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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–287

PLANNED PARENTHOOD OF MONTANA, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.,

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV 23–299, the Honorable Mike Menahan, Presiding

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Did the District Court err in failing to apply the correct legal standards, properly consider the facts, and exercise independent judgment?

2. Did the District Court err in issuing a preliminary injunction based on findings unsupported by or directly controverting the evidence?

STATEMENT OF THE CASE

The laws and agency rule challenged in this lawsuit are all aimed at preserving the integrity of the Montana Medicaid Program, preventing fraud, ensuring compliance with federal and state law, and establishing appropriate clinical requirements for the Medicaid Program to ensure the health and safety of Medicaid beneficiaries. They are squarely within the State's power and authority to enact, do not implicate fundamental rights, and do not contravene the Montana Constitution. The District Court manifestly abused its discretion in enjoining an administrative rule promulgated by DPHHS that amends Admin. R. Mont. 37.82.102 and 37.86.104 (the "Rule") (Proposed Rule Amendment attached as **Appendix C** and Notice of Amendment attached as **Appendix D**), House Bill ("HB") 544 (2023) (attached as **Appendix E**), and HB 862 (2023) (attached as **Appendix F**) (collectively, the "Legal Provisions"). It also erred by applying incorrect legal standards in granting the preliminary injunction. The preliminary injunction should be reversed.

Planned Parenthood of Montana, All Families Healthcare, Blue Mountain Clinic, Samuel Dickman, M.D., and Helen Weems, APRN-FNP (collectively, "Abortion Providers") assert the Legal Provisions violate the Montana Constitution's right of privacy, right to equal protection of the laws, right to seek safety, health, and happiness, right to individual dignity, and violate the Montana Governmental Code of Fair Practices. (Doc. 44 at ¶¶ 116–129, 144–152.) They also assert the Rule and HB 544 violate the freedom of provider choice provisions of Mont. Code Ann. § 53-6-104 and that the Rule violates Mont. Code Ann. § 2-4-101 of the Montana Administrative Procedures Act. (*Id.* at ¶¶ 130–143.)

Abortion Providers filed their original Complaint on April 28, 2023, challenging the Rule (Doc. 1.) and simultaneously filed an Application for Temporary Restraining Order ("TRO"), Preliminary Injunction and Writ of Prohibition. (Docs. 9.5, 10.) The State filed its Opposition Brief to the TRO Application and Motion for Substitution of Judge on May 1, 2023. (Docs. 12, 13.) Judge Menahan assumed jurisdiction and granted the TRO the same day. (Docs. 14, 15.) The State filed its Opposition Brief to the Motion for Preliminary Injunction and Writ of Prohibition on May 12, 2023. (Doc. 23.)

Abortion Providers amended their Complaint to include challenges to HB 544 and HB 862 on May 18, 2023, filing an Application for a Preliminary Injunction and Brief in Support on those bills the same day. (Docs. 44, 45, 46.) The Court held a

combined preliminary injunction hearing on the Legal Provisions, as well as HB 575 (2023) and HB 721 (2023) (challenged in Montana First Judicial District Court, Lewis & Clark County Cause No. ADV 23–231) on May 23, 2023. Prior to the hearing, the parties stipulated that testimony presented for either case could be relied upon by the parties or the District Court in the other case. (Doc. 50.)

At the hearing, the District Court heard the statements and arguments of counsel, as well as testimony from a total of six witnesses. Upon conclusion of the four-hour hearing, the District Court orally enjoined the Legal Provisions from the bench. (Hearing Transcript 168–169 (May 23, 2023) ("Tr."), attached as **Appendix A**.) The District Court further stated it was unsure how quickly it would issue a written order given its caseload. (*Id.* at 169:21-25.) The State appealed the issuance of the preliminary injunction the following day, on May 24, 2023. The Montana Supreme Court Clerk received and filed the District Court record (Docs. 1–53) on May 25, 2023. (Doc. 54.)

Three weeks later, on June 15, 2023, Abortion Providers filed an unsolicited proposed Order Granting Plaintiffs' Motions for Preliminary Injunction (attached as **Appendix B**). To the State's knowledge, the District Court never asked Abortion Providers to prepare a proposed order. Nearly a month later, on July 11, 2023, the District Court signed and entered Abortion Providers' proposed Order verbatim,

without any revisions or additions—the District Court did not even remove the word "[PROPOSED]" from the title of the document. (Doc. 62.)

STATEMENT OF FACTS

Federal and State Medicaid Requirements

Since the 1970s, the federal Hyde Amendment has banned the use of federal funds for abortions in State Medicaid programs except in certain, limited circumstances. (Doc. 24 at ¶ 2.) Only abortions provided because of rape, incest, or when the pregnancy endangers mother's life are eligible for federal financial participation ("FFP"). (*Id.*) Abortions for any other purpose are not eligible for FFP. (*Id.*) Following *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (May 22, 1995), Montana Medicaid has funded abortions where a physician has determined them to be medically necessary. (*Id.* at ¶ 4.) Importantly, *Jeannette R.* does not require the State to fund elective, nontherapeutic abortions. *Id.* at *4 ("this case has nothing to do with indigent women who may seek an elective abortion. [. . .] Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician."), and *29 ("It is clear that the state need not fund nontherapeutic elective abortions.").

Montana Medicaid regulates abortion providers regarding abortions eligible for FFP, as well as those funded with State-only Medicaid funds (medically

necessary abortions where the mother's life is not endangered) through the Administrative Rules of Montana and the Physician-Related Services Manual ("Manual"). (Doc. 24 at ¶ 3.) The Manual provides in relevant part:

> Abortions (ARM 37.86.104)
> Abortions are covered when one of the following conditions is met:
>
> - The member's life would be endangered if the fetus is carried to term.
> - The pregnancy is the result of rape or incest.
> - The abortion is determined by the attending physician to be medically necessary, even if the member's life is not endangered if the fetus is carried to term.
>
> A completed Medicaid Healthcare Programs Physician Certification for Abortion Services (MA–37) form must be submitted with every abortion claim or payment will be denied. This form is the only form Medicaid accepts for abortion services. Complete only one section of this form.
>
> The form required for abortions can be found on the Provider Information website under Forms in the site index in the left menu of the Provider Website.
>
> When using mifepristone (Mifeprex or RU 486) to terminate a pregnancy, it must be administered within 49 days from the beginning of the last menstrual period by or under the supervision of a physician who:
>
> - Can assess the duration of a pregnancy.
> - Can diagnose ectopic pregnancies.
> - Can provide surgical intervention in cases of incomplete abortion or severe bleeding, or can provide such care through other qualified physicians.
> - Can assure access to medical facilities equipped to provide blood transfusion and resuscitation.
> - Has read, understood, and explained to the member the prescribing information for mifepristone.

