

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**No. DA 25-0602**

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PLANNED PARENTHOOD OF MONTANA; ALL FAMILIES HEALTHCARE;  
BLUE MOUNTAIN CLINIC; SAMUEL DICKMAN, M.D.; and HELEN WEEMS,  
APRN-FNP, on behalf of themselves and their patients,

*Plaintiffs, Appellees, and Cross-Appellants;*

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, Appellants, and Cross-Appellees.*

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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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**APPELLEES' ANSWER BRIEF AND  
OPENING BRIEF IN SUPPORT OF CROSS-APPEAL**

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## INTRODUCTION

As this Court has consistently held for more than two decades, the State cannot restrict Montanans’ right to abortion unless doing so addresses “a medically-acknowledged, bona fide health risk, clearly and convincingly demonstrated.” *Planned Parenthood of Mont. v. State*, 2024 MT 228, ¶ 23, 418 Mont. 253, 557 P.3d 440 (“*PPMT V*”)<sup>1</sup> (plurality opinion) (alteration omitted) (quoting *Armstrong v. State*, 1999 MT 261, ¶ 62, 296 Mont. 361, 989 P.2d 364); *id.* ¶ 56 (Baker, J., specially concurring) (“join[ing] the Court’s analysis of the privacy claims”); *see also Weems v. State*, 2023 MT 82, ¶ 37, 412 Mont. 132, 529 P.3d 798 (“*Weems II*”) (recognizing that “*Armstrong* unequivocally established” this standard). That precedent protects Medicaid patients, just as it protects all other Montanans—a point this Court underscored when it held, at the preliminary injunction stage, that the restrictions at issue here are subject to strict scrutiny review. *PPMT V*, ¶¶ 23–24 (plurality opinion), 56 (Baker, J., specially concurring).

Defendant-Appellants (collectively, the “State”) now ask this Court to revisit that holding. The Court should decline. The State’s opening brief does not even attempt to argue that the restrictions on Medicaid patients’ access to abortion satisfy strict scrutiny—the standard this Court has consistently applied to abortion

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<sup>1</sup> Appellees erroneously labeled the prior opinion in this case as “*PPMT IV*” below. As set forth *infra* p. 18, n. 5, that prior opinion should be “*PPMT V*.”

restrictions for a quarter century. That silence is unsurprising: the State’s summary judgment briefing below contained no statement of facts and not a single citation to the factual record, leaving no evidentiary foundation for such an argument on appeal. Having forfeited any argument that the restrictions address a medically-acknowledged, bona fide health risk, the State pivots back to a theory this Court rejected at the preliminary-injunction stage: that because the restrictions relate to Medicaid funding, they escape strict scrutiny. The State invokes separation of powers, casts the restrictions as mere “funding decisions,” and urges this court to follow *Harris v. McRae*, 448 U.S. 297 (1980). The Court should reject these arguments, as it did in *PPMT V*.

The district court correctly entered judgment in favor of Plaintiffs-Appellees Planned Parenthood of Montana (“PPMT”); All Families Healthcare; Blue Mountain Clinic; Samuel Dickman, M.D.; and Helen Weems, APRN-FNP (collectively, “Providers”) and permanently enjoined (1) the rule adopted by Defendant-Appellant Montana Department of Public Health and Human Services (“DPHHS”) at Montana Administrative Register Notice 37-1024 amending Mont. Admin. R. 37.82.102 and 37.86.104 (“the Rule”), (2) 2023 House Bill 544 (“HB 544”), and (3) 2023 House Bill 862 (“HB 862”) (collectively, the “Restrictions”). This Court should affirm.

Providers cross-appeal the district court’s denial of attorney fees under the private attorney general doctrine, which allows for recovery of fees when the State

“fails to properly enforce interests which are significant to its citizens,” *Forward Mont. v. State*, 2024 MT 75, ¶ 37, 416 Mont. 175, 546 P.3d 778, *reh’g granted* (Apr. 9, 2024) (citation and internal quotation marks omitted). The district court correctly concluded that this litigation vindicated rights of societal importance, but it denied fees for two erroneous reasons: first, that the private attorney general doctrine generally does not apply when the Attorney General defends the State—reasoning this Court rejected in *Forward Montana*—and second, that too few people benefit from the decision, despite evidence that the Medicaid coverage at issue is critical for hundreds of Montana patients each year. This Court should reverse and remand for a determination of fees.

### STATEMENT OF THE ISSUES

1. Whether the Restrictions, which separately and together would make it nearly impossible for Medicaid patients<sup>2</sup> to access abortion, are subject to strict scrutiny under *Armstrong* because they infringe on the fundamental right to privacy in the Montana Constitution.
2. Whether the Restrictions, which impose burdens on pregnant Medicaid patients seeking abortions but not on those who choose to continue their pregnancies, are

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<sup>2</sup> The phrases “Medicaid patients” or “Montanans on Medicaid” herein refer not only to Montanans currently enrolled in Medicaid but also those eligible for Medicaid coverage.

subject to strict scrutiny under the Equal Protection Clause of the Montana Constitution.

3. **Cross-Appeal:** Whether the private attorney general doctrine allows for the recovery of fees in a case in which (1) the Attorney General’s Office defends a law that violates Montanans’ constitutional rights and (2) hundreds of Montanans each year benefit directly from the relief obtained.
4. **Cross-Appeal:** In the alternative, whether Providers are entitled to fees under the Uniform Declaratory Judgments Act (“UDJA”), 27-8-313, MCA.

