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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

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INTRODUCTION

Abortion Providers seek special exceptions unavailable to other Medicaid participants. Montana law is clear that Medicaid need not cover elective abortions. Thus, the State may justifiably set parameters ensuring compliance with statutes limiting Medicaid coverage to medically necessary services and preserving the Medicaid program's integrity. At the outset, the Legal Provisions do not affect women's constitutional rights; thus, Abortion Providers lack standing and are unlikely to succeed on the merits. Moreover, the Legal Provisions are not subject to strict scrutiny, and easily pass rational basis review. The remaining preliminary injunction factors also require reversal. Finally, this Court should reverse because the District Court failed to exercise independent judgment by denying Defendants the opportunity to present a proposed Order and rubber-stamping Abortion Providers' proposal without proper consideration of the evidence.

ARGUMENT

I. ABORTION PROVIDERS FAILED TO MEET THE PRELIMINARY INJUNCTION STANDARD.

A. ABORTION PROVIDERS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The first factor "is a threshold inquiry and is the most important factor." *Baird v.*

Bonta, 81 F.4th 1036, 1040 (9th Cir. 2023) (citation omitted). The analysis ends if the moving party fails to show a likelihood of success on the merits. *Cty & Cnty. of San Francisco v. U.S.*, 944 F.3d 773, 790 (9th Cir. 2019). Abortion Providers are unlikely to succeed on the merits because they conflate the right to have an abortion with the right to receive Medicaid benefits. The right to receive Medicaid benefits is not a fundamental right; thus, Abortion Providers lack third party standing and their claims cannot succeed.

1. Abortion Providers Lack Third Party Standing.

Abortion Providers do not have third party standing to assert claims on their patients' behalf. Relying on *Weems I*, Abortion Providers claim standing on the basis that the Legal Provisions "impact the constitutional rights of women patients." (Appellees' Br. at 16) (quoting *Weems v. State*, 2019 MT 98, ¶ 12, 395 Mont. 350, 440 P.3d 4) ("*Weems I*") But this is not the case. None of the Legal Provisions are laws or regulations directed at healthcare providers like the statute in *Weems I*.

In *Weems I*, the challenged statute prevented certified nurse practitioners and midwives from seeking licensure to perform abortions, and "preclude[d] the 'appropriate medical examining and licensing authority' from making a determination that they are competent to perform the medical procedures at issue." *Weems I*, ¶ 14 (quoting *Armstrong v. State*, 1999 MT 261, ¶ 14, n.1., 296 Mont. 361, 989 P.2d 264). Conversely, the Legal Provisions directly implicate only Medicaid

reimbursement, by "clarify[ing] the circumstances under which abortion is medically necessary," "mandat[ing] the requirements for Medicaid coverage of abortion services," and creating a state version of the Hyde Amendment. (Appellants' Br. at 8–9.) None of the Legal Provisions prevent any Abortion Provider from obtaining licensure to perform abortions or any woman from obtaining abortion services. This sharply differentiates this case from *Armstrong* and *Weems I.* Thus, the third-party standing rule of those cases does not apply here.

Rather, the appropriate test is this Court's long-settled third-party standing test enumerated in *Baxter Homeowners Assn. v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145. Contrary to Abortion Providers' assertion that the State relies on federal law for its standing argument, the *Baxter* test is a Montana test. It requires a litigant to demonstrate (1) an injury in fact; (2) a close relationship to the third party; and (3) the existence of some hinderance to the third party's ability to protect their own interests. *Baxter*, ¶ 15; *see also Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022).

As to the "injury in fact" element, the only injury Abortion Providers raise is a financial one (Appellees' Br. at 34) (loss of Medicaid coverage for abortions could force All Families to close completely). But this cannot suffice to confer third-party standing. Abortion Providers have no right to rely on taxpayer funds to subsidize their businesses. If they cannot make their businesses profitable, it is not the State's

(taxpayers') responsibility to do that for them. Neither Abortion Providers nor their patients have a fundamental right to Medicaid benefits. *See Timm v. Mont. Dept. of Public Health & Human Servs.*, 2008 MT 126, ¶ 34, 343 Mont. 11, 184 P.3d 994. The "injury in fact" element is not met.