(Doc. 24 at ¶ 5; *see also* Sample MA–37 Form, attached as **Appendix G**.) The completed MA–37 form allows Medicaid to assign the correct fund code—when the form indicates rape, incest, or mother's life, the abortion is eligible for FFP. (Doc. 24 at ¶ 10.) Abortions for any other medically necessary reason are funded exclusively by the State general fund. (*Id.*)

Legislative Review of Medicaid-Funded Abortions

The 2021 Legislature directed DPHHS to review and report on the history, utilization data, policies, rules, and definitions applicable to Medicaid-reimbursed abortions. (Doc. 24 at ¶ 11.) During the September 2021 meetings of the Interim Budget Committee for Section B and the Children, Families, Health, and Human Services Interim Committee, DPHHS presented a summary of current laws, rules, policies, procedures, and claims estimates associated with Medicaid-funded abortions. (*Id.* at ¶ 12 and Ex. 2.) The report showed that Medicaid automatically paid abortion claims accompanied by an MA–37 form, without substantive review or auditing. (*Id.* at ¶ 13.) The Committees requested that DPHHS conduct an in-depth review of Medicaid abortion claims and the current laws governing them. (*Id.* at ¶ 14.) Using a contractor, DPHHS reviewed all Medicaid-funded abortions for which DPHHS claimed FFP between July 2011 and June 2021 (6 abortions), as well as 10% of the abortions paid for by State-only funds based on medical necessity

between July 2019 and June 2021 (79 claims for SFY 2019, 67 claims for SFY 2020, and 75 claims for SFY 2021). (*Id.* at ¶ 15.)

DPHHS presented the results of this analysis—concluding that the information submitted on the MA–37 form lacks sufficient information to verify medical necessity—to the Interim Budget Committee for Section B in September 2022. (*Id.* at ¶ 16.) DPHHS's contractor reported that MA–37 forms contained a brief narrative, but only 11.31% (25 claims, submitted by one provider), contained additional documentation. (*Id.* at ¶ 17.) Such additional documentation typically correlated with the vague medical condition of "complications of unintended pregnancy," or an assessment of the situation, rather than documentation to support a medical complication or disease other than the pregnancy itself. (*Id.* at ¶ 18.) The four conditions routinely indicated on the MA–37 form were: (1) pain and suffering (47.5%); (2) emotional stability (24.43%); (3) mental and physical health (9.05%); and (4) complications of unintended pregnancy (19.00%). (*Id.* at ¶ 19.) Ninety claims related to medication abortions, but only 10 such claims included documentation establishing that the Manual's requirements for medication abortions were met. (*Id.* at ¶ 20.)

These results caused DPHHS grave concern, especially with respect to State-only funded abortions. (*Id.* at ¶ 21.) The consistent lack of documentation, coupled with the conditions routinely provided on the MA–37 forms as the basis for medical

necessity, led DPHHS to reasonably believe that Medicaid is paying for abortions that are not actually medically necessary, but are, in fact, elective, nontherapeutic abortions, contrary to the statutory limitations imposed on the Medicaid Program. (*Id.*) DPHHS was also concerned that, if state-funds-only abortions were audited, DPHHS would not have sufficient documentation to establish that they were medically necessary. (*Id.*) Similarly, DPHHS feared that, if the federal government were to audit abortions for which FFP was claimed, DPHHS may not have sufficient documentation to establish that the abortions met the requirements of the Hyde Amendment. (*Id.*) DPHHS's contractor recommended that Medicaid abortion claims be supported by documentation—including a brief history and physical examination with evidence of the medical diagnosis necessitating abortion, corroborating laboratory or imaging results, and an estimate of gestational age—and submission of information on (or with) the MA–37 form. (*Id.* at ¶ 23.)

<u>The Legal Provisions</u>

The Rule amends provisions of Admin. R. Mont. 37.82.102 and 37.86.104 to clarify the circumstances under which abortion is medically necessary and therefore eligible for Medicaid coverage; to require prior authorization (with certain exceptions for when prior authorization cannot be obtained) for Medicaid-covered abortions; to implement documentation requirements supporting medical necessity; and to require that Medicaid-covered abortions be performed by a physician. (App.

C and D.) The purposes of these requirements are to ensure that (1) Medicaid only pays for medically necessary (not elective, nontherapeutic) abortions, consistent with Mont. Code Ann. § 53-6-101(9) (services provided under this part may be only those that are medically necessary), and (2) the abortions Medicaid pays for meet appropriate clinical requirements to ensure the health and safety of Medicaid beneficiaries. (*Id.* at ¶ 25.) The Rule was adopted on April 28, 2023. (App. D.)

HB 544 mandates requirements for Medicaid coverage of abortion services and is nearly identical to the Rule. (App. E.) HB 862, a state law Hyde Amendment, prohibits the expenditure of public funds for abortions unless (1) the pregnancy is the result of an act of rape or incest; or (2) in cases where 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. (App. F.) Both bills have effective dates of July 1, 2023.

The Legal Provisions compare to a majority of other states as follows:

- 33 states and the District of Columbia follow the federal standard, covering abortions only for rape, incest, and where the mother's life is endangered

- Only four states provide state funds for abortions in cases of fetal impairment

- Only four states provide state funds for abortions that are necessary to prevent grave, long-lasting damage to the mother's physical health

- 16 states have a policy that directs Medicaid to pay for all or most medically necessary abortions. Of these 16, seven provide such funds voluntarily while nine—including Montana—do so pursuant to a court order.