### **STATEMENT OF THE CASE**

DPHHS proposed the Rule on December 23, 2022. Supp.App.A41. The Rule’s text repeatedly referenced *Jeannette R.*, demonstrating DPHHS’s awareness of its constitutional obligation to cover medically necessary abortions. Supp.App.A43–46. Providers submitted comments opposing the Rule, participated in a hearing on it, and warned DPHHS that it contravened *Jeannette R.* and violated the Montana Constitution. Supp.App.A53–54. Providers also attempted, to no avail, to engage with DPHHS during the rulemaking process. Supp.App.A71–84. Providers then notified DPHHS that they intended to seek injunctive relief and asked to delay the Rule’s effective date or stipulate to a stay pending judicial review. Supp.App.A71, 76. DPHHS declined—and even refused to give Providers a copy of the Rule after submitting it for publication. Supp.App.A74, 79, 81, 84.

DPHHS adopted the Rule as proposed on April 28, 2023; it was scheduled to take effect on May 1. Supp.App.A53, 69. On April 28, the day the Rule was adopted, Providers filed suit seeking a temporary restraining order (“TRO”) and preliminary injunction, arguing the Rule violated their Medicaid patients’ rights to privacy and equal protection under the Montana Constitution. On May 1, the district court granted a TRO.

On May 15 and 16, 2023, Governor Greg Gianforte signed HB 544 and HB 862, respectively. Providers amended their complaint and sought a preliminary injunction of both laws. Supp.App.B. On May 23, the district court held a hearing on Providers’ motions with respect to all three Restrictions and issued a preliminary injunction from the bench, followed by a written ruling on July 11, 2023. The State appealed.

On October 9, 2024, this Court affirmed. The plurality opinion affirmed with respect to Providers’ privacy claim, determining that the Restrictions “are not simple funding decisions” but instead “implicate the constitutional rights of Medicaid-eligible Montanans” by restricting access to abortion care, and that they are subject to strict scrutiny. *PPMT V*, ¶ 24 (plurality opinion). Justice Baker, joined by Justice Shea, specially concurred, “join[ing] the Court’s analysis of the privacy claims in affirming the preliminary injunction,” thereby making that analysis the binding

holding of the Court. *Id.* ¶ 56 (Baker, J., specially concurring).<sup>3</sup> The plurality also affirmed the district court’s application of strict scrutiny to Providers’ equal protection claim because the Restrictions treat differently the “proper comparison classes [of] Medicaid-eligible women who seek funding for abortion and Medicaid-eligible women who seek funding for natal and prenatal care.” *Id.* ¶ 31 (plurality opinion).

Following discovery, the parties filed cross-motions for summary judgment. Providers filed a statement of undisputed material facts detailing the ways the Restrictions infringe on their patients’ rights and single out for differential treatment Medicaid patients seeking abortions. Supp.App.F. The State did not contest any of the facts, did not submit its own statement of facts, and did not include a single citation to the record. Instead, the State relied exclusively on legal arguments this Court rejected in *PPMT V*.

On March 11, 2025, the district court granted Providers’ motion and denied the State’s. The district court concluded that the undisputed facts establish “that abortion is safe and effective, that [advanced practice clinicians (“APCs”)] provide medication abortions and aspiration abortions with the same safety and efficacy as their physician counterparts, and that an overwhelming consensus in the medical

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<sup>3</sup> For simplicity, this brief refers to the plurality’s holdings on the privacy claim as the Court’s holdings and cites to both the plurality opinion and the special concurrence.

community supports APCs as abortion providers,” and pointed out that “the State has no evidence that abortions provided by APCs are any less safe or effective than abortions provided by physicians, or that prohibiting APCs from providing abortions covered by Medicaid improves patient health and safety.” App.A10–11 (citations omitted).

With respect to the prior authorization requirement in HB 544 and the Rule, the district court concluded based on the undisputed facts “that the prior authorization requirements in the rule and HB 544 do not address a medically acknowledged, *bona fide* health risk” because they “require patients to make an extra in-person visit to a health care provider for a physical examination[,] . . . [would] result in delays that harm patient health[,] and would in practice ban direct-to-patient medication abortions which have been safely done via telehealth for years without the need for any in-person visit,” further noting that “[t]he State admits it has no evidence that medication abortions provided via telehealth are any less safe or effective than abortions provided in-person.” App.A11 (citations omitted).

The court noted that the State did not “offer[] any reason to implement a definition of medical necessity unique to abortion” and that the narrowed definitions in the Rule and HB 544 “serve to limit access to abortion otherwise required to be covered by *Jeannette R.*” App.A13. “At their core,” it stated, “these definitions attempt to supplant the clinical judgment of the medical providers as to what

constitutes medical necessity.” *Id.* And with respect to HB 862, the court noted that *Jeannette R.* “declared unconstitutional a regulation that did the very same thing” as that statute. *Id.*

The State appeals.

Providers sought attorney fees and costs. On June 25, 2025, the district court granted an award of costs of \$22,254.08,<sup>4</sup> but denied the request for attorney fees. It agreed that this litigation had vindicated rights of “societal importance” and that Providers had borne the burden of bringing it, but concluded that “the private attorney general doctrine is usually not applicable when a government agency represents a public interest and complies with its duties.” App.B04, 05 (fees order). It also found the number of beneficiaries insufficient despite record evidence that 836 of the 2092 abortions in Montana in 2023 were covered by Medicaid. App.B03, 06. The district court also denied fees under the UDJA.

