IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0040

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; AND HELEN WEEMS, MSN, APRN-FNP, on behalf of themselves, their employees, and their patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services,

Defendants and Appellants.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. DDV-23-592, The Honorable Christopher Abbott, Presiding

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STATEMENT OF THE ISSUES

Defendants-Appellants (collectively the "State") raise the following issues:

1. Did the district court abuse its discretion when it preliminarily enjoined House Bill ("HB") 937 and its implementing rules in the Administrative Rules of Montana ("Mont. Admin. R.") 37.106.3101 to 37.106.3114 relating to licensing and regulating abortion clinics, where the district court used the sliding scale test in *Stensvad v. Newman Ayers Ranch, Inc.*, and the Legislature has abrogated that test in MCA § 27-19-201(4)(b)?

2. Did the district court abuse its discretion by issuing an overbroad preliminary injunction, where it concluded for Plaintiffs' equal protection claim that strict scrutiny applied to all of HB 937 and Mont. Admin. R. 37.106.3101 to 37.106.3114, and it enjoined them in their entirety, even though most provisions—closely mirroring similar requirements imposed on other types of health care facilities—neither directly regulate abortion procedures nor prohibit classes of licensed providers from performing abortions, and the State suffers irreparable harm whenever any of its laws are enjoined?

STATEMENT OF THE CASE

This appeal involves the district court's preliminary injunction of all 2023 Mont. Laws, ch. 492 ("HB 937"), as well as all implementing regulations adopted by the Department of Public Health and Human Services ("DPHHS") and codified

at Mont. Admin. R. 37.106.3101 to 37.106.3114. *See* App. A; Dkt. 68 at 3.[1] The statute and rules relate to the licensure and regulation of abortion clinics. The Governor signed HB 937 into law on May 16, 2023, with an effective date of October 1, 2023. 2023 Mont. Laws ch. 492.

Plaintiffs-Appellees ("Plaintiffs") are two abortion clinics and an abortion provider. *Id.* They filed their original complaint on September 1, 2023, asserting only state constitutional challenges under article II, sections 3, 4, 10, and 17 of the Montana Constitution. Dkt. 1. Plaintiffs simultaneously filed an Application for a Temporary Restraining Order and Preliminary Injunction. Dkt. 6. They argued that with the impending effective date of October 1, "compliance with [HB 937] is impossible" due to a lack of regulations and alleged uncertainty regarding how the law would apply to them. Dkt. 6 at 2.

On September 27, 2023, the district court granted a temporary restraining order. Dkt. 48. The Court based its TRO on the ground that HB 937 prohibited an abortion clinic from operating without a license, and DPHHS had not yet issued regulations to implement the licensure requirement. Dkt. 48 at 3-4.

On October 18, 2023, the parties stipulated to extend the TRO and vacate the hearing on the preliminary injunction. Dkt. 53. This stipulation extended the TRO

[1] "Dkt." cites are to the docket in District Court. Citations to the Appendix are prefaced with "App."

until 60 days after the effective date of the final rules promulgated to implement HB 937. The Court granted the stipulation. Dkt. 54.

On October 7, 2024, Plaintiffs moved for leave to file a First Amended Complaint, Dkt. 57, which was filed on November 4, 2024. App. H; Dkt. 64. Plaintiffs noted that DPHHS issued proposed rules on July 26, 2024 and accepted comments until August 23, 2024. The First Amended Complaint contained the following six claims: violation of right to privacy under Article II, Section 10; violation of right to equal protection of the laws under Article II, Section 4; violation of due process as void for vagueness under Article II, Section 17; violation of right to seek safety, health and happiness under Article II, Section 3; violation of right to individual dignity under Article II, Section 4; and violation of the Montana Administrative Procedure Act, challenging the rules issued by DPHHS. *Id.* at 34-38.

Also on October 7, 2024, Plaintiffs moved for a preliminary injunction and filed a brief in support. App. B, Dkt. 57; App. C, Dkt. 58. The brief sought a preliminary injunction under the sliding scale in *Alliance for The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). App. C, Dkt. 58 at 9. Plaintiffs moved for a preliminary injunction based on violation of their patients' right to privacy, *id.* at 10-15, equal protection, *id.* at 15-17, and vagueness, *id.* at 17-18. The Motion was supported by declarations from Plaintiff Helen Weems, MSN, APRN-FNP, *id.* at 60; Joey Banks, MD, *id.* at 88; and Jennifer Mayo, MD, *id.* at 126.

On October 29, 2024, the State filed its response to the Plaintiffs' Application for Preliminary Injunction. App. D, Dkt. 62. On November 5, 2024, Plaintiffs filed their Reply. App. E, Dkt. 65.

On November 8, 2024, the district court held a hearing on Plaintiffs' request for preliminary injunction. It heard testimony from Tara Wooten, an experienced administrator at DPHHS; received Exhibits A-H into evidence; and heard oral argument from counsel. App. F (Transcript of Hearing).