Guttmacher Institute, *State Funding of Abortion Under Medicaid*, available at https://tinyurl.com/mwr4ab5z.

STANDARD OF REVIEW

This Court reviews a District Court's grant or denial of a preliminary injunction for a manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (citation omitted); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citation omitted); A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bound of reason resulting in substantial injustice." *Id.* at ¶ 5 (citation omitted). "A manifest abuse of discretion is one that is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (citing *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 ("*Weems I*") (quotation omitted).

If a preliminary injunction decision was based on legal conclusions, however, this Court reviews those conclusions de novo. *Planned Parenthood of Mont.*, ¶ 5 (citing *Driscoll*, ¶ 12.) The Court reviews the District Court's legal conclusions to determine if its interpretation of the law is correct. *Driscoll*, ¶ 12 (citation omitted). "Issues of justiciability, such as standing and ripeness, also are questions of law, for which [this Court's] review is de novo." *Id.* (citation omitted).

This Court's "review of constitutional questions is plenary." *Weems v. State*, 2023 MT 82, ¶ 33, 412 Mont. 132, 529 P.3d 798 ("Weems II") (citation omitted). "A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which [this Court] review[s] to determine whether the conclusion is correct." *Id.* (quotation omitted).

Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("*MCIA*"). Parties presenting a facial challenge must demonstrate that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Trust Lands*

v. State, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If any constitutional application is shown, the facial challenge fails. *Id.* at ¶ 29. If any doubt exists, it must be resolved in favor of the statute. *MCIA*, ¶ 12. The party challenging the constitutionality of the statute bears the burden of proof. *Id.*

SUMMARY OF THE ARGUMENT

The District Court erred in several ways in enjoining the Legal Provisions. The District Court applied the wrong legal standard in issuing its oral injunction when it focused on "maintaining the status quo" instead of evaluating the Legal Provisions under the four-part conjunctive test required by Senate Bill ("SB") 191 (2023) In fact, the District Court criticized the new standard, and simply ignored it. Then, the District Court rubber-stamped Abortion Providers' unsolicited proposed Order verbatim, and further erred by failing to properly consider the facts and exercise independent judgment in its written ruling. It relied too heavily on Abortion Providers' proposed findings—excluding any meaningful consideration of the State's written submissions, exhibits, affidavits, or hearing testimony. The District Court also applied the wrong level of scrutiny to the Legal Provisions. Relying solely on Abortion Providers' proposed Order, the Court applied strict scrutiny, even though this Court has previously held there is no fundamental or constitutional right to Medicaid benefits.

A de novo review demonstrates that Abortion Providers did not meet their burden of proof to obtain a preliminary injunction. Abortion Providers cannot succeed on the merits because they lack standing as a threshold matter. The Legal Provisions do not violate the rights to privacy or equal protection. Abortion Providers will not suffer irreparable harm because any wrongful denial of Medicaid benefits can be repaired by a money judgment and an Order directing DPHHS to pay their Medicaid claims. The balance of the equities and public interest favor the State, which has an obligation to ensure the integrity of the Medicaid Program, prevent fraud and abuse, ensure the health and safety of Medicaid beneficiaries, comply with applicable state and federal laws, and steward taxpayer dollars. Abortion Providers, conversely, have no legitimate interest in Medicaid funding abortions which are not medically (therapeutically) necessary and do not meet the reasonable health and safety requirements that Medicaid—acting in the best interests of its beneficiaries—has imposed as a condition for payment.

Finally, the District Court's Order almost exclusively considered evidence presented by Abortion Providers while ignoring the substantial evidence presented by the State. The State demonstrated that a Plaintiff made untruthful statements on the MA–37 form, that an objective, legal definition of medical necessity is needed, and that it has legitimate interests in imposing the physician requirement. These many errors mandate reversal of the District Court's preliminary injunction.

ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). A preliminary injunction is "never awarded as of right." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); see also *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933) (injunction is not a remedy which issues as of course). A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24 (citation omitted); *see also Hooks v. Nexstar Broad. Inc.*, 54 F.4th 1101, 1114 (9th Cir. 2022) (injunctive relief must be evaluated on a case-by-case basis according to traditional equitable principles, without presumptions or a "thumb on the scale" in favor of issuing such relief).

I. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS, FAILED TO PROPERLY CONSIDER THE FACTS, AND FAILED TO EXERCISE INDEPENDENT JUDGMENT.

The Montana standard for issuing preliminary injunctions is now the same standard that federal courts have employed for decades. *See* SB 191. A preliminary

injunction may be granted only when the applicant establishes: (a) likelihood of success on the merits; (b) likelihood of suffering 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. *Id.* at § 1. SB 191 changes the requirements for obtaining a preliminary injunction in Montana in at least the following significant ways: First, the burden of proof no longer rests with defendants to show why an injunction should not issue; the burden now rests with the applicants to show why an injunction should issue. Second, the former five-part disjunctive test is now a four-part conjunctive test, and applicants must prove all four elements. The Legislature emphasized its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Compare* Mont. Code Ann. §§ 27-19-201 (2021) and 27-19-315 (2021) with SB 191.

A. THE DISTRICT COURT'S ORAL INJUNCTION IGNORED SB 191.

In issuing an oral preliminary injunction from the bench, the District Court erred by relying on a single factor—maintaining status quo—without any analysis of likelihood of success on the merits or the other factors of the test. In fact, the District Court was openly critical of the new preliminary injunction standard, stating:

> In the ten years I've been on the bench I don't think I've ever granted a temporary restraining order or preliminary injunction by finding on the ultimate issue of the merits of the case. I think that the Montana legislature enacting the most recent changes to Montana's restraining

> order injunction, preliminary injunction, final injunction, I think it puts the District Court judges in a difficult position because it requires us to issue an order making a finding, essentially a legal conclusion on the law and the evidence of the case, when the facts haven't been fully developed during the course of the litigation, nor have all the arguments on the legal matters been presented. But the legislature with its recent enactment to mirror, I think, federal law passed—has the Court consider that.
>
> I think the purpose of an injunction is to maintain the status quo. That, above all considerations, is the most important one for me. So I'm granting the preliminary injunction on that matter.

(Tr. at 168:18–169:12.)