Providers cross-appeal the district court’s denial of fees.

### **STATEMENT OF FACTS**

The State did not contest below and does not contest on appeal any statement in Providers’ statement of undisputed material facts. *See* Supp.App.F (Pls.’

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<sup>4</sup> The State’s notice of appeal states it is appealing the award of costs. However, its opening brief does not mention costs; any appeal of the costs issue is therefore waived. *See Schaubel v. Iversen*, 257 Mont. 164, 166, 848 P.2d 489, 490 (1993).

Statement of Undisputed Material Facts in Supp. of Pls.’ Mot. for Summ. J. (“SUMF”).

### **I. Plaintiffs-Appellees’ Provision of Abortions to Medicaid Patients**

Access to safe, legal, and timely abortion is an important component of health care. Abortion is common, and the medical risks associated with it are considerably lower than the medical risks of carrying a pregnancy to term. Supp.App.F03 (SUMF ¶ 1). Providers operate the only clinics that provide abortions in Montana. Supp.App.F03 (SUMF ¶ 2).

Medicaid coverage is critical for the health and wellbeing of Medicaid patients. Supp.App.F03 (SUMF ¶ 3). In 2023, Medicaid patients made up 36% of PPMT’s 1327 abortion patients, almost 50% of All Families’ 380 abortion patients, and almost 40% of Blue Mountain’s 385 abortion patients. Supp.App.E062, 088–089, 100; Supp.App.F03–04. This means that, all told, over 800 Montana patients had their abortions covered by Medicaid in 2023, *see* App.B06, which is consistent with evidence in the record about other years, *see, e.g.*, Supp.App.E119.

APCs provide medication and aspiration abortions with the same safety and efficacy as their physician counterparts. Supp.App.F06 (SUMF ¶ 14); *see also Weems II*, ¶¶ 46–48. An overwhelming consensus in the medical community supports and relies on APCs as abortion providers. Supp.App.F06 (SUMF ¶ 14). Ms. Weems, a nurse practitioner, is the sole clinician at All Families, and the only

abortion provider in the Flathead Valley. Supp.App.F06 (SUMF ¶ 13). PPMT and Blue Mountain also rely heavily on APCs to provide abortions. Supp.App.F06 (In 2023, APCs provided 85% of abortions for Medicaid patients at PPMT and 30% of abortions at Blue Mountain). APCs’ role is particularly crucial because only a few physicians in the entire state provide abortions, and they practice only in Helena and Missoula. Supp.App.F05 (SUMF ¶ 12).

Medication abortion via direct-to-patient telehealth is as safe and effective as in-person provision. Supp.App.F08 (SUMF ¶ 27); *Planned Parenthood of Mont. v. State*, 2025 MT 120, ¶¶ 83, 87, 422 Mont. 241, 570 P.3d 51 (“*PPMT VT*”) (holding “[t]he State has not shown there is a bona fide health risk to telehealth medication abortions to justify banning them altogether”). Telehealth is especially important for underserved communities and in rural areas. Supp.App.F08 (SUMF ¶ 30).

In 1995, the First Judicial District Court held in *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at \*24–28 (Mont. Dist. Ct. May 22, 1995), that excluding abortion from otherwise comprehensive Medicaid coverage violates the Montana Constitution’s guarantees of privacy and equal protection. Since then, Montana Medicaid has reimbursed for all medically necessary abortions. DPHHS regulations contain the following definition of “medically necessary service,” which applies generally to all medical care:

[A] service or item reimbursable under the Montana Medicaid program, as provided in these rules . . . [w]hich

is reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient which:

- (i) endanger life;
- (ii) cause suffering or pain;
- (iii) result in illness or infirmity;
- (iv) threaten to cause or aggravate a handicap; or
- (v) cause physical deformity or malfunction.

Mont. Admin. R. 37.82.102(18)(a).

## **II. The Restrictions**

### **A. The Rule**

The Rule restricts Medicaid patients' access to abortion in three ways, each of which singles out abortion for treatment that applies to no other medical service.

First, it categorically bars Medicaid coverage for abortions provided by APCs, eliminating Medicaid patients' access to most of the abortion providers in Montana. This restriction has no medical justification. DPHHS admitted it has no evidence that APCs provide abortions less safely or effectively than physicians, or that this restriction improves patient health and safety. Supp.App.F06 (SUMF ¶ 16). Montana Medicaid covers other reproductive health care services provided by APCs if that care falls within the APC's scope of practice. Supp.App.F07 (SUMF ¶ 19). Before the Rule, DPHHS never had a policy restricting Medicaid coverage of abortions provided by APCs; DPHHS is aware of no other procedure for which Medicaid previously covered services provided by APCs and then issued a

regulation restricting coverage to physicians only. Supp.App.F06, 07 (SUMF ¶¶ 18, 20).

Banning Medicaid coverage for APCs would drastically reduce the availability of abortions in Montana and would strip patients of their ability to access abortion care from their chosen provider. Supp.App.F07 (SUMF ¶ 21). Further, banning Medicaid coverage of abortions covered by APCs treats abortion differently from other medical care.