Further, Abortion Providers have not demonstrated facts supporting the "close relationship" or "hinderance" elements. In *Tingley*, a therapist failed to satisfy the "close relationship" element even though he established a bond with minors through counseling. 47 F.4th at 1069. Conversely, Abortion Providers usually only see their patients once. If a counseling relationship doesn't satisfy the "close relationship" factor, then a single interaction doesn't either. Abortion Providers did not even attempt to meet the requirements of this test, relying instead on the inapplicable *Armstrong* test. The *Tingley* Court also found the counselor's claims on the "hinderance" element to be speculative because minors have repeatedly shown a willingness to engage in litigation on their own, sometimes under a pseudonym. *Id*. at 1069–70. Similarly, here, Abortion Providers have made no showing that their patients are hindered from bringing their own claims for Medicaid benefits. Abortion Providers simply can't assert third-party standing here.

Further, third-party standing is not appropriate where there is a potential conflict of interest. *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 9, 15 (2004). A conflict of interest exists because—as Abortion Providers admit—they have a

financial motivation to receive Medicaid reimbursement for abortions. (Appellees' Answer at 34.) Ms. Weems and All Families' motivation is so strong that apparently—without taxpayers funding all abortions she deems medically necessary—Ms. Weems may be forced to close her clinic. (*Id.*) This is exactly the type of conflict of interest in which third-party standing is inappropriate.

Because the Legal Provisions neither inhibit Abortion Providers from obtaining licensure nor prevent women from obtaining abortions, *Armstrong* and *Weems I*'s standing test does not apply. Rather, *Baxter's* test applies, and Abortion Providers have failed to demonstrate that any of its elements are met. They further admit to a financial motivation—a conflict of interest that in any event renders third party standing inappropriate. They therefore lack standing to bring these claims on behalf of their patients and are not likely to succeed on the merits.

2. Strict Scrutiny Does Not Apply To The Legal Provisions.

In reviewing the constitutionality of a law, courts apply one of three levels of scrutiny: strict, middle-tier, or rationality review. *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶¶ 17–19, 302 Mont. 518, 15 P.3d 877. Strict scrutiny applies "when a law affects a suspect class or threatens a fundamental right." *Jaksha*, 2009 MT 263, ¶ 17 (citation and quotations omitted). Middle-tier scrutiny applies "when the law affects a right conferred by the Montana Constitution but is not found in the

Constitution's Declaration of Rights." *Id.* Rational basis review applies "when neither strict nor middle-tier scrutiny applies." *Id.*

The District Court erred in applying strict scrutiny because the Legal Provisions neither implicate nor burden any fundamental right. The District Court improperly conflated the right to terminate a pre-viability pregnancy with whether the State is required to pay for an abortion through Medicaid. Because "there is no fundamental right to receive Medicaid benefits in Montana, nor does any other provision of the Montana Constitution confer such a right," the correct level of scrutiny is rational basis. *Timm*, ¶ 34; *see also Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, *29 (May 22, 1995) ("the state need not fund nontherapeutic elective abortions"); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (states may insist upon a prior showing of medical necessity to ensure public funds are spent only for authorized purposes). The issue has never been restriction of or access to abortion. The issue is whether the State may impose limitations on Medicaid coverage of abortions to ensure compliance with the statutory purposes and limitations of Medicaid. When no constitutional or fundamental rights are implicated, the appropriate level of review is rational basis. *Jaksha*, ¶ 17.

Abortion Providers' equal protection argument also fails as a basis for strict scrutiny. *Maher*, 432 U.S. at 470 (court erred in determining that a State "must accord equal treatment to both abortion and childbirth, and may not evidence a

policy preference by funding only the medical expenses incident to childbirth."); *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("[T]he principal impact of the Hyde Amendment falls on the indigent. But that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification. That *Maher* involved the refusal to fund nontherapeutic abortions, whereas the present case involves the refusal to fund medically necessary abortions, has no bearing on the factors that render a classification 'suspect' within the meaning of the constitutional guarantee of equal protection.").[1] Thus, because the Legislature has neither "invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest." *McRae*, 448 U.S. at 326. The District Court erred in applying strict scrutiny here.