On November 15, 2024, the district court issued a preliminary injunction of all provisions of HB 937 and all implementing regulations promulgated by DPHHS, Mont. Admin. R. 37.106.3101 to 37.106.3114. App. A, Dkt. 68 at 3, 29. The district court expressly cited the sliding scale test for a preliminary injunction. *Id.* at 13 (citing *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, ¶¶ 23-29, 418 Mont. 378, 557 P.3d 1240). The district court based its likelihood of success on the merits analysis on the equal protection guarantee in article II, section 4 of the Montana Constitution. App. A; Dkt. 68 at 14, 25. It cited the three-step framework of identifying similarly situated classes, determining the appropriate level of scrutiny to apply, and applying that scrutiny. *Id.* at 14-16. The Court described the change in law in HB 937 as requiring "abortion clinics" to be licensed, when they previously were not regulated nor subject to licensure. *Id.* at 16. The Court described the similarly situated groups as licensed healthcare providers who "prescribe

mifepristone or misoprostol, or who perform dilation & evacuation or vacuum aspiration procedures for the purpose of managing spontaneous miscarriages" and those who "prescribe the same drugs and perform the same procedures, but with the purpose of inducing an abortion." *Id.* at 17. Critically, the Court then held that strict scrutiny applied to this classification. *Id.* at 19. Finally, the Court concluded that the law and regulations do not survive strict scrutiny because they do not also apply "to the offices of private doctors and other healthcare professionals where they provide the same procedures for miscarriage management." *Id.* at 22.

The district court also rejected the State's argument that "the Court must review the statute and the regulations individually." *Id.* The Court found irreparable injury from the unequal treatment of similarly situated classes. *Id.* at 26. And it also found that expiration of the TRO is likely to inhibit access to abortion. *Id.* Finally, the Court found the last two factors—balance of the equities and public interest—merge, and the State's interest in enforcing its law is "heavily mitigated when there is a strong showing that the statute infringes on a fundamental right, because 'the government suffers no harm from an injunction that merely ends unconstitutional practices.'" *Id.* at 27.

The State timely appealed the grant of the preliminary injunction. Dkt. 72.

STATEMENT OF THE FACTS

The Governor signed HB 937 into law on May 16, 2023, and it took effect on October 1, 2023. 2023 Mont. Laws ch. 492. HB 937 added a new Part 9 to Chapter 20, Title 50 of the MCA, codified at §§ 50-20-901 to 50-20-904. These sections provide that an abortion clinic is subject to licensure before it may operate or advertise. MCA § 50-20-902(1). That statute also provides items that DPHHS shall include in the application for licensure. MCA § 50-20-902(2). Section 3 of HB 937 directs DPHHS to adopt regulations and license and regulate abortion clinics consistent with those regulations. MCA § 50-20-903. It provides various topics for regulation, including sanitation, staff qualifications, emergency equipment, and medical records. MCA § 50-20-903(2). Section 4 of HB 937 provides that DPHHS shall inspect abortion clinics at least once per year and conduct additional investigations "as needed" to respond to complaints. MCA § 50-20-904. Finally, Section 5 of HB 937 amended MCA § 50-5-101(26)(a) to include "abortion clinics" as defined in § 50-20-901 in the statutory definition of a "health care facility" for purposes of Parts 1 through 3 of Chapter 5 of Title 50, Health and Safety.

Plaintiffs-Appellees ("Plaintiffs") are All Families Healthcare, which provides abortions in this state and has been in operation since 2018; Blue Mountain Clinic, which also provides abortions in this state and has been in operation since 1977; and Helen Weems, MSN, APRN-FNP, who is the owner and sole clinician of

All Families Healthcare. App. A, Dkt. 68 at 5-6. Both All Families Healthcare and Blue Mountain Clinic perform more than five abortions per year, and therefore are subject to licensing and regulation under HB 937. App. A, Dkt. 68 at 5-6.

Defendants-Appellants (collectively the "State") are the State of Montana, the Montana Department of Public Health and Human Services ("DPHHS"), and Charles T. Brereton, in his official capacity as Director of DPHHS. App. A, Dkt. 68 at 3.

STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a preliminary injunction "for manifest abuse of discretion." *Netzer Law Office, P.C. v. State by and Through Knudsen*, 2022 MT 234, ¶ 9, 410 Mont. 513, 520 P.3d 335; *see also Stensvad*, ¶ 8. "A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess the bounds of reason, resulting in a substantial injustice." *Id.* ; *see also Planned Parenthood of Mont. v. State (Planned Parenthood I)*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301. "If the district court's decision on a preliminary injunction was based upon legal conclusions, [this Court] will review those conclusions [for correctness]." *Montanans Against Irresponsible Densification, LLC v. State* (*MAID*), 2024 MT 200, ¶ 8, 418 Mont. 78, 555 P.3d 759.

"A statute is 'presumed constitutional unless it conflicts with the Montana Constitution, in the judgement [*sic*] of the [C]ourt, beyond a reasonable doubt.'" *State v. Akhmedli*, 2023 MT 120, ¶ 3, 412 Mont. 538, 531 P.3d 562 (quoting *Mont. Indep. Living Project v. DOT*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216) (second alteration in original). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 (citations omitted). The party challenging a statute bears the burden of proving that it is unconstitutional. *Id.* (citations omitted).

When interpreting constitutional provisions, this Court applies ordinary rules of statutory construction. *See Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 269, 488 P.3d 548. It first looks at the plain meaning of the constitutional text. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. In doing so, the Court construes the constitutional text as a whole, avoiding isolating specific terms from the context in which they appear. *See Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.