Second, the Rule mandates an arbitrary, onerous, and invasive prior authorization process forcing Medicaid patients to make an extra in-person visit for a physical exam, even though for most abortion patients a physical examination is medically unnecessary. Supp.App.F07 (SUMF ¶¶ 22, 24). This built-in, de facto waiting period delays care, even though abortion is a time-sensitive health service. Supp.App.F09 (SUMF ¶ 32). The Rule also sets no deadline for DPHHS to approve or deny coverage. Supp.App.F08–09 (SUMF ¶ 31). Without Medicaid coverage—or without timely coverage—patients face financial hardship, delayed care, or being forced to carry their pregnancies to term. Supp.App.F10 (SUMF ¶¶ 38–39).

Like the bar on coverage for abortions provided by APCs, the prior authorization process treats abortion differently from other care. Medicaid does not require prior authorization or a waiting period for other reproductive health care,

including contraception, ultrasounds, or any other gynecological services. Supp.App.F09 (SUMF ¶ 33).

The prior authorization process also lacks any fiscal justification: DPHHS’s own analysis shows that each prior authorization review would cost the State \$965, nearly double the \$534.50 average estimated cost for each abortion itself. Supp.App.F14 (SUMF ¶ 59). The Medicaid Chief Financial Manager admitted the Rule would *increase* costs for Montana Medicaid. Supp.App.F14 (SUMF ¶¶ 58, 59, 61). DPHHS is aware of no other services for which the cost of prior authorization is higher than the cost of the service itself. Supp.App.F15 (SUMF ¶ 62).

Finally, the Rule creates an abortion-specific definition of “medically necessary” far narrower than the definition that applies to all other Medicaid services. Mont. Admin. R. 37.82.102(18); Supp.App.F12 (SUMF ¶ 51). Should the Rule take effect, coverage would be permitted only when:

- (a) a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed; or
- (b) although it does not place the woman in danger of death unless an abortion is performed, a woman suffers from:
  - (i) a physical condition that would, as certified by a physician, be significantly aggravated by the pregnancy; or

(ii) a psychological condition that would, as certified by a physician, be significantly aggravated by the pregnancy.

Supp.App.A42. The narrowed definition would result in coverage denials, financial hardship, delayed care, and patients being forced to continue their pregnancies.

Supp.App.F12 (SUMF ¶ 52).

### **B. HB 544**

Like the Rule, HB 544 categorically bars Medicaid coverage for abortions provided by APCs; imposes an arbitrary, onerous, and invasive prior authorization process; and narrows the definition of “medically necessary” solely for abortions. The statute’s definition of “medically necessary” is even narrower than the definition in the Rule, allowing coverage only when a physician certifies the pregnant person “suffers from: (a) a physical condition that would be significantly aggravated by the pregnancy; or (b) a severe mental illness or intellectual disability that would be significantly aggravated by the pregnancy.” Supp.App.E022. The requirement of a “severe mental illness or intellectual disability” is an even narrower category than the “psychological condition” under the Rule.

### **C. HB 862**

HB 862 goes further still, prohibiting the use of public funds for abortions unless the pregnancy is the result of rape or incest or puts the pregnant person in danger of death. Supp.App.E029. This is a near-total ban on Medicaid coverage:

from Fiscal Years 2011 to 2021, only five abortions were reported as falling into these categories. Supp.App.F13 (SUMF ¶ 53).

### STANDARD OF REVIEW

This Court “review[s] a district court’s grant or denial of summary judgment de novo, applying the same criteria as M. R. Civ. P. 56.” *Barrett v. State*, 2024 MT 86, ¶ 11, 416 Mont. 226, 547 P.3d 630 (citation omitted). “To meet the responsive Rule 56 burden of demonstrating that a genuine issue of material fact precludes summary judgment, the nonmoving party must in proper form, and by more than mere denial, speculation, or pleading allegation, ‘set out specific facts’ showing the existence of a genuine issue of material fact.” *Kageco Orchards, LLC v. Mont. Dep’t of Transp.*, 2023 MT 71, ¶ 8, 412 Mont. 45, 528 P.3d 1097 (citing M. R. Civ. P. 56(e)(2)).

This Court reviews “de novo a district court’s conclusion on whether legal authority exists to support an award of attorney fees. If legal authority exists, [it] review[s] for an abuse of discretion the court’s order granting or denying fees. An abuse of discretion exists if the district court acted arbitrarily, without the employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice.” *Forward Mont.*, ¶ 12 (citations omitted).

## SUMMARY OF THE ARGUMENT

This Court has consistently recognized that the Montana Constitution broadly guarantees Montanans the right to make decisions “affecting one’s own health and bodily integrity without government interference.” *Armstrong*, ¶ 72. In *PPMT V*, this Court upheld the district court’s conclusion that these Restrictions likely infringe on the right to privacy of Montanans on Medicaid and are therefore subject to strict scrutiny review. *PPMT V*, ¶¶ 23–24 (plurality opinion), 56 (Baker, J., specially concurring). The district court faithfully applied these holdings, and because the State put forward no evidence that the Restrictions address a medically acknowledged, bona fide health risk, it permanently enjoined them.

Here, the State does not argue the Restrictions satisfy strict scrutiny—nor could it, having presented no evidence below. Instead, the State seeks to reframe this case as being about funding rather than abortion access, invoking separation-of-powers principles and federal law to argue that the Restrictions should escape constitutional scrutiny altogether. But *PPMT V* rejected the argument that these are “simple funding issues” that do not implicate the right to privacy. *Id.* ¶¶ 22 (plurality opinion), 56 (Baker, J., specially concurring). And for good reason: the Restrictions do not merely affect funding—they impose affirmative barriers that single out abortion for burdens that apply to no other Medicaid service.