3. The Legal Provisions Survive Rational Basis Review.

The Legal Provisions pass constitutional muster because they are rationally related to legitimate government interests. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 19, 325 Mont. 148, 104 P.3d 445. Montanna "has a police power by which it

[1] The same rationale applies to miscarriage care. Like pregnancy, miscarriage care is qualitatively different in that the unborn child has already experienced fetal demise from natural causes, whereas abortion artificially terminates an unborn child's life. These are not similarly situated classes.

can regulate for the health and safety of its citizens." *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133 (citing *State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1988)). The State's exercise of that power often implicates individual rights. *Id.* (citing *State v. Rathbone*, 110 Mont. 225, 241, 100 P.2d 86, 92 (1940)). However, when no fundamental rights are affected, strict scrutiny review requiring a compelling state interest is not appropriate . *Id.* (citing *Peterson v. Great Falls Sch. Dist. No. 1 & A*, 237 Mont. 376, 380, 773 P.2d 316, 318 (1989)). "Instead, the State need only demonstrate a rational basis for the regulation." *Id.* (citing *Peterson*, 237 Mont. at 380, 773 P.2d at 318).

The State is not required to fund elective, nontherapeutic abortions. *Jeannette R.*, 1995 Mont. Dist. LEXIS at *29. Abortion Providers are essentially asking this Court to bypass the Legislative and Executive branches and unilaterally expand Medicaid benefits to any abortion that Abortion Providers—who have a profit motive to perform them—deem to be medically necessary. (Doc. 24 at ¶¶ 17–21, 23–24.) It is within the sole province of the Legislature—not courts—to determine how to spend public funds. *See, e.g. U.S. Chamber of Comm. v. Brown*, 554 U.S. 60, 79 (2008) (the law gives legislatures broad authority to decide how to spend the people's money because legislatures generally need not fund activities they would prefer not to fund—even where the activities are otherwise protected); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) ("We have held

in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Lyng v. Intl. Union*, 485 U.S. 360, 373 (1988) ("But our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts."); *Maher*, 432 U.S. at 479 ("[W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."). The Rule and HB 544 are rationally related to legitimate government interests of protecting Medicaid program integrity by ensuring that—consistent with statutory limitations—Medicaid only pays for services that are medically necessary; protecting the health and safety of Medicaid beneficiaries; and ensuring that Medicaid does not pay for elective, nontherapeutic abortions. (Doc. 24 at ¶ 27.)

"It 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." *Maher*, 432 U.S. at 480. In *Maher*, Connecticut limited state Medicaid benefits to "medically necessary" first trimester abortions. *Id*. at 466. The District Court held that equal protection "forbids the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth." *Id*. at 468. The District Court proscribed imposing

requirements on Medicaid payments for abortions not equally applicable to Medicaid payments for childbirth. *Id*. at 469 (internal quotations omitted).

The Supreme Court reversed. *Id*. at 481. The Court found that *Roe v. Wade*, 410 U.S. 113 (1973) (like *Armstrong*) implies no limitation on states' to make value judgments favoring childbirth over abortion "and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474. "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth.'" *Id*. at 474 (quoting *Beal v. Doe*, 432 U.S. 438, 446(1977)). "Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Id*. at 479. The Court, therefore, declined to apply strict scrutiny and—based upon Connecticut's rational "interest in encouraging normal childbirth,"—the law survived. *Id*. at 478–80.

The same rationale applies here. Montana has a strong and legitimate interest in encouraging normal childbirth that is "an interest honored over the centuries." *Id.* at 478–79. It has wide latitude in choosing among competing demands for limited public funds. There is no equal protection violation in funding pregnancy-related medical care (including miscarriage care) but not abortion. Abortion is qualitatively different than pregnancy-related care. One results in life, the other in death. One promotes the State's interest in encouraging childbirth, the other thwarts that interest. Those who choose to terminate their pregnancies are not similarly situated

to those who choose to carry their unborn children to term. *Id.* at 469–70. The State is therefore justified in exercising discretion to fund eligible pregnancy-related care to promote its legitimate interest in normal childbirth, while denying coverage for most abortions. This is especially true because abortion is a politically and morally charged issue, and taxpayer dollars should only be spent for services that the Legislature has authorized.