SUMMARY OF THE ARGUMENT

This appeal raises important issues regarding the test for a preliminary injunction and the scope of the right to privacy as applied to pre-viability abortions. "A preliminary injunction is an extraordinary remedy never awarded as of right." *MAID*, ¶ 10 (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). Moreover, not

"every restriction on" abortion "necessarily impermissibly infringe[s] on the right to privacy." *Weems v. State (Weems II)*, 2023 MT 82, ¶ 38, 412 Mont. 132, 529 P.3d 798. Here, the district court made compounding errors that contravened these foundational principles.

First, the district court erroneously used the sliding scale test when granting the preliminary injunction. However, the Legislature has amended the preliminary injunction statute to make clear that Montana courts must consider each of the preliminary injunction factors independently and cannot use a sliding scale. MCA § 27-19-201(4)(b).

Second, the district court issued a grossly overbroad injunction that covered *all* of HB 937 and its implementing regulations, Mont. Admin. R. 37.106.3101 to 37.106.3114. The district court did not analyze whether the specific statutory and regulatory provisions Plaintiffs challenged directly regulate pre-viability abortion procedures or prohibit a category of licensed providers from performing abortions. Instead, the district court erroneously concluded that strict scrutiny applies to any different or additional regulation of abortion providers.[2]

Having found a constitutional violation based on a grossly overbroad application of strict scrutiny, the district court largely based irreparable injury on the

[2] In doing so the District Court's classification disregarded the fact that many of the regulatory requirements at issue here are identical, or substantially similar to, requirements already imposed on other healthcare facilities.

fact that Plaintiffs will be required under HB 937 to seek and obtain a license and comply with the rules issued by DPHHS for abortion clinics. App. A, Dkt. 68 at 25-26. It found that this "disparate treatment" was per se irreparable harm under equal protection. *Id.* The district court then similarly based its analysis of the balance of the equities and public policy (third and fourth injunction factors) on its conclusion that HB 937 and its implementing rules "inflict[] constitutional injury on" Plaintiffs. *Id.* at 27. This failed to give proper weight to the irreparable injury that the State suffers when its democratically enacted laws are enjoined. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

In sum, the district court made multiple, compounding errors that culminated in issuing a blanket injunction of HB 937 and all implementing regulations. This Court must reverse and remand.

ARGUMENT

I. The district court abused its discretion by using the sliding scale test for its preliminary injunction order, in contravention of MCA § 27-19-201.

This Court should vacate the preliminary injunction and remand to the district court to apply the correct standard codified in MCA § 27-19-201. After amendment earlier this year to clarify the Legislature's intent, that statute requires movants to establish each of the four elements for a preliminary injunction before a district court may grant relief. MCA § 27-19-201(1), (4)(b). And as explained below, this change

in the law applies to the preliminary injunction in this case, even if such application could be considered retroactive. It is therefore appropriate for this Court to remand to the district court to conduct the required analysis. *See, e.g.*, *Utah v. Su*, 109 F.4th 313, 320 (5th Cir. 2024) (remanding after change in law for district court to evaluate question first and stating "appellate courts generally sit as courts 'of review, not first view'").[3]

A. The State preserved the issue by objecting to the sliding scale test in the district court.

Over the State's opposition, the district court's Order (Dkt. 68 at 13) expressly cited the "sliding scale approach" articulated by the Ninth Circuit in *Alliance for the Wild Rockies*, 632 F.3d 1127, and adopted by this Court in *Stensvad v. Newman Ayers Ranch, Inc.*, 2024 MT 246, ¶ 23-29, 418 Mont. 378, 557 P.3d 1240. Critically, under that approach, "the applicant … need not strictly show an absolute likelihood of success on the merits, provided they make a sufficiently strong showing that the equities favor an injunction." App. A; Dkt. 68 at 13. Instead, raising "serious questions going to the merits" can be sufficient to meet the test's first element. *Id.*

The issue of a sliding scale was preserved below. The State opposed any sliding scale approach in its Opposition to Preliminary Injunction. App. D, Dkt. 62

[3] Vacating and remanding is also required based on the District Court's erroneous application of strict scrutiny and overbroad injunction. *See* Part II, *infra*.

at 4 n.1.[4] In reply, Plaintiffs cited to *Stensvad* and expressly argued that they had "certainly demonstrat[ed] 'serious questions' going to the merits." App. E, Dkt. 65 at 4. Ultimately, the district court followed the *Stensvad* sliding scale test over the State's objection. App. A; Dkt. 68 at 13.

B. The Legislature's 2025 amendment has abrogated or clarified that Montana law prohibits the sliding scale test.

The district court's Order does not comply with Montana law because the Legislature has abrogated the sliding scale test. On March 25, 2025, the Governor signed HB 409, which contained express legislative findings that "the use of the serious questions test or any other sliding scale test is contrary to the legislative intent expressed in section 27-19-201." 2025 Mont. Laws ch. 20.