The district court also correctly applied strict scrutiny review to Providers’ equal protection claim. The Restrictions discriminate between Medicaid patients who chose to terminate their pregnancies and those who do not—the proper comparator classes when a law burdens the exercise of a fundamental right. The State’s argument that these classes are not “similarly situated” misapprehends the equal protection inquiry. Finally, the State raises a meritless standing argument that this Court should summarily reject.

On attorney fees, the district court correctly determined that this litigation vindicated rights of societal importance. But it erred in concluding that (1) the doctrine generally does not apply in cases involving the attorney general’s office defending an unconstitutional statute, and (2) the number of people affected by this case is insufficient to justify fees.

## **ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY HELD THAT PROVIDERS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS.**

#### **A. Strict scrutiny review applies to Providers’ privacy claim.**

The right to privacy in the Montana Constitution is “one of the most stringent protections of its citizens’ right to privacy in the United States,” and protects a patient’s right to “obtain[] a . . . pre-viability abortion . . . from a health care provider of her choosing.” *Armstrong*, ¶¶ 2, 34. It encompasses “a woman’s moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy

demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation.” *Id.* ¶ 49. “[L]egislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis,” which requires that a law “must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.” *Id.* ¶ 34.

Since *Armstrong*, this Court has repeatedly reapplied that standard to each law infringing on abortion access that has come before it. *See PPMT VI*, ¶¶ 12–44; *Planned Parenthood of Mont. v. State*, 2024 MT 227, ¶ 24, 418 Mont. 226, 557 P.3d 471 (“*PPMT IV*”); *Weems II*, ¶ 43; *Planned Parenthood of Mont. v. State*, 2024 MT 178, ¶¶ 22–25, 417 Mont. 457, 554 P.3d 153 (“*PPMT III*”); *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 20, 409 Mont. 378, 515 P.3d 301 (“*PPMT II*”); *Weems v. State*, 2019 MT 98, ¶ 19, 395 Mont. 350, 440 P.3d 4 (“*Weems I*”).<sup>5</sup> This precedent establishes that strict scrutiny applies when a law implicates Montanans’ fundamental right to abortion, not solely when it bans abortions outright. *See PPMT VI*, ¶¶ 12–44 (applying strict scrutiny to, *inter alia*, informed consent requirements and reporting requirement); *Weems II*, ¶ 43 (applying strict scrutiny to prohibition on abortion provision by advanced practice registered nurses).

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<sup>5</sup> *Planned Parenthood of Montana v. State*, 2015 MT 31, 378 Mont. 151, 342 P.3d 684 (“*PPMT I*”) was not decided under *Armstrong*.

The State invokes the presumption of constitutionality. Courts “begin” their review with this principle, *PPMT V*, ¶ 21 (quoting *Weems II*, ¶ 34), as the district court did here, App.A06. But that presumption does not insulate the Restrictions from judicial review. “[T]he analysis of a statute pertaining to fundamental rights will generally require a strict scrutiny review that ultimately shifts the burden.” *PPMT V*, ¶¶ 21 (plurality opinion), 56 (Baker, J., specially concurring).

The undisputed record establishes that the Restrictions impose significant barriers for Medicaid patients seeking abortions, forcing them to pay for an abortion out of pocket, delay care, or forgo care altogether. Supp.App.F05, 07, 09–10, 12, 13 (SUMF ¶¶ 11–12, 21, 32, 36–41, 51, 54). The State did not contest these facts at the district court, and it does not do so before this Court. Accordingly, the district court correctly held that strict scrutiny review applies to Providers’ privacy claim, consistent with *PPMT V*’s determination that strict scrutiny review applies because “otherwise eligible [Medicaid] recipients would be disqualified or otherwise restricted from certain public healthcare benefits based on their exercise of their fundamental right to privacy as guaranteed under the Montana Constitution.” *PPMT V*, ¶¶ 23 (plurality opinion), 56 (Baker, J., specially concurring).

*PPMT V* also expressly rejected the State’s argument that the Restrictions are “simple funding issues” that do not implicate the right to privacy. *Id.* ¶ 22. The Court noted that the APC ban in the Rule and HB 544 contravenes this Court’s recent

reaffirmation that “the judgment of who is qualified to provide an abortion is the medical community’s, not the Legislature’s, to make”; the prior authorization process “both impose[s] a delay in the time-sensitive procedure and require[s] a patient to make an in-person visit to a medical center when medication abortions have ‘safely been done via telehealth for years’”; and the narrowed, abortion-specific definition of “medically necessary” procedure “is untethered from both the definition applicable to every other medical service provided under Medicaid and from the medical judgment of a patient’s own doctor.” *Id.* HB 862 also “untether[s] the act of abortion from the medical judgment of the patient’s own doctor and violat[es] the personal autonomy guarantees of the Montana Constitution.” *Id.*

**B. Strict scrutiny review applies to Providers’ equal protection claim.**

The Montana Constitution mandates that “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4. When weighing an equal protection challenge, this Court first “identif[ies] the classes involved and determine[s] whether they are similarly situated.” *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456. If a classification “affects a suspect class or threatens a fundamental right,” this Court applies strict scrutiny, under which a law may be upheld only if it is “narrowly tailored to serve a compelling State interest.” *McDermott v. Mont. Dep’t of Corrs.*, 2001 MT 134, ¶ 31, 305 Mont. 462, 29 P.3d 992. When a classification affects the fundamental right to

abortion, the law must be narrowly tailored to address a “medically-acknowledged, *bona fide* health risk.” *Armstrong*, ¶ 59.