Moreover, if the federal Hyde Amendment is constitutional, HB 862 should be too. *See McRae*, 448 U.S. at 301. In *McRae*, the Supreme Court upheld the Hyde Amendment, finding that it had "a rational relationship to its legitimate interest in protecting the potential life of the fetus." *Id.* at 324. Similar provisions other states have adopted have also survived constitutional scrutiny. *See Williams v. Zbaraz*, 448 U.S. 358, 360 (1980). In *Williams*, an Illinois law more restrictive than HB 862 "prohibit[ed] state medical assistance payments for all abortions except those 'necessary for the preservation of the life of the woman seeking such treatment.'" *Id*. at 360. The District Court found the law unconstitutional, holding that "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." *Id*. at 365 (internal quotations omitted). The Supreme Court reversed, finding that, because the Hyde Amendment was constitutional under rational basis scrutiny, "[i]t follows, for the same reasons, that

that the comparable funding restrictions in the Illinois statute do not violate the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 369.

Abortion Providers, rather than challenge these holdings, contend that the "unduly burdensome" standard of *Roe* cannot compare to *Armstrong*'s high bar for reviewing abortion-related restrictions. (Appellees' Br. at 32–33.) To Abortion Providers, *Armstrong* created an insurmountable standard that any law that even mentions abortion is unconstitutional. But this goes too far. "[I]t does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right." *Wiser*, ¶ 15; *Weems v. State*, 2023 MT 82, ¶ 38, 412 Mont. 132, 529 P.3d 798 ("*Weems II*"). Indeed, *Maher*, *McRae*, and *Williams* show that a very different analysis is required when Medicaid coverage is implicated. States have "wider latitude" in how they choose to expend limited public funds. *Maher*, 432 U.S. at 479. The Legal Provisions survive rational basis review and are therefore constitutional. Thus, Abortion Providers are unlikely to succeed on the merits of their equal protection and privacy claims.

B. THE REMAINING FACTORS DO NOT FAVOR ABORTION PROVIDERS.

1. Abortion Providers Are Not Likely To Suffer Irreparable Harm Absent An Injunction.

Abortion Providers assert that "[t]his Court has long held that 'the loss of a constitutional right constitutes irreparable harm'" (Appellees' Br. at 33), but ignore that "there is no fundamental right to receive Medicaid benefits in Montana." *Timm*,

¶ 34. Abortion Providers 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. Conversely, any time a State is enjoined from effectuating statutes enacted by representatives of its people, it suffers irreparable injury. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (citation omitted).

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 constitute irreparable injury and possibility of compensatory or other corrective relief available in the ordinary course of litigation weighs heavily against irreparable harm). Here, because Abortion Providers can obtain pecuniary redress if they are ultimately successful, they cannot demonstrate irreparable harm.

Further, Abortion Providers assert the physician-only requirement constitutes irreparable harm "because of the low number of physicians providing abortions in Montana." (Appellees' Answer at 34.) But most physicians' choice not to provide abortion services—and abortion providers' business decisions about where to locate their clinics or practices—do not equate to the State burdening access to abortion by requiring a high level of care for Medicaid reimbursement. Any "harm" caused by these business decisions is no consequence of any State action. In fact, Medicaid has

a physician-only requirement for other medical services, even though, according to Montana's Department of Public Health and Human Services ("DPHHS"), 52 of Montana's 56 counties are considered "medically-underserved," and designated as health professional shortage areas.[2] Like other insurers, Medicaid employs a billing code system.[3] Only physicians can utilize certain billing codes, meaning some Medicaid covered services can only be provided by physicians. Abortion Providers are not entitled to a special exception exempting them from the same requirements other providers are subject to in order to receive Medicaid reimbursement.

Additionally, Abortion Providers decry Medicaid's prior authorization requirement because it requires an additional provider visit, adds time, and allegedly harms patients that are rural, disabled, have limited access to transportation, and suffer from partner violence. (Appellees' Br. at 34.)[4] But, like the physician-only requirement, many of these issues apply to every other patient seeking a medical procedure that requires prior authorization for Medicaid coverage.[5] For example,

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[2] *Montana Health Professional Shortage Area (HPSA) Designations*, Montana DPHHS, available at: https://tinyurl.com/4r837v44.