But federal courts have been applying this same SB 191 standard for decades, analyzing likelihood of success on the merits as the weightiest factor of the preliminary injunction test. "At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits." *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (citation omitted); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). Demonstrating a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco v. United States.*, 944 F.3d 773, 789 (9th Cir. 2019) (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted). Not only did the Court not consider this factor or the other three factors in issuing an oral injunction, it expressly declined to do so. (Tr. at 168:18–169:12.) This was error.

B. THE COURT'S WRITTEN ORDER FAILED TO PROPERLY CONSIDER THE FACTS AND LACKED INDEPENDENT JUDGMENT.

Not only did the District Court err in failing to consider the applicable preliminary injunction test when issuing its ruling from the bench, but also its written Order—drafted by Abortion Providers and adopted verbatim—failed to properly consider the facts and lacked independent judgment. Thus, the written Order's discussion of the SB 191 legal standard does not overcome the District Court's initial error. Instead, it creates another legal basis to reverse the preliminary injunction.

This Court has expressed its dissatisfaction—if not outright disapproval—of verbatim adoption of proposed findings of fact. *Tomaskie v. Tomaskie*, 191 Mont. 508, 510–12, 625 P.2d 536, 538–39 (1981); *In re Marriage of Hunter*, 196 Mont. 235, 245–46, 639 P.2d 489, 495 (1982); *In re Marriage of Wolfe*, 202 Mont. 454, 457–458, 659 P.2d 259, 261–62 (1983); *In Re Marriage of Merry*, 213 Mont. 141, 149, 689 P.2d 1250, 1254 (1984); *Eaton v. Morse*, 212 Mont. 233, 243–44, 687 P.2d 1004, 1009–10 (1984).

> It is wise practice for the trial court to prepare and file its own findings and conclusions. Only in that fashion can the parties know that the trial court has carefully considered all the relevant facts and issues involved. This is not to say, however, that the trial court shouldn't have guidance from the lawyers on both sides. But guidance in an adversary system is always such that the findings and conclusions may not indicate a thorough treatment of the facts and law to be applied. But proposed findings and conclusions give the trial judge good insight as to just what factors and what law the parties deem to be important. It is then up to the trial court to translate its own judgment and conclusions into appropriate findings and conclusions. It is becoming increasingly

> apparent to this Court, however, that the trial courts rely too heavily on the proposed findings and conclusions submitted by the winning party. That is wrong!

Tomaskie, 191 Mont. at 512, 625 P.2d at 538–39 (citation omitted). A judge relies "too heavily" upon proposed findings when they are used "to the exclusion of a consideration of the facts and the exercise of his own judgment." *In re Marriage of Wolfe*, 202 Mont. at 457, 689 P.2d at 261 (citing *In re Marriage of Hunter*, 196 Mont. at 245, 639 P.2d at 495). "We have time and time again paid lip service to the oft-stated but usually ignored rule that, while not error per se, district courts should not adopt verbatim the findings of fact and conclusions of law of the prevailing party." *In re Marriage of Davies*, 266 Mont. 466, 480, 880 P.2d 1368, 1377 (1994) (Nelson, J. concurring) (citations omitted). "[E]rror occurs when the court accepts one party's proposed findings of fact without proper consideration of the facts and where there is a lack of independent judgment by the court." *Id.*, 880 P.2d at 1377 (citations omitted).

Here, the District Court's Order amounts to an unsolicited, one-sided, rubber-stamped ratification of Abortion Providers' desired outcome. The District Court adopted verbatim the facts as framed by Abortion Providers. This raises serious questions as to whether the District Court exercised independent judgment. For example, the Order made no references or citations to the State's Brief in Opposition to Plaintiffs' Application for TRO (Doc. 13), the State's Brief in Opposition to

Plaintiffs' Motion for Preliminary Injunction (Doc. 23), or the State's Answer to Plaintiffs' Amended Complaint (Doc. 58). Despite admission of several stipulated exhibits during the hearing, only one—the MA–37 form—was even mentioned. (Tr. 8:12–15; Doc. 62 at 5.) Largely ignoring testimony provided at the hearing, the Order primarily cited the Abortion Providers' affidavits—even when statements made in those affidavits sustained objections and were excluded at the hearing. For example, the Order cites Dr. Dickman's affidavit for the proposition that a "significant percentage of low-income patients seeking abortions are forced to delay paying for essentials such as bills and groceries." (Doc. 62 at 2.) But at the hearing, when the witness was asked what financial impacts the cost of abortion would have on a typical Medicaid patient, objections on grounds of speculation, foundation, and hearsay were sustained. (Tr. 18:4–19:12.)

In sum, the District Court relied too heavily upon Abortion Providers' proposed findings and excluded any meaningful consideration of the State's written submissions, exhibits, affidavits, and hearing testimony. The District Court obviously and manifestly failed to exercise its own independent judgment, instead adopting Abortion Providers' desired outcome verbatim. This is clear error.

C. THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY.

The District Court incorrectly analyzed the Legal Provisions using strict scrutiny, stating:

> Under *Jeannette R.* and *Armstrong*, Medicaid must pay for medically necessary abortions, and it must leave to a patient and their provider decisions regarding whether an abortion is medically necessary—a decision that is within a medical provider's clinical judgment. Any interference with this relationship is subject to strict scrutiny.

(Doc. 62 at 9) (citing *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 264). But this is not what *Armstrong* says. *Armstrong* says:

> Indeed, since the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right. It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives. For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis—i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.

Armstrong, ¶ 34 (citations omitted).

The District Court's legal conclusion that "Medicaid must pay for medically necessary abortions, and it must leave to a patient and their provider decisions regarding whether an abortion is medically necessary—a decision that is within a medical provider's clinical judgment[—][a]ny interference with this relationship is subject to strict scrutiny," is clearly incorrect. Indeed, this Court has held: "there is no fundamental right to receive Medicaid benefits in Montana, nor does any other provision of the Montana Constitution confer such a right." *Timm v. Mont. Dept. of Public Health & Human Servs.*, 2008 MT 126, ¶ 34, 343 Mont. 11, 184 P.3d 994 (citing *State v. Ellis*, 2007 MT 2010, ¶ 11, 339 Mont. 14, 167 P.3d 896) (rational

basis review is appropriate for laws not affecting fundamental rights or rights conferred by the Montana Constitution or Declaration of Rights). The District Court improperly conflated the right to terminate a pre-viability pregnancy (based on *Armstrong* and its progeny) with whether the State is required to pay for an abortion through Medicaid.