The Legislature also amended § 27-19-201 to add a new subsection 4(b) that states, "[w]hen conducting the preliminary injunction analysis, the court shall examine the four criteria in subsection (1) independently. The court may not use a sliding scale test, the serious questions test, flexible interplay, or another federal circuit modification to the criteria." That express language abrogates this Court's prior preliminary injunction standard interpretation in *Stensvad*. *See State v. Daniels*,

[4] The State's Opposition was filed the same day as *Stensvad* was issued by this Court. A few weeks before *Stensvad*, this Court cited to the *Alliance for the Wild Rockies* sliding scale test in *Planned Parenthood of Mont. v. State* (*Planned Parenthood IV*), 2024 MT 228, ¶ 13, 418 Mont. 253, 557 P.3d 440, and *Planned Parenthood of Mont. v. State* (*Planned Parenthood III*), 2024 MT 227, ¶ 31, 418 Mont. 226, 557 P.3d 471.

2011 MT 278, ¶ 14, 362 Mont. 426, 265 P.3d 623 (recognizing that enactment of legislation "effectively abrogated" prior cases on "the burden of proof for the defense of justifiable use of force").

Here, the State objected to the sliding scale test and its appeal of the preliminary injunction was pending when the 2025 amendment to § 27-19-201 took effect. It is therefore appropriate to apply this amendment and vacate the preliminary injunction that is based on an incorrect legal standard. See *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 17, 388 Mont. 1, 397 P.3d 1 ("[W]e have repeatedly held that '[a]lthough the general rule of law is that a statute is not to be applied retroactively, an exception to that rule is a change in a law that is merely procedural rather than substantive.'" (citations omitted)). And the *City of Helena* court explained that "chang[ing] the burden of proof … create[s] a procedural change." *Id.* ¶ 18. That holds true here where the Legislature has made clear in § 27-19-201(4)(b) what the burden of proof is to obtain a preliminary injunction. Similarly, in *Dempsey v. Allstate Insurance Co.*, this Court held that a judicial decision applied retroactively to all non-final civil cases. 2004 MT 391, ¶ 10, 325 Mont. 207, 104 P.3d 483. The Court stated that "limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their

claims. Interests of fairness are not served by drawing such a line, nor are interests of finality." *Id.* ¶ 28.[5]

C. Montana law requires a movant to "establish [] the likelihood of each element" independently for a preliminary injunction.

Whether interpreting the 2025 amendment as abrogating *Stensvad*, or clarifying the law since 2023, this Court must now adopt the straightforward interpretation of § 27-19-201 that is consistent with the Fourth and Tenth Circuits' approaches, and that was advocated by Justice Rice in his special concurrence in *Stensvad*.

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[5] In the alternative, this Court should hold the 2025 amendment also clarified that § 27-19-201 has not permitted a sliding scale test for a preliminary injunction since 2003. There is a well-established canon of construction that an amendment may "*clarif[y]* the meaning of the prior language, to the extent the former provision was ambiguous and leading to conflicting results in the courts." *McCoy v. Chase Manhattan Bank, USA*, 654 F.3d 971, 974 (9th Cir. 2011) (citing 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction,* § 22.31 (7th ed. 2011)).

Here, the Legislature provided in 2023 that that the elements for a preliminary injunction should "mirror the federal preliminary injunction standard" and "closely follow United States supreme court case law." 2023 Mont. Laws ch. 43. In *Stensvad*, this Court found an ambiguity regarding that language based the fact that different federal circuits had adopted different tests, and this Court followed the Ninth Circuit test. However, only months earlier, this Court in *MAID* adopted a much more straightforward, textual reading of § 27-19-201. *MAID*, ¶ 12. The 2025 amendment to § 27-19-201 can therefore be interpreted as a prompt clarification that, consistent with the U.S. Supreme Court precedent, the Legislature has intended (since 2023) that the movant must establish a likelihood for each of the four elements independently and not based on a sliding scale. *See* MCA § 27-19-201(4)(b).

In *Stensvad*, the majority recognized that the U.S. Supreme Court's "most recent definitive ruling on the federal preliminary injunction standard was *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)." *Stensvad*, ¶ 11. However, the *Stensvad* majority found ambiguity in what the Legislature meant in § 27-19-201(4) due to "a diverse landscape of approaches to equitable relief." *Id.* at ¶ 12; *see also id.* at ¶ 17 ("*Winter* … neither addressed nor explicitly overruled the various sliding scale approaches."). After reviewing various federal circuits' approaches, the *Stensvad* Court approved of the Ninth Circuit's approach in *Alliance for the Wild Rockies*, and held that "the serious questions test is the most appropriate means of applying the federal preliminary injunction standard." *Stensvad*, ¶ 25.

This Court must now adopt a much simpler, text-based interpretation: "the applicant for an injunction bears the burden of establishing *the likelihood of each element*: success on the merits; irreparable harm; balance of equities; and public interest." *MAID*, ¶ 12 (emphasis added).