[3] *37.86.105 Physician Services, Reimbursement/General Requirements and Modifiers,* Administrative Rules of Montana (Mar. 1, 2018), available at: https://tinyurl.com/4j7n6w8y.

[4] Abortion Providers ignore that the Rule and HB 544 provide an alternative to prior authorization: if prior authorization is not obtained—due to an emergency or otherwise—a claim for abortion services will undergo post-service, prepayment review. (Doc. 24 at ¶ 30.)

[5] Michael Randol's affidavit includes a non-exhaustive list of such services. (Doc. 24 at ¶ 31.)

Medicaid requires prior authorization for youth mental health services, pharmacy outpatient drugs, physician administered drugs, and all transplant services.[6] Like abortion, many of these services are time-sensitive, but the Administrative Rules of Montana require prior authorization for covered abortions within 3 business days.[7] Patients in need of Medicaid covered services requiring prior authorization must wait, contend with DPHHS staffing shortages (Appellees' Br. at 35, n. 9), and perhaps even see an additional doctor prior to receiving care. But none of those patients—including those in dire need of an organ transplant—get a special exception to this requirement, except abortion patients who get a 3-day waiting period. Prior authorization does not cause irreparable harm.

Lastly, Abortion Providers contend the State's definition of "medical necessity" constitutes irreparable harm because it applies to abortions and not other medical procedures. (*Id*. at 35–36.) This argument directly contravenes *Bailey v. Mont. Dept. of Pub. Health and Human Servs.*, 2015 MT 37, 378 Mont. 162, 343 P.3d 170. "[A] state may 'adopt a definition of medical necessity that places reasonable limits on a physician's discretion,' and therefore is not required to provide coverage for every procedure falling within a mandatory service area."

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[6] *Prior Authorization Information*, Montana DPHHS, available at: https://tinyurl.com/4ksmabbf.

[7] *Montana Administrative Register Notice 37-1024*, Administrative Rules of Montana (Apr. 28, 2023), available at: https://tinyurl.com/586huh6d.

Bailey, ¶ 19 (quoting *Rush v. Parham*, 625 F.2d 1150, 1154 (5th Cir. 1980)). This is because the State has "the discretion granted to [it] by the federal Medicaid statute by defining the term '[m]edically necessary service" within the Montana Medicaid program. *Id.* at ¶ 21 (citing Admin. R. Mont. 37.82.102(18)).

Through the Legal Provisions, the State has placed reasonable limits on what qualifies as a medically necessary abortion to ensure the integrity of the Medicaid program. *Bailey*, ¶ 23 ("Montana law explicitly recognizes the need to address the State's fiscal realities, providing specific funding principles and permitting [DPHHS] to 'set priorities to limit, reduce, or otherwise curtail the amount, scope, or duration of the medical services made available' in accordance with those principles") (quoting Mont. Code Ann. § 53-6-101(12)). In short, the "harms" Abortion Providers allege are no different than requirements for certain other time-sensitive medical treatments and procedures. Many Montanans must travel to receive primary care and specialized care. Those seeking critical care—including transplant services—must also wait for Medicaid approval. Others, as in *Bailey*, cannot obtain coverage for certain procedures that do not meet the definition of medical necessity. These issues are not unique to Abortion Providers (or their patients), and do not rise to the level of irreparable harm.

2. The Balance of Equities And Public Interest Favor The State.

The balance of the equities and the public interest do not favor Abortion Providers. 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). "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." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

