw.com

Peter Im*
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
(202) 803-4096
peter.im@ppfa.org

Dylan Cowit*
Planned Parenthood Federation of America, Inc.
123 William St., 9th Floor
New York, NY 10038
(212) 541-7800
dylan.cowit@ppfa.org

Attorneys for Plaintiffs Planned Parenthood of Montana and Samuel Dickman, M.D.

Akilah Deernose
Alex Rate
ACLU of Montana
PO Box 1986
Missoula, MT 59806
(406) 203-3375
deernosea@aclumontana.org
ratea@aclumontana.org

Erin M. Erickson
Bohyer, Erickson, Beaudette,
and Tranel P.C.
283 West Front St., Suite 201
Missoula, MT 59802
(406) 532-7800
erickson@bebtlaw.com

Hillary Schneller*
Jen Samantha D. Rasay*
Adria Bonillas*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org
jrasay@reprorights.org
abonillas@reprorights.org

Attorneys for Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Helen Weems, APRN-FNP

* *Applications for admission* pro hac vice *pending*

VERIFICATION

STATE OF FLORIDA)
)ss.
County of PALM BEACH)

I, Martha Fuller, being first duly sworn upon her oath, verify that the statements contained in the foregoing Amended Complaint, except for (1) the statements in paragraphs 17–19, 41–42, 84–85, and 88 of the Amended Complaint and (2) the statements about Blue Mountain Clinic and All Families Healthcare in paragraphs 56, 79, 83, and 92 of the Amended Complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 05/17/2023

Martha Fuller

Subscribed and sworn to before me this 17th day of May, 2023.

(NOTARIAL SEAL)

DARIEN HERNANDEZ
Notary Public - State of Florida
Commission # HH186735
Expires on October 14, 2025

Printed Name: DARIEN HERNANDEZ

This notarial act was an online notarization
PRODUCED A MONTANA DRIVER'S LICENSE

VERIFICATION

STATE OF MONTANA)
)ss.
County of Missoula)

I, Nicole K. Smith, PhD, MPH, being first duly sworn upon her oath, verify that the foregoing statements contained in paragraphs 19, 42, and 88 of the Amended Complaint, as well the statements about Blue Mountain Clinic in paragraphs 56, 79, and 83 of the Amended Complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 18 May 2023

N Smith

Nicole K. Smith, PhD, MPH,

Subscribed and sworn to before me this 18th MDH day of May, 2023.

(NOTARIAL SEAL)

MARK HELVESTON
Notary Public for the
State of Montana
Residing at MISSOULA, MT
My Commission Expires
March 17, 2026

Mark Helveston

Printed Name: Mark Helveston

VERIFICATION

STATE OF MONTANA)
)ss.
County of Flathead)

I, Helen Weems, MSN, APRN-FNP, verify that the foregoing statements contained in paragraphs 17–18, 41, and 84–85 of the Amended Complaint, as well the statements about All Families Healthcare in paragraphs 56, 79, 83, and 92 of the Amended Complaint, are true and accurate to the best of my knowledge, information, and belief.

Dated: 5/17/23

Helen Weems, MSN, APRN-FNP

Subscribed and sworn to before me this 17th day of May, 2023.

(NOTARIAL SEAL)

Printed Name: _____

DONNA PELC
NOTARY PUBLIC for the
State of Montana
Residing at Whitefish, Montana
My Commission Expires
November 17, 2025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 18th day of May, 2023, by electronic mail on the following:

Austin Knudsen
Thane Johnson
thane.johnson@mt.gov
Michael D. Russell
michael.russell@mt.gov
Levi R. Roadman
levi.roadman@mt.gov
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620

Emily Jones
emily@joneslawmt.com
Special Assistant Attorney General
115 N. Broadway, Suite 410
Billings, MT 59101

Graybill Law Firm, PC

CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Complaint - Amended Complaint to the following on 05-18-2023:

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: All Families Healthcare, Helen Weems
Service Method: eService

Akilah Maya Deernose (Attorney)
1121 Knight St.
Helena MT 59601
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: eService

Erin M. Erickson (Attorney)
283 W. Front St. Suite 201
PO Box 7729
Missoula MT 59807
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: eService

Hillary Anne Schneller (Attorney)
Center for Reproductive Rights
199 Water Street
22nd Floor
New York NY 10038
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: MT Department of Public Health and Human Services, Charlie Brereton, State of Montana
Service Method: eService

Emily Jones (Attorney)

115 North Broadway
Suite 410
Billings MT 59101
Representing: MT Department of Public Health and Human Services, Charlie Brereton, State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: MT Department of Public Health and Human Services, Charlie Brereton, State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: MT Department of Public Health and Human Services, Charlie Brereton, State of Montana
Service Method: eService

Tanis M. Holm (Attorney)
310 Grand Ave.
Billings MT 59101
Representing: Planned Parenthood of Montana, Samuel Dickman
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Emma Edwards on behalf of Raphael Jeffrey Carlisle Graybill
Dated: 05-18-2023