Under the revised preliminary injunction standard statute, this Court should follow the lead of the Fourth and Tenth Circuits, as that approach was outlined in *Stensvad* at ¶¶18-19. For example, in the Fourth Circuit "the movant must show more than a 'grave or serious question for litigation'; instead, the moving party bears the 'heavy burden' of making a 'clear showing' that he satisfies all four factors." *Roswell v. Mayor*, 671 F. Supp. 3d 607, 616 (D. Md. 2023) (citing *Real Truth About*

Obama, Inc. v. FEC, 575 F.3d 342, 345–47 (4th Cir. 2009)), *aff'd*, No. 23-1567, 2023 WL 8728503 (4th Cir. Dec. 19, 2023).[6]

Similarly, the Tenth Circuit "held … that although *Winter* 'dealt with a different prong of the preliminary injunction test' than likelihood of success, its reasoning meant that 'any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.'" *Stensvad*, ¶ 19 (quoting *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016)).[7]

Justice Rice's special concurrence in *Stensvad* similarly emphasized key points about the statutory language of § 27-19-201(4) and the U.S. Supreme Court's jurisprudence in *Winter*. Justice Rice wrote:

> The Legislature adopted an exact re-statement of the *Winter* factors for the new statute. Section 27-19-201, MCA (2023). In applying those factors, the Legislature expressly required that courts are to "closely follow" U.S. Supreme Court case law. Section 27-19-201(4), MCA. The four-part *Winter* test provided by the U.S. Supreme Court is a straightforward test that has been applied consistently by the Supreme Court for many years, as set forth above. In its cases, the Supreme Court does not apply sliding scales or impose additional tests upon factors or

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[6] *See also Glob. Consulting USA LLC v. Pinnacle Risk Eng'g, LLC*, No. 2:24-CV-04919-DCN, 2025 WL 329664, at *3 n.4 (D.S.C. Jan. 29, 2025) ("[T]he Fourth Circuit determined in *Real Truth* that … *Winter* required abandoning the balance-of-hardship test …. The *Winter* requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the merits is far stricter than the … requirement that the plaintiff demonstrate only a grave or serious *question* for litigation....").

[7] *See also Schiermeyer on Behalf of Blockchain Game Partners, Inc. v. Thurston*, 746 F. Supp. 3d 1188, 1193 n.1 (D. Utah 2024) (under *Diné Citizens*, "a moving party 'must show he is likely to succeed on the merits' of his underlying claims").

> require additional inquiries or employ approaches that may be used by the federal circuits or other courts.

Stensvad, ¶ 45 (Rice, J., specially concurring). Justice Rice's formulation also gives effect to the word "likely" in § 27-19-201(1).

Another key point is that the district court must confine itself to the record before it and existing law. Here, the district court indicated that part of its reasoning was that the future constitutional initiative, CI-128, will be part of the constitution in the future and it "informs the Cout's assessment of the Providers' showing of a likelihood of success on the merits." App. A, Dkt. 68 at 5 n.4. The assumption that the future constitutional amendment would change or "inform" likelihood of success on the merits was purely speculative at the time of the preliminary injunction, including for the reasons pointed out in this brief. *See* note 8, *infra*. Nor should a district court predict other facts or developments that are not part of the record before it. It should closely adhere to the existing pleadings and law when determining likelihood of success on the merits. This Court should therefore make clear that district court's should not speculate about changes in the law (whether constitutional, statutory, or decisional), but rather should only find a likelihood of success if such a likelihood exists based on current law.

Given the clear language, this Court must hold that under § 27-19-201(1), a movant must establish each element of the preliminary injunction, and district courts cannot use a sliding scale analysis. As a court of "review, not first view," this Court

should vacate the preliminary injunction in this case and remand to the district court for further analysis. *Su*, 109 F.4th at 320.

II. The district court also abused its discretion by granting a grossly overbroad injunction.

The district court also made serious errors resulting in a grossly overbroad injunction that struck the entirety of HB 937 and its implementing regulations. First, the district court adopted an equal protection analysis that goes beyond all previous holdings of this Court and created an effective fundamental constitutional right for *abortion providers* to carry out their profession without any different or additional regulations by the State. Second, the district court largely ignored the requirement of establishing irreparable injury specific to each enjoined law and regulation and instead enjoined all challenged laws and regulations *en masse*. The district court similarly failed to give proper weight to the State's irreparable injury from having its laws enjoined. Given these errors, this Court should provide instructions to the district court to guide its analysis on remand.

A. The district court erroneously created a fundamental right for abortion providers to carry out their profession free from any regulation, unless the State meets strict scrutiny.

The district court impermissibly created a new fundamental right to support strict scrutiny for its equal protection analysis—the fundamental right for abortion providers to be free from any different or additional regulation. Under Montana law, the fundamental right at issue here is the right of privacy, which has been interpreted

to include women seeking pre-viability abortions from the licensed provider of their choice. This Court has recognized, however, that not "every restriction on" abortion "necessarily impermissibly infringe[s] on the right to privacy." *Weems II*, ¶ 38. And even Plaintiffs' own brief correctly proposed applying rational basis scrutiny under equal protection to regulations that affected their operations but did not impinge on the right of privacy held by women. App. C, Dkt. 58 at 16; *see also Wiser v. State*, 2006 MT 20, ¶¶ 20-25, 331 Mont. 28, 129 P.3d 133 (disagreeing with contention that "the right to obtain medical care free of regulation is a fundamental right" or that providers "have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare"). However, the district court eradicated that distinction and created a freestanding fundamental right for a different person (the abortion provider) that is unsupported by Montana law. This Court must reverse.[8]

[8] Even the recently adopted constitutional amendment, CI-128, describes the right as the right of the woman, grounded in the "right to make and carry out decisions about one's own pregnancy." https://archive.legmt.gov/content/Committees/Interim/2023-2024/Senate-Select-Committee-on-Judicial-Oversight-Reform/Meetings/24061213-June-2024/1-CI-128-Ballot-Language.pdf. Therefore, the distinction between the woman's rights and the provider's rights is of ongoing relevance to Montana constitutional law.