Here, the State has an interest in ensuring that Medicaid only pays for healthcare 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 services—including medically necessary abortions—to ensure they are high quality. (*Id*. at ¶ 25.) Abortion providers have no legitimate interest in receiving Medicaid reimbursement for ineligible abortion services, or those that do not meet the reasonable health and safety requirements that Medicaid—acting in the best interests of its beneficiaries—imposes as a condition for payment. Montana taxpayers also have interests at stake—that tax dollars be spent only for legislatively authorized services and prevention of waste, fraud, and abuse. Indeed, disturbing evidence in this case demonstrates the need for the Legal Provisions. Ms. Weems admitted that

although she is not a physician, she signs MA–37 reimbursement forms, in violation of the law. Abortion Providers minimize this by asserting the State should have "updated" the form. (Appellees' Br. at 26–27.) But nothing in *Weems I* or *Weems II* addressed the physician-only requirement for Medicaid-covered abortions, which has always been required. *See Bailey*, ¶ 23. Nothing in those cases required DPHHS to "update" the MA–37 form or to require Medicaid to cover abortions performed by advance practice registered nurses like Ms. Weems rather than physicians. This raises serious concerns that Ms. Weems has violated Medicaid reimbursement requirements and, in addition to other evidence, demonstrates the necessity of the Legal Provisions.[8] The balance of the equities and the public interest favor Defendants.

II. THE DISTRICT COURT'S ORDER LACKED INDEPENDENT JUDGMENT.

The District Court's flawed oral injunction and rubber-stamping of Abortion Providers' proposed order are grounds enough for reversal. The District Court did not alter a single word of Abortion Providers' unsolicited proposed Order. Indeed, the Order was electronically signed, stamped, and filed with the word "[Proposed]" still in the caption. (Doc. 62.) Abortion Providers' attempts to justify the District

[8] *Medicaid Fraud and Abuse*, available at: https://tinyurl.com/5ds23ny4 (examples of Medicaid provider fraud include falsifying timesheets or signatures in providing personal care services).

Court's findings and conclusions are, at best, disingenuous because they wrote them. The District Court—failing to exercise any independent judgment—adopted Abortion Providers' factual findings and legal conclusions verbatim.

Abortion Providers' attempts to save the District Court's application of the incorrect preliminary injunction standard (Appellees' Br. at 41) likewise fall flat. As Defendants have shown, not only was the District Court openly critical of the new preliminary injunction standard, but it also explicitly stated: "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.) The District Court's oral injunction did not even consider the relevant factors of the preliminary injunction test. Thus, the District Court erred.

Abortion Providers minimize this error by arguing that the subsequent written Order controls. (Appellees' Br. at 42.) Even if that were true (and setting aside the very problematic issues attendant to the Order), the oral injunction enjoined the Legal Provisions for almost two months under the wrong standard.[9] Moreover, while Abortion Providers contend wholesale adoption is not always error, (*Id*. at 43–44), it is here: "[E]rror occurs when the court accepts one party's proposed findings of fact without proper consideration of the facts and where there is lack of independent

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[9] The oral injunction was issued May 23, 2023. The District Court did not issue the written "[Proposed]" Order until July 11, 2023. (*See* Doc. 62.)

judgment by the court." *In re Marriage of Barker*, 264 Mont. 110, 118, 870 P.2d 86 (1994) (citing *In re Marriage of Kukes*, 258 Mont. 324, 327, 852 P.2d 655 (1993)). The District Court gave Defendants no opportunity to submit a proposed Order. And the Order made no references or citations to any of Defendants' written submissions, overlooked most of Defendants' stipulated exhibits, ignored testimony from the hearing (citing primarily to Plaintiffs' affidavits, including to statements to which objections were sustained at the hearing). (Appellants' Br. at 18–19.) In short, the Order read like a one-sided, preferential adoption of facts and law—because that's what it was. It was not a thoughtful consideration of arguments taken from the briefing and testimony presented by all parties; it was a rubber-stamped ratification of Abortion Providers' desired outcome so uncritically made that the word "proposed" and the final signature page were glossed over when the Order was stamped and filed. This manifest lack of independent judgment constitutes reversible error.

CONCLUSION

The District Court erred in enjoining the Legal Provisions. It applied the incorrect standard when it issued its oral injunction and failed to exercise independent judgment when it issued its written Order. The District Court improperly conflated the fundamental right to have an abortion with the absence of any fundamental right to Medicaid reimbursement or benefits. The District Court

thus incorrectly subjected the Legal Provisions to strict scrutiny. Further, none of the factors necessary to obtain injunctive relief are met. De novo review demonstrates that a preliminary injunction is not appropriate in this case. These many errors mandate reversal.

DATED this 13th day of March, 2024.

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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 4,804 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendix.

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