Similarly, in the equal protection context, the District Court concluded: "Because the Rule, HB 544, and HB 862 each infringe on Montanans' fundamental right to access pre-viability abortions, *see supra*, the Court must apply strict scrutiny." (Doc. 62 at 13.) The District Court held: "The Rule and statutes enact restrictions that will prevent pregnant Medicaid patients who decide to terminate their pregnancies from accessing those medically necessary abortions, *see supra*, without imposing similar restrictions on medically necessary care for Medicaid patients who choose to continue their pregnancies." (*Id.* at 13–14.) Here, the issue is not the right to abortion (or the legality of certain abortion proscriptions), but the conditions the State can impose on Medicaid coverage of abortion to ensure compliance with the purposes and statutory limitations of the Medicaid Program. These are two distinct issues: "It is clear that the state need not fund nontherapeutic elective abortions." *Jeannette R.*, 1995 Mont. Dist. LEXIS at *29; *see also Maher v. Roe*, 432 U.S. 464 (1977) ("[i]t is not unreasonable for a State to insist upon a prior showing of medical necessity to insure [sic] that its money is being spent only for

authorized purposes”). Abortion Providers’ own witness, Nicole Smith, testified that requiring documentation of the reasons for the abortion would prevent fraudulent use of Medicaid funds. (Tr. at 75:12–23.) Ms. Smith agreed the State has a strong interest in preventing fraud. (*Id.* at 75:24–76:1.)

Faithfulness to the scope of the Medicaid Program and accountability to Montana taxpayers for State funds justifies requiring documentation to support Medicaid payment for medically necessary abortions. (Doc. 24 at ¶ 26.) Such requirements are not uncommon and are applied to other Medicaid-reimbursed services to ensure program integrity. (*Id.*) The Rule and HB 544 are reasonably necessary to ensure Medicaid program integrity, protect the health and safety of Medicaid beneficiaries, and to ensure that Medicaid does not pay for elective, nontherapeutic abortions. (*Id.* at ¶ 27.) The District Court erred in applying strict scrutiny.

II. APPLYING THE CORRECT STANDARD DE NOVO SHOWS THAT A PRELIMINARY INJUNCTION SHOULD NOT ISSUE.

Because the District Court failed to correctly apply the preliminary injunction standard, as discussed above, the Court must apply the correct legal standard de novo. *Planned Parenthood of Mont.*, ¶ 5 (citing *Driscoll*, ¶ 12.) Applying the four-part conjunctive test to the Legal Provisions at issue demonstrates that Abortion Providers cannot meet all four parts of the test.

A. Abortion Providers Are Unlikely To Succeed On The Merits.

The first prong requires that a party seeking a preliminary injunction demonstrate "a likelihood of success on the merits." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citing *Mazurek*, 520 U.S. at 972). While satisfaction of this prong has been approached on a case-by-case basis, federal courts have held that showing of a likelihood to succeed on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of San Francisco*, 944 F.3d at 789 (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citation omitted).

1. Abortion Providers Lack Standing.

"Standing is one of several justiciability doctrines which limit Montana courts, like federal courts, to deciding only 'cases and controversies.'" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citation omitted); *see also* U.S. Const. art. III, § 2; Mont. Const. art. VII, § 4. "'The irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Id.* at ¶ 32 (citations omitted). "Beyond these minimum constitutional requirements, the Supreme Court has adopted several prudential limits: the plaintiff

generally must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff's complaint must fall within the zone of interests protected by the law invoked." *Elk Grove Unif. Sch. Dist.*, 542 U.S. 1, 12 (2004); *see also Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties); *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145.

Courts recognize a "limited" exception to this rule, but to qualify a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004); *Baxter*, ¶ 15 (citing *see also Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). Recently, the U.S. Supreme Court has "disavowed the theories of third-party standing that previously allowed doctors to raise patients' claims in abortion cases." *Alliance for Hippocratic Med. v. FDA*, 2023 U.S. App. LEXIS 8898, n.4 (5th Cir. 2023) (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 and n.61 (2022) (comparing *Warth*, 422 U.S. at 499 and *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 15 with *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Alito, J. dissenting), (Gorsuch, J. dissenting) (collecting cases) and *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 632, n.1 (2016) (Thomas, J. dissenting))). This is

because "[a] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *June Med. Servs L.L.C.*, 140 S. Ct. at 2168 (Alito, J., dissenting), *abrogated by Dobbs*, 142 S. Ct. at 2275 and n.61. Moreover, "abortionists have a 'financial interest in avoiding burdensome regulations,' while women seeking abortions 'have an interest in the preservation of regulations that protect their health.'" *Id.* Third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unif. Sch. Dist.*, 542 U.S. at 9, 15, and n.7.

Notwithstanding that abortion providers generally cannot meet the third-party standing test, this Court has carved out a special exception. When the State directly interdicts the normal functioning of the physician-patient relationship by criminalizing certain procedures, abortion providers "have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing." *Armstrong*, ¶¶ 12–13; *see also Weems I*, ¶ 12 ("when 'governmental regulation directed at health care providers impacts the constitutional rights of women patients,' the providers have standing to challenge the alleged infringement of such rights.") (quoting *Armstrong*, ¶¶ 8–13).

Abortion Providers have neither pled nor argued that they have a "close relationship" to the Medicaid-qualified women for whom they perform abortions or a hindrance to these women's ability to bring suit. (*See generally* Doc. 44.) Rather, Abortion Providers bring their claims on behalf of themselves "and their patients" (Doc. 44 at 2) in reliance on *Armstrong* and *Weems I*. But the Legal Provisions do not "impact the constitutional rights of women patients" or "interdict the normal functioning of the physician-patient relationship by criminalizing certain procedures"—they merely ensure that elective, nontherapeutic abortions are not paid for by Medicaid in violation of the law. *See Timm*, ¶ 34 (there is no fundamental right to receive Medicaid benefits in Montana). The exception allowing physicians to sue on behalf of their patients does not apply to the circumstances of this case. Abortion Providers therefore cannot demonstrate sufficient third-party standing. Additionally, Abortion Providers themselves have no constitutional or fundamental rights to perform abortions or to have them reimbursed by Medicaid. They cannot establish a concrete injury in fact sufficient to confer standing. Because they cannot clear this threshold jurisdictional issue, they are not likely to succeed on the merits of their claims.