The district court correctly applied strict scrutiny review because the undisputed record establishes that the Restrictions apply solely to Medicaid patients seeking abortions, and not to Medicaid patients seeking care related to continuing a pregnancy. Supp.App.F07, 09, 12 (SUMF ¶¶ 19, 33, 51). In the words of the *PPMT V* plurality, the State

has taken the class of indigent pregnant Medicaid eligible women and divided them. One class, who needs medically necessary treatment (an abortion) are not entitled to help from the state. However, another class (those women for whom child birth is a medically necessary treatment) are entitled to state financial help.

*PPMT V*, ¶ 31 (plurality opinion) (quoting *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at \*27); *see also id.* ¶ 32 (“[T]he State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent.” (quoting *Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982))). Once the State creates a Medicaid program, it “must be neutral” and cannot exclude patients “from benefits to which they are otherwise entitled solely because they seek to exercise a constitutional right.” *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at \*25–27.

The State protests that these classes cannot be similarly situated because they “are making fundamentally different choices that have different consequences,

require different medical treatments, and ultimately impose different financial costs on the State.” Appellants’ Opening Br. at 35. The State misapprehends the nature of the equal protection analysis when a law discriminates based on the exercise of the fundamental right. The issue is not whether the classes are similarly situated in some abstract philosophical sense, but rather whether the classes are similarly situated *but for* their exercise of the fundamental right. *See PPMT VI*, ¶ 74 (in challenge to 20-week abortion ban, classes of “women exercising their right to a pre-viability abortion before and after 20 weeks’ gestational age . . . are similarly situated because both comprise pregnant women seeking the same reproductive health care before the fetus is viable”).

In other words, for an equal protection claim based on the exercise of a fundamental right, “the question is straightforward: has the government expressed a preference for the manner in which a right is exercised?” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 943 (Pa. 2024). The answer here is clearly yes. Because the Restrictions apply solely if a Medicaid patient chooses to terminate their pregnancy, the relevant classes are Medicaid patients who choose to terminate their pregnancies and those who do not. *See id.* at 945 (“The Coverage Exclusion differentiates between pregnant women on Medical Assistance who would seek to obtain abortions and pregnant women on Medical Assistance who would seek to carry their pregnancies to term. . . . The controlling factor influencing

the statutory funding scheme is how a pregnant woman on medical assistance decides to exercise her reproductive choices.”); *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1001 (Alaska 2019) (“The most appropriate comparison classes are therefore Medicaid-eligible women who seek funding for abortion and Medicaid-eligible women who seek funding for natal and prenatal care.”). And because the Restrictions single out abortion patients for differential treatment, they trigger strict scrutiny review.

**C. The State’s arguments that strict scrutiny review does not apply are meritless.**

The State does not argue the Restrictions satisfy strict scrutiny. Instead, the State argues the Restrictions should escape strict scrutiny review because they involve Medicaid funding. But *PPMT V* squarely rejected the argument that the Restrictions are “simple funding issues” that do not implicate the right to privacy. *PPMT V*, ¶¶ 22, (plurality opinion), 56 (Baker, J., specially concurring). The State asks this Court to reconsider that holding, but none of its arguments has merit.

*1. Separation-of-powers principles do not exempt the Restrictions from constitutional review.*

The State first invokes broad separation-of-powers principles to suggest that the judiciary cannot review state funding decisions.<sup>6</sup> But the Restrictions do not

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<sup>6</sup> The State relies on a quotation from *Jeannette R.* that the Legislature “can pass its own Hyde amendment if it wishes.” Opening Br. at 11 (quoting *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at \*17). This dictum comes from a portion of the

merely regulate spending—they impose substantive barriers on Medicaid patients’ access to abortion. The undisputed record establishes that the Restrictions operate as limits on abortion access, not neutral funding decisions. Supp.App.F05, 07, 09–10, 12, 13 (SUMF ¶¶ 11–12, 21, 32, 36–41, 51, 54). The State did not dispute these facts below and points to no contrary record evidence now. This is fatal to its appeal.

Contrary to the State’s characterization, the district court did not commandeer the Legislature’s power of the purse by ordering it to fund abortions. Rather, it held that the State cannot condition existing Medicaid benefits in a way that infringes on constitutional rights. This is not an encroachment on legislative authority—it is the judiciary performing its constitutional role. If a statute conditioned access to Medicaid on race, this Court would apply strict scrutiny review. That the State funds Medicaid would not insulate the discrimination from review, or change the applicable level of scrutiny. The same is true here.

*2. The distinction between negative and positive rights is inapt.*

The State argues at length that the Montana Constitution creates only “negative” rights prohibiting governmental interference rather than “positive” rights requiring governmental funding, and that Providers seek to transform the right to

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district court’s opinion holding that the administrative rule at issue violated the agency’s enabling statute. The opinion goes on to explain that the rule also violated the substantive guarantees of the Montana Constitution, meaning that even if the Legislature had passed a state equivalent of the Hyde Amendment, that bill would be unconstitutional.

privacy into a funding entitlement. The State pretends to scour the Montana Constitution for an entitlement to funding,<sup>7</sup> as though the absence of an express right to funding allows the State to administer State-funded programs in an unconstitutional manner.