1. Laws only implicate the fundamental right to privacy when they directly regulate pre-viability abortion procedures or prohibit a category of licensed providers from providing abortions.

In multiple relevant abortion decisions starting with *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, this Court has held the fundamental right to privacy is implicated when the State directly regulates a pre-viability abortion procedure itself or prohibits a category of licensed providers from performing such procedures. If such a burden is established, then strict scrutiny can apply based on infringement of the right to privacy, violation of equal protection based on a fundamental right, or unconstitutional conditions. In contrast, none of this Court's cases has taken the illogical leap to hold that any different or additional regulation of abortion providers automatically burdens the fundamental right of privacy of the abortion provider's patients. Such a leap defies common sense, and as noted above, this Court stated the exact opposite in *Weems II*.

This Court has issued at least seven relevant opinions in abortion cases starting with *Armstrong*, and reviewing the laws at issue in those cases shows that the above is an accurate statement of this Court's holdings. It is also consistent with the application of the right to privacy to pre-viability abortions that was articulated in *Armstrong*, which described the privacy right at issue as "the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference," and "the right to

seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Armstrong*, ¶ 14. That articulation of the right to privacy covers laws directly regulating an abortion procedure itself or prohibiting a category of licensed providers; it does not cover any different or additional regulation of abortion providers.[9]

a. Laws directly regulating pre-viability abortion procedures

Four cases, all brought by Planned Parenthood of Montana, have involved laws that directly regulate abortion procedures themselves, including informed consent for such procedures, which is closely intertwined with both the procedure itself and personal autonomy to seek such procedures—the very privacy principles articulated in *Armstrong*. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 585 (5th Cir. 2012) (Higginbotham, J., concurring) (noting "[t]he doctor-patient relationship has long been conducted within the constraints of informed consent to the risks of medical procedures" and this "doctrine itself rests on settled principles of personal autonomy").

[9] Some of cases discussed herein involved affirming a preliminary injunction under a deferential standard of review. Nothing in this discussion should be construed as the State conceding those cases were correctly decided. Instead, the sole purpose of this discussion is to show how the instant preliminary injunction incorrectly creates a right to privacy that is unsupported by any prior decision of this Court.

First, *Planned Parenthood I* involved a law that restricted abortions performed after 20 weeks, regulated tele-health services for abortions, and required informed consent. *Planned Parenthood I*, ¶ 3. All these provisions concern the direct regulation of the abortion procedure itself. Planned Parenthood also challenged a reporting requirement but that was based on a literal privacy concern—that the identity of a woman who seeks or obtains an abortion procedure could be improperly disclosed.[10]

Planned Parenthood of Mont. v. State (*Planned Parenthood II*), 2024 MT 178, ¶ 1, 417 Mont. 457, 554 P.3d 153, *petition for cert. filed* No. 24-745 (U.S. Jan. 14, 2025), involved a law regulating parental notice and consent for abortions, and it thus involved informed consent and literal privacy concerns. This Court reiterated *Weems II*'s statement that "[n]ot every restriction on the provision of medical care impermissibly infringes on the right to privacy." *Id.* ¶ 23.

Planned Parenthood III involved statutes that prohibited dilation and evacuation (D&E) abortions, prohibited abortions after viability unless necessary to preserve the life of the mother, and effectively required an ultrasound prior to abortion. *Planned Parenthood III*, ¶¶ 5-6. All these laws directly relate to the abortion procedure itself.

[10] The credentialing requirement at issue in this case is discussed in the next subsection Part II(A)(1)(b), *infra*.

Finally, *Planned Parenthood IV* involved the funding of abortion procedures. ¶ 1. The district court there found those funding provisions actually placed "restrictions that will prevent pregnant Medicaid patients who decide to terminate their pregnancies from accessing those medically necessary abortions." *Id.* ¶ 31.

b. Laws prohibiting categories of licensed providers from providing abortions

The three other opinions involved prohibitions on categories of licensed providers performing abortions. In *Armstrong*, the Court addressed a challenge by a licensed physician assistants-certified (PA-C) to a law that prohibited the performance of pre-viability abortions by anyone other than a licensed physician. In affirming a preliminary injunction, this Court discussed a "health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so." *Armstrong*, ¶ 62; *see also Wiser*, ¶ 16, ("*Armstrong* did not hold that there is a right to see a health care provider who is not licensed to provide the services desired.").

Similarly, *Weems v. State (Weems I)*, 2019 MT 98, ¶ 1, 395 Mont. 350, 353, 440 P.3d 4, 6, affirmed a preliminary injunction of the prohibition on licensed nurse practitioners and certified nurse midwives, as advance practice registered nurses, from performing pre-viability abortions. *Weems II* affirmed this on final judgment. This Court emphasized that not "every restriction on" abortion "necessarily impermissibly infringe[s] on the right to privacy." *Id.* ¶ 38. It also explained why

there was an actual burden here: "limiting the pool of qualified abortion providers would significantly interfere with a patient's right of privacy because of significant cost and travel required to access a provider." *Id.* ¶ 50.