2. The Legal Provisions Do Not Violate The Right To Privacy Or Equal Protection Of The Laws.

In applying for injunctive relief from the District Court, Abortion Providers' legal bases for injunctive relief were that the Legal Provisions violated their patients'

right to privacy and right to equal protection only (*See* Doc. 10 at 8–15; Doc. 44 at ¶¶ 116–129; Doc. 46 at 6–13.) Abortion Providers never discussed the merits of their claims under Claims Three through Seven. (*Id.*) The District Court's Order likewise grants a preliminary injunction based on the right to privacy and the right to equal protection. (Doc. 62 at 16.) However, none of the Legal Provisions violate either of these constitutional rights. The preliminary injunction should therefore be reversed.

The Legal Provisions' physician requirement does not violate a woman's right to personal autonomy over her decision on whether to obtain an abortion. Unless a health insurer like Medicaid blanketly pays all claims without regard to waste, fraud, or abuse—or without regard to whether a service is medically necessary—it necessarily must interact with a patient and her health care provider. (Doc. 24 at ¶ 35.) Unlike the abortion provider, Medicaid has an ongoing relationship with—and responsibility to—Medicaid beneficiaries. (*Id.* at ¶ 36.) If an abortion is medically necessary, Medicaid could be responsible for covering the necessary treatment to address the condition necessitating the abortion. (*Id.*) Similarly, if a Medicaid beneficiary experiences either immediate or delayed adverse physical or psychological effects from an abortion, Medicaid must pay for the services to treat those adverse effects for as long as the beneficiary is Medicaid eligible. (*Id.* at ¶ 45.) Medicaid, thus, has an interest in ensuring that professionals performing abortions

for its beneficiaries have the skills necessary to provide a high level of care—to comply with federal and state law, to protect the integrity of the Medicaid Program, and to protect the health and safety of Medicaid beneficiaries. (*See id.* at ¶ 46; App. D at Response Nos. 4, 8, 9, 11, 20, 34.) The physician requirement does not violate a woman's right to privacy.

The District Court's conclusion that the prior authorization or prepayment review (and related documentation) requirements violate the right to privacy also presumes that the only way to implement the requirements is an in-person physical examination and then a waiting period while prior authorization is obtained. The Order conflates an impermissible 24-hour waiting period with provisions intended to establish medical necessity for Medicaid funding. But the patient can obtain a physical examination and the related lab test results/imaging/diagnosis (and supporting documentation) from another provider and submit the results to the abortion provider. Providing a healthcare exam at one facility and having the results shipped to another facility is "done all the time every day where you do an exam, do testing, and that's forwarded to a consultant at another provider," including "[h]istory and physical, laboratory tests, imaging studies, including ultrasound, previous notes." (Tr. at 53:9–18.) In other words, a physician can examine a patient

and determine an abortion is necessary to save the mother's life in one facility and ship the result to an abortion facility. (*Id*. at 53:23–54:2.)[1]

Additionally, the fact that Medicaid does not require prior authorization or prepayment review for other reproductive health services does not establish that such a requirement for abortion is an impermissible attempt to interfere with a woman's right to abortion. Rather, recognizing, as the court did in *Jeannette R.*, that—unlike other reproductive health services—abortion may be medically necessary, or that it may be a noncovered, elective, nontherapeutic service, the State is justified in establishing a robust process to obtain documentation to ensure that a Medicaid-paid abortion is truly medically necessary.[2] This is not a privacy or equal protection violation.

Moreover, just like other insurers, HB 544 and the Rule provide a specific definition of what constitutes medically necessary (or therapeutic) abortions. (App. C at 2359; App. E at § 1(3).) This also provides clear guidance on what constitutes

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[1] Furthermore, the Rule and HB 544 recognize that it may not be possible to obtain prior authorization. If prior authorization is not obtained—due to an emergency situation or otherwise—the Medicaid Program will conduct post-service, prepayment review to ensure that the abortion meets the requirements for Medicaid coverage.

[2] This is consistent with other Medicaid-covered services that may be medically necessary in some circumstances, but not medically necessary in others.

elective, nontherapeutic abortion and in what circumstances abortions are or are not covered by Medicaid. Again, this is not a privacy or equal protection violation.

Abortion Providers' argument that HB 544 and the Rule violate equal protection because they only impose requirements on abortions and not other reproductive health services means that Medicaid impermissibly discriminates against them misconstrues *Jeannette R.* and defies common sense. Abortions end a human life, while miscarriage treatment (where fetal demise has already occurred), pregnancy services, and other reproductive health services do not. Additionally, the purpose of the requirements imposed by the definition of medical necessity, prior authorization/prepayment review, supporting documentation, etc., is to ensure that Medicaid-funded abortions are medically necessary (not elective), consistent with the statutory limitations on Medicaid coverage, ensure program integrity, and meet appropriate clinical requirements to ensure the health and safety of Medicaid beneficiaries receiving the abortion. These requirements are rationally related to these important governmental purposes.

Finally, HB 862 constitutes a Montana counterpart of the federal Hyde Amendment, which has withstood court scrutiny. *See, e.g. Harris v. McRae*, 448 U.S. 297, 301 (1980) (upholding the Hyde Amendment and its funding restrictions found to be constitutional and stating that "a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically

necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."). HB 862 is no more restrictive than the federal Hyde Amendment, and therefore does not violate the right to privacy or equal protection.