Judicial review of funding restrictions is commonplace. *See, e.g., Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257 (holding in a challenge to a school funding provision, that “(1) once the Legislature has acted, or ‘executed,’ a provision (2) that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature’s constitutional responsibility.”).

Moreover, whether the right to privacy “carr[ies] with it a funding entitlement,” Opening Br. at 27, is not the issue in this case. The Restrictions affirmatively impose barriers to care that violate the Montana Constitution’s fundamental right to privacy; they are targeted restrictions of a fundamental right, not neutral fiscal choices. With respect to Providers’ equal protection claim, the State may not discriminate against Montanans on Medicaid on the basis of their exercise of a fundamental right. Having created a comprehensive Medicaid program covering

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<sup>7</sup> The State devotes a section of its brief to Article I, section 36, the right to abortion newly enshrined in the Montana Constitution after the passage of Constitutional Initiative No. 128 (“CI-128”). Providers have not brought a claim under this provision, neither party raised the issue below, and the district court did not pass on it.

virtually all medically necessary care, the State cannot single out abortion—and only abortion—for restrictions that apply to no other service.

3. *Harris v. McRae is also inapt.*

The State urges this Court to follow *McRae*, in which the U.S. Supreme Court held that the federal Hyde Amendment did not violate the federal constitutional right to abortion. But as the State acknowledges, *id.* at 28, *McRae* interpreted and applied the *federal* Constitution, not the Montana Constitution. It does not control this Court’s interpretation of the Montana Constitution, which this Court has repeatedly explained affords “significantly broader protection” of the right to privacy than the federal Constitution. *See, e.g., PPMT V*, ¶¶ 21 (plurality opinion) (quoting *Weems II*, ¶ 35), 56 (Baker J., specially concurring). Nor does it control DPHHS’s use of Montana state funds.

Were it not already clear from *PPMT V* that the Montana Constitution subjects the Restrictions to strict scrutiny, this Court has since relied on *PPMT V* to apply strict scrutiny to a restriction on gender-affirming care for youth that included a state Medicaid coverage ban. *See Cross ex rel. Cross v. State*, 2024 MT 303, ¶ 39, 419 Mont. 290, 560 P.3d 637 (“[W]e recently held that strict scrutiny applies to a statute disqualifying or restricting ‘otherwise eligible recipients . . . from certain public healthcare benefits based on their exercise of their fundamental right to privacy as guaranteed under the Montana Constitution.’” (quoting *PPMT V*, ¶ 23)). This Court

has rejected *McRae*'s analysis in the context of claims under the Montana Constitution, as have many other states. *See, e.g., Allegheny Reprod. Health Ctr.*, 309 A.3d at 934 (overruling a prior case that “blindly followed” *McRae*); *Planned Parenthood of the Great Nw.*, 436 P.3d at 1002 (relying on *McRae* dissent); *Right to Choose*, 450 A.2d at 933 (rejecting *McRae* and noting the relevant provision of the New Jersey Constitution contains “more expansive language than that of the United States Constitution”).<sup>8</sup>

The State also conflates Providers' privacy and equal protection claims, stating that the district court “tried to shoehorn in a privacy framing” but that “the relevant analysis falls under equal protection.” Opening Br. at 33. Not so. Providers brought separate privacy and equal protection claims, which must be analyzed separately, as this Court did in *PPMT V* and the district court did in its summary judgment order. As set forth above, the Restrictions are subject to strict scrutiny review for the independent reasons that they infringe on Providers' Medicaid patients' fundamental right to privacy and that they discriminate against those patients based on their exercise of a fundamental right.

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<sup>8</sup> Puzzlingly, the State cites Florida as a state whose approach this Court should follow. The Florida Supreme Court has held that the Florida Constitution's right to privacy does not include a right to abortion, *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87 (Fla. 2024), and abortion is generally banned in Florida after six weeks of gestational age, Fla. Stat. Ann. § 390.0111(1). That state's jurisprudence on abortion has no relevance here.

#### **D. The Restrictions fail strict scrutiny review.**

To survive strict scrutiny review, the Restrictions must be narrowly tailored to address “a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated.” *Armstrong*, ¶ 62. The district court correctly held, based on the undisputed facts, that the Restrictions are not narrowly tailored to address a compelling interest. The State presented no evidence that any Restriction addresses a *bona fide* health risk. To the contrary, the undisputed evidence establishes that APCs provide abortions as safely and effectively as physicians; that the prior authorization requirement serves no medical purpose and causes harmful delays; and that the narrowed medical necessity definitions override medical judgment without medical justification. App.A10–11.