Finally, *Planned Parenthood I* (discussed above) also involved a credentialing requirement in HB 171. ¶ 12. The preliminary injunction as to that requirement was upheld based on expert testimony that it would prohibit multiple categories of licensed providers from performing procedures. *Id.* ¶ 44 ("Providers' expert opined that *no* single provider could be credentialed in handling all the purported complications HB 171 identifies, and the district court appears to have found that opinion credible." (emphasis added)). It thus fits squarely within the category of laws that prohibit licensed providers for purposes of strict scrutiny.

* * *

In sum, none of the above cases involves holding that every regulation of abortion providers triggers strict scrutiny. And this Court should not extend the right to privacy to cover every such regulation because it would fundamentally shift the right at issue, contravene this Court's prior statement in *Weems II*, and impermissibly limit the police power of the State to enact health and safety regulations.

2. Here, the district court automatically concluded that *every* regulation of an abortion provider rises to the level of a burden on the fundamental right to privacy.

Given the above discussion, the district court's legal error is straightforward: it concluded that every regulation of abortion providers that was different than for non-abortion providers implicated a fundamental right and therefore triggered strict scrutiny. *See* App. A; Dkt. 68 at 19-21. However, the vast majority of provisions in HB 937 and its implementing regulations do not involve the direct regulation of abortion procedures themselves or prohibit a category of providers. They are thus not subject to strict scrutiny, but only the rational-basis test. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 35, 366 Mont. 224, 286 P.3d 1161.

HB 937 added §§ 50-20-901 to 50-20-904 to Chapter 20 of Title 50, MCA, which center on the new licensed entity of an "abortion clinic." MCA § 50-20-901(1)(a). Those four sections consist of 1) a definitions section, 2) a section on licensure of abortion clinics, 3) a section on regulation of abortion clinics, and 4) a section on inspections. As to licensure, the statute first requires that a person who operates or advertises an abortion clinic must be licensed by the DPHHS. The permissibility of requiring licensure itself is consistent with express statements of all prior cases from this Court related to abortion. *See* Part II(A)(1)(b), *supra* (discussing *Armstrong*, *Weems,* and *Wiser*). Second, the licensure application does

not directly regulate the abortion procedure. *See* MCA § 50-20-902(2)-(3).[11] Plaintiffs also challenged the term "reputable and responsible character," but in a pre-enforcement challenge they have made no showing that this term is unconstitutional, despite other health care licensing provisions using similar terms,[12] and DPHHS's interpretation explanation. Section 50-20-903 relates to regulation of abortion clinics, and it covers such topics for clinics as sanitation, staff qualifications, emergency equipment, emergency care, quality assurance, infection control, architecture of the clinic, and operating policies. None of these categories relate to directly regulating the abortion procedures themselves or prohibiting categories of providers. Only a few categories in § 50-20-903 *could* be read as directly regulating abortion procedures, such as those related to monitoring patients after anesthesia and follow-up care for complications. Section 50-20-904 simply provides for DPHHS inspections of abortion clinics, including based on receiving a complaint. Finally, HB 937 adds "abortion clinics" as defined in § 50-20-901 to the definition of a "health care facility" in § 50-5-101. In sum, almost none of the

[11] Even if the term "medical practitioner" in § 50-20-902(2)(d) could be read as a requirement for a clinic to have a medical doctor or physician assistant-certified, and not a licensed nurse practitioner, *see* MCA § 50-20-109, that reading only shows the overbreadth of the District Court's injunction here in applying strict scrutiny to every provision.

[12] *See, e.g.,* MCA §§ 50-5-117 ("personal character"); 50-5-207 ("evidence of character traits inimical to the health and safety of patients or residents"); 50-37-104 ("good moral character"); 52-3-204 ("reputable persons").

statutory scheme triggers strict scrutiny because it does not directly regulate a pre-viability abortion procedure itself or prohibit a category of licensed providers from performing such procedures.

Pursuant to HB 937, DPHHS also issued regulations, and those regulations largely do not trigger strict scrutiny because they do not directly regulate an abortion procedure itself or prohibit a category of licensed provider. The regulations are codified in fourteen subchapters—37.106.3101 to 37.106.3114. At the preliminary injunction hearing, the State introduced a demonstrative exhibit that shows what each subchapter generally covers and where in Montana healthcare facility regulations, or, rarely, other states' provisions, these regulations were derived. App. G at 120-121. Rule 37.106.3101 does not require anything and simply identifies the purpose of the regulations as well as permitting waiver in some circumstances ("if not necessary in light of the scope of, and any gestational limits on, the abortions to be provided or performed"). Rule 37.106.3102 relates to licensing and generally tracks MCA § 50-20-902(2)-(3). The contents of the application do not directly regulate abortion procedures themselves. Rule 37.106.3103 addresses physical plant standards; it does not directly regulate abortion procedures, and subsection 7 expressly permits waiver in some circumstances. Rule 37.106.3104 addresses policies and procedures. Only limited subsections could even be read as regulating the abortion procedures themselves, such as policies regarding anesthesia. Rule

37.106.3106 relates to staff files, and this does not regulate the abortion procedure itself or prohibit a category or provider. Rule 37.106.3108 relates to sanitation. Rule 37.106.3111 relates to quality assurance. Rule 37.106.3112 relates to infection prevention and control. Rule 37.106.3113 relates to safety, and Rule 37.106.3114 relates to emergency preparedness. Out of the fourteen rules, these ten rules (with very narrow potential exceptions) do not relate to directly regulating abortion procedures themselves or excluding a category of providers. Yet the district court did not analyze the provisions specifically or apply the appropriate level of scrutiny.