B. ABORTION PROVIDERS WILL NOT SUFFER IRREPARABLE HARM.

Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("Wright & Miller") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); Wright & Miller at 154–155 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). Typically, monetary harm does not constitute irreparable harm. *L.A. Memorial Coliseum Commn. v. Natl. Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *see also Sampson v. Murray*, 415 U.S. 61, 90, (1974) (temporary loss of income does not usually constitute irreparable injury and the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of

irreparable harm.") While constitutional violations "cannot be adequately remedied through damages," (*Stormans, Inc. v. Seleky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted)), the Legal Provisions do not violate the constitutional rights of Abortion Providers or their patients. Accordingly, Abortion Providers cannot show likelihood of irreparable injury in the absence of a preliminary injunction.

The Legal Provisions address when Medicaid will pay for abortion services. Nothing in the Legal Provisions precludes Abortion Providers from continuing to provide abortion services to Medicaid beneficiaries as they have in the past, to the extent that such services are otherwise legally permissible. The only issue is whether Medicaid will pay for those services. But this is not unique to Abortion Providers—all Medicaid providers run the risk that Medicaid, based on review of a claim by its utilization review contractor, will determine that a service is not medically necessary and either deny payment of the claim or seek recoupment of a previously paid claim. (Doc. 24 at ¶ 50.) If Abortion Providers ultimately succeed on the merits of their claims, an order requiring the payment of their claims for abortion services provided to Medicaid beneficiaries will make them whole.

C. THE OTHER FACTORS FAVOR THE STATE.

The third and fourth factors of the preliminary injunction test—balance of equities and public interest—merge into one inquiry when the government opposes a preliminary injunction. *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021)

(citation omitted). A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20). In assessing whether the plaintiffs have met this burden, courts have a "duty . . . to balance the interests of all parties and weigh the damage to each." See *L.A. Memorial Coliseum Commn.*, 634 F.2d at 1203.

Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (quoting *Stormans, Inc.*, 586 F.3d at 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quotation omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* (citation omitted). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S.

305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

The balance of the equities and the public interest favor the State. The State has the constitutional concern that the laws be faithfully executed. Mont. Const. art. VI, § 4(1). Here, that interest is to ensure Medicaid program integrity by ensuring that Medicaid only pays for health care services that are medically necessary (as required by statute). (Doc. 24 at ¶¶ 26–27.) The State also has an interest in protecting the health, safety, and well-being of Medicaid beneficiaries by imposing conditions on payment of Medicaid services, including medically necessary abortions, to help ensure that the services are high quality. (*Id* at ¶ 25.) Abortion Providers' interests (as distinct from those of their potential patients) amount to their interest in obtaining Medicaid coverage for the abortion services provided to Medicaid beneficiaries—abortions which may or may not meet the reasonable standard for medical necessity (or any reasonable standard for therapeutic abortions) and may, in fact, constitute elective abortions.

Abortion Providers have no legitimate interest in having Medicaid pay them for abortions for Medicaid beneficiaries which are not medically (therapeutically) necessary and do not meet the reasonable health and safety requirements that Medicaid, acting in the best interests of its beneficiaries, has imposed as a condition

for payment. The hearing testimony demonstrates that an objective, legal standard for medical necessity is needed, as medical judgment can vary from provider to provider. Moreover, Abortion Providers have a conflict of interest in making a medical necessity determination because determining an abortion is not medically necessary means Medicaid won't pay them to perform it and—according to them—Medicaid funds may be the only means by which low-income women could afford an abortion. The State has every right, therefore, to regulate this determination to prevent fraud or abuse.

Furthermore, Medicaid beneficiaries do not have the right to have Medicaid pay for any and all abortions without regard to whether they are medically necessary or are performed consistent with conditions designed to ensure their health and safety. Montana taxpayers also have an interest here—that their tax dollars only be spent for services that the Legislature has authorized, especially in light of the highly charged nature of abortion, the fact that abortion results in the taking of the life of a human being, and the fact that only state funds can be used for most Medicaid-covered abortions. The balance of the equities and the public interest in these circumstances favor the State.

III. THE DISTRICT COURT ERRED IN ISSUING A PRELIMINARY INJUNCTION WITHOUT ADEQUATE EVIDENTIARY SUPPORT.

A. THE ORDER WRONGLY STATES THAT THE STATE PRESENTED NO EVIDENCE OF FRAUD OR UNTRUTHFULNESS.

The District Court Order erroneously found that "the State has introduced no evidence that abortion providers in Montana do not make individualized determinations of medical necessity for each Medicaid patient, that they are untruthful in completing the MA–37 forms on which they document medical necessity, or that they engage in Medicaid fraud." (Doc. 62 at 5.) But the State introduced substantial evidence about the very real concerns raised by the independent audit. Lack of documentation submitted with the MA–37 form, based on the DPHHS contractor's review, gave DPHHS significant concern that Medicaid funds were being used to cover nontherapeutic, elective abortions in violation of law. The review showed that MA–37 forms routinely lacked any depth or documentation—and often contained only a vague description no more detailed than describing pregnancy symptoms generally—as the basis for medical necessity. The District Court's finding was wrong—the State did submit evidence, but the District Court failed to weigh the evidence and make an independent judgment.

The State also elicited testimony that at least one of the Abortion Providers is untruthful in completing the MA–37 documenting medical necessity. Importantly, the MA–37 form has always required a physician's signature—this is not a new

requirement imposed by the Legal Provisions. (*See* App. F (instructions state throughout that the form requires a physician's signature).) Abortion Providers' own witness—Plaintiff Helen Weems—testified at the hearing that she is a certified nurse practitioner, not a physician. (Tr., 31:15–17.) Ms. Weems testified she is familiar with the MA–37 form, it is the form she uses, and she completes it truthfully. (*Id.* at 32:15–19; 37:5–11.) However, Ms. Weems testified that she completes and signs the form, even though it requires a physician's signature, and she is not a physician. (*Id.* at 37:12–14.) In other words, Abortion Providers' own witness and a party to this case—a non-physician—admitted to signing the MA–37 forms that require and have always required a physician's signature.

Unauthorized persons signing forms requiring a physician's signature is additional cause for concern justifying closer scrutiny of the use of Medicaid funds. The District Court, however, manifestly abused its discretion by ignoring this clear evidence of Ms. Weems's untruthful representation (signing a form requiring a physician's signature when she is not a physician), instead adopting Abortion Providers' skewed proposed Order. The District Court's findings that the State showed no fraud or untruthfulness is not supported by the evidence.

B. THE ORDER WRONGLY STATES THAT THE STATE HAS NO REASON TO IMPLEMENT A MEDICAL NECESSITY DEFINITION UNIQUE TO ABORTION.

The District Court's Order erroneously found: "The State has offered no medically acknowledged, bona fide health risk that the new definitions address, nor has it offered any reason to implement a definition of medical necessity unique to abortion." (Doc. 62 at 12.) As a preliminary matter, this is the wrong test because the Legal Provisions do not restrict access to or regulate abortion—they simply define the circumstances under which Medicaid will pay for an abortion. This Court has never held that the State needs to demonstrate a medically acknowledged, bona fide health risk in imposing conditions on Medicaid payments for abortions—preserving the integrity of the Medicaid Program, preventing fraud or abuse, and ensure compliance with the law are sufficient State interests.

Additionally, this statement is not supported by the actual witness testimony, which demonstrated that an objective legal standard for "medically necessary" is needed. Indeed, as Abortion Providers' counsel was questioning the State's witness, Dr. Mulcaire-Jones, about the meaning of "medically necessary" at the hearing, the subjectiveness of the term became obvious and problematic:

> Q. In your understanding of the term medically necessary as a medical provider would…a pregnancy that results from rape be medically necessary?
>
> A. So, again, I think that you would have to define medically necessary. Ms. Weems talked about depression and anxiety

resulting from continuing a pregnancy, does that mean it's medically necessary? Do they have chronic renal failure, is that medically necessary? It's such a vague term that it's impossible to answer your question.

Q. So you also don't provide abortions in case where the pregnancy results from incest, is that right?

A. I've never been confronted with that.

Q. So in such a case such an abortion is not—it is your opinion such a abortion is not medically necessary either?

MR. JOHNSON: Objection. He's answered this line of questioning. He said he can't answer it. He said it was impossible.

THE WITNESS: You are asking me to say—

THE COURT: Overruled.

THE WITNESS: —is it medically necessary? Does that mean it's necessary to save a life? I mean, is it affecting an organ system? Again, I can't—is it socially necessary, is it whatever? It's not going to—whether or not she has an abortion or not isn't going to lead to serious harm and the end of her life? So, again, the term medically necessary is hard to respond to.

(Tr., 65:13–66:17.) Contrary to findings of the written Order, Dr. Mulcaire-Jones's testimony underscores the unwieldy situation of not having an objective, legal definition of medically necessary—an issue that the Rule and HB 544 squarely address. The District Court's finding that the State did not offer any reason to implement a definition of medical necessity unique to abortion is directly controverted by the evidence.

C. THE ORDER WRONGLY STATES THAT THERE IS NO MEDICALLY ACKNOWLEDGED BONA FIDE HEALTH REASON FOR RESTRICTING MEDICAID COVERAGE OF ABORTIONS TO PHYSICIANS ONLY.

The District Court's Order wrongly finds: "…that there is no medically acknowledged bona fide health reason for restricting Medicaid coverage of abortions to physicians only." (Doc. 62 at 10.) Not only does this also apply the wrong legal test, but it again ignores the State's evidence. Michael Randol, the Medicaid and Health Services Executive Director for DPHHS, stated in his affidavit:

> Medicaid has ongoing relationships with—and responsibility to—Medicaid beneficiaries, including those pregnant women who choose an abortion. While Medicaid cannot cover abortions that are not medically necessary, if an abortion is medically necessary because of a physical or mental health condition, Medicaid could be responsible for covering the necessary treatment to address the condition.
>
> [. . .]
>
> If a pregnant Medicaid beneficiary experiences adverse effects of a surgical or medication/chemical abortion—whether the adverse effects are physical or psychological and whether they occur immediately or do not manifest themselves for some time after the abortion—Medicaid would be responsible for providing coverage for the necessary physical and/or mental health services to treat or mitigate those adverse effects, as long as the beneficiary remains eligible for such Medicaid services.

(Doc. 24 at ¶¶ 36, 45.) So Medicaid's relationship with the beneficiary is not limited to the abortion. Rather, to the extent a patient remains Medicaid-eligible, Medicaid has an obligation to provide for the health and safety of the beneficiary before and after an abortion, and could be responsible for covering services to treat the underlying health conditions dictating a medically necessary abortion and any

complications thereof. Accordingly, Medicaid is justified in requiring a physician to provide the abortion where Medicaid will cover the abortion, to ensure that the beneficiary is receiving high quality services.

Abortion Providers and the District Court dismissed the physician requirement as a burden on abortion access. But this again conflates abortion access with government funding of the abortion. Abortion Providers do not have a constitutional right to taxpayer funding of abortion. The State can restrict government funding of procedures to ensure the health and safety of Medicaid beneficiaries and the integrity of the Medicaid Program. The District Court's adoption of findings drafted by Abortion Providers that are unsupported by or directly contradict the evidence was error.

CONCLUSION

The District Court erred in enjoining the Legal Provisions. The District Court applied the wrong standard in issuing its oral injunction—maintaining the status quo—instead of evaluating the four-part, conjunctive SB 191 test. The District Court's subsequent written Order—a verbatim adoption of Abortion Providers' proposed Order, without even removing the word "Proposed" in the caption—failed to consider the facts, relied too heavily (exclusively) on Abortion Providers' proposed findings, lacked independent judgment, and did not match the evidence. Additionally, the Court applied the wrong level of scrutiny. De novo review

demonstrates that a preliminary injunction is not appropriate in this case. These many errors mandate reversal of the District Court's preliminary injunction.

DATED this 30th day of October, 2023.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 9,985 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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APPENDIX

Transcript Pages of Oral Ruling ....App. A

[Proposed] Order Granting Plaintiffs'
Motions for Preliminary Injunction (Doc. 62)…………………………………App. B

Proposed Rule Amendment……………………………………………………App. C

Notice of Amendment…………………………………………………………..App. D

House Bill 544 (2023)…………………………………………………..……App. E

House Bill 862 (2023)…………………………………………………………..App. F

Sample MA–37 Form…………………………………………………………..App. G

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