While the State strongly disagrees, four subchapters could conceivably be interpreted as involving regulation of procedures or exclusion of categories of providers—but only absent a Rule 37.106.3101 waiver. Rule 37.106.3105 relates to the medical director of the clinic. But this subchapter neither regulates the abortion procedures themselves nor limits the categories of providers who can perform abortions at the clinic. Rule 37.106.3107 relates to patient files; Rule 37.106.3109 relates to emergency procedures; and Rule 37.106.3110 relates to anesthesia. Similarly, these rules do not regulate or limit the procedures or who can perform abortions. But even as to these, the district court failed to analyze specific provisions before applying strict scrutiny to every regulation.

In sum, the district court applied strict scrutiny to every statutory and regulatory provision at issue, which resulted in it issuing a grossly overbroad injunction.

B. The district court did not find irreparable injury specific to each enjoined law and regulation and failed to give proper weight to the State's injury from having its laws enjoined.

The district court gave short shrift to the other requirements for a preliminary injunction because it effectively relied on its conclusion that all the provisions of HB 937 and its implementing rules failed strict scrutiny to find an irreparable injury of "disparate treatment" and that the balance of equities and public policy favored an injunction. App. A, Dkt. 68, at 25-28.

The district court should have evaluated whether each of the provisions it enjoined were *likely* to cause irreparable injury to Plaintiffs. MCA § 27-19-201(1)(b) (requiring that the applicant to show it is "likely to suffer irreparable harm in the absence of preliminary relief); *Winter*, 555 U.S. at 22 (the applicant must "demonstrate that the irreparable injury is *likely* in the absence of an injunction"); *Stensvad*, ¶ 24 (recognizing that "*Winter* cabined a court's flexibility with regard to the irreparable harm finding to more than a possibility of harm"); *MAID*, ¶ 15 ("Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely, not merely speculative, in the absence of an injunction.").

In contrast to this binding authority, the district court did not find a likelihood of irreparable injury for each provision enjoined. Instead, it primarily based its finding on the fact that Plaintiffs had not yet received licenses from DPHHS. App. A, Dkt. 68, at 25. It then reasoned that even if Plaintiffs received licenses, they would be subject to different or additional regulation, which will result in "disparate treatment under the law." *Id.* at 25-26. The only provisions that the district court found were actually likely to injure Plaintiff were the provisions "requiring physician involvement or medical testing." *Id.* at 26. The district court also mentioned physical plant requirements, but it failed to give sufficient weight to the fact that the regulations expressly provide authority for DPHHS to grant waivers. *Id.*

As a result of this deeply flawed analysis, the district court has excused Plaintiffs from even attempting to obtain a license under MCA §§ 50-20-902 to 50-20-903 or comply with any of the rules in Mont. Admin. R. 37.106.3101 to 37.106.3114 for the entire pendency of this litigation. Because of its erroneous "disparate treatment" analysis, which directly flows from its erroneous conclusion that any different or additional regulation of abortion providers triggers strict scrutiny, *see* Part I, *supra*, the preliminary injunction contains no requirement that Plaintiffs even continue attempting to get licensed; comply with any regulations that they could feasibly comply with; or be subject to the inspection provisions of HB 937.

Finally, the district court's treatment of the balance of the equities and public interest factors similarly failed to give proper weight to the injury to the State from enjoining its laws and regulations. In *Maryland v. King*, Chief Justice Roberts recognized that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." 567 U.S. at 1303 (Roberts, C.J., in chambers). This is important because laws are enacted through a democratic process, but injunctions of democratically enacted laws are anti-democratic. And the district court's reasoning on these factors again heavily relied on its flawed "disparate treatment" conclusion. App. A, Dkt. 68 at 27-28. Thus, it effectively used its erroneous analysis of the scope of the right to privacy to satisfy these two injunctive factors.

This Court should provide instructions to the district court on remand that the "disparate treatment" conclusion is flawed, the scope of the preliminary injunction must be limited to those provisions that it actually finds are likely to result in irreparable injury, and the Court must give proper weight to the State's injury from having its laws enjoined.

CONCLUSION

For the foregoing reasons, the district court's order granting preliminary injunction should be vacated and remanded.

DATED this 9th day of April 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,499 words, excluding certificate of service and certificate of compliance.

/s/ Michael D. Russell
Michael D. Russell

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0040

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; AND HELEN WEEMS, MSN, APRN-FNP, on behalf of themselves, their employees, and their patients,

Plaintiffs and Appellees,

v.

STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services,

Defendants and Appellants.

APPENDICES

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