The State does not argue on appeal that the Restrictions satisfy strict scrutiny, nor does it identify any factual disputes. It has therefore waived any such argument. *See Schaubel*, 257 Mont. at 166, 848 P.2d at 490. This Court should affirm the district court’s conclusion that the Restrictions violate the rights to privacy and equal protection under the Montana Constitution because they do not satisfy strict scrutiny review.<sup>9</sup>

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<sup>9</sup> The State’s justifications for the Restrictions are not sufficient even to satisfy rational basis review. *See Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 113, 762 P.2d 226, 229 (1988), *superseded by statute on other grounds* (“[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.” (citation omitted)). The State contends the Restrictions “ensure the State’s Medicaid program maintains

### **E. Providers have standing.**

For the first time on appeal,<sup>10</sup> the State makes a feeble attempt to undercut Providers’ standing. Under federal legislation enacted last year, PPMT can no longer seek federal Medicaid reimbursements for health care services provided during the one-year period beginning on July 4, 2025. *See* An Act to provide for reconciliation pursuant to title II of H. Con. Res. 14, Pub. L. No. 119-21, § 71113, 139 Stat. 72, 300–01 (2025). But this federal legislation has no effect on Providers’ standing for several reasons. First, it only impacts PPMT and care Dr. Dickman provides at PPMT; it has no impact on All Families Healthcare, Blue Mountain Clinic, or Helen Weems. “In a multi-plaintiff case such as here, the standing of any one plaintiff is sufficient for a claim to proceed and, upon finding that one plaintiff has standing, the standing of the other parties does not merit further inquiry.” *Cross*, ¶ 16 (citation,

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financial integrity and follows federal law for reimbursement purposes.” Opening Br. at 13–14, 41. With respect to “program integrity,” DPHHS admitted (1) it has no evidence that “Medicaid has paid for any abortions that were not medically necessary” or “program integrity has been compromised” and (2) it has no knowledge of any credible allegations of or investigations of Medicaid fraud by any Montana abortion provider. Supp.App.F15 (SUMF ¶¶ 62–63, 65). As for any purported interest in “follow[ing] federal law,” Opening Br. at 14, federal law is not binding on how Montana uses its state funds. Further, there is no fiscal justification: each prior authorization review would cost the State \$965, nearly double the \$534.50 average estimated cost for each abortion itself, and the Rule would *increase* costs for Montana Medicaid. Supp.App.F14 (SUMF ¶¶ 58, 59, 61).

<sup>10</sup> In connection with its second motion for an extension before this Court, the State acknowledged the possibility of resolving factual issues related to this argument before the district court. But after being granted an extension, the State filed nothing at the district court.

alteration, and internal quotation marks omitted). Second, the legislation only prevents PPMT from seeking *federal* Medicaid funds and therefore has no effect on *state-only* Medicaid funding, which has been the only funding available for the vast majority of abortions in Montana since *Jeannette R.* because of the federal Hyde Amendment.

Providers have standing, and this case is not moot.

## **II. PROVIDERS ARE ENTITLED TO ATTORNEY FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.**

The district court erred in holding that Plaintiffs are not entitled to an award of attorney fees. The private attorney general doctrine permits an award of fees when the State “fails to properly enforce interests which are significant to its citizens.” *Forward Mont.*, ¶ 37; see also *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm’rs*, 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800 (“*Montrust*”). The doctrine is a “narrow equitable exception[] to the American rule,” *Forward Mont.*, ¶ 15. The party seeking attorney fees must establish: “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision.” *Id.* (quoting *Montrust*, ¶ 66). All three are satisfied here.

### **A. The litigation vindicated rights of societal importance.**

The first *Montrust* factor is “the strength or societal importance of the public policy vindicated by the litigation.” *Id.* Vindication of constitutional interests satisfies this factor. *See Burns v. Cnty. of Musselshell*, 2019 MT 291, ¶ 21, 398 Mont. 140, 454 P.3d 685 (“It is the vindication of constitutional interests that demonstrates the societal importance of the litigation.”); *cf. Upper Mo. Waterkeeper v. Broadwater Cnty.*, 2025 MT 137, ¶ 39, 422 Mont. 449, 571 P.3d 626 (Bidegaray, J., concurring) (“Explicit acknowledgment of the constitutional rights at stake further solidifies the remedial purpose and reach of this equitable doctrine.”).

The district court correctly held that “the use of public funds for abortion services is an issue of societal importance.” App.B04. Providers advanced “important public policies that are grounded in Montana’s Constitution,” *Montrust*, ¶ 67, by successfully barring enforcement of restrictions that would have impeded or prevented their Medicaid patients from exercising their constitutionally protected rights and that impermissibly discriminated against their Medicaid patients who terminate their pregnancies. Providers’ vindication of Montanans’ free exercise of their right to privacy is especially significant, as this Court has held that the right to privacy is among “the most important rights guaranteed to the citizens of this State.” *Weems II*, ¶ 36 (citation omitted).

**B. Providers bore the necessary burden of private enforcement.**

On the second factor, “the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff,” *Burns*, ¶ 22, the district court agreed that Providers bore the burden of bringing this litigation but did not clearly rule that the second factor was satisfied, instead reasoning that “the private attorney general doctrine is usually not applicable when a government agency represents a public interest and complies with its duties.” App.B05. This was error.

Private enforcement was necessary because the Restrictions would have taken effect without Providers’ lawsuit. *See Forward Mont.*, ¶ 41 (“Since the only governmental entity involved in this case was defending the statute, private enforcement was necessary.”); *cf. Montrust*, ¶ 67 (because the state argued that it had a duty to defend challenged statutes, it did “not dispute the necessity of private enforcement”). Moreover, Providers did not seek monetary relief but rather bore the full burden of bringing this public interest litigation. *Cf. Forward Mont.*, ¶ 36 (holding the doctrine does not apply where the litigation results in a monetary judgment for plaintiffs”).

The State argued below that private enforcement became unnecessary after the voters passed CI-128 in November 2024. The district court correctly rejected this argument, noting that most of the litigation in this case occurred before that date. *See* App.B05. Moreover, the State argues in this very appeal that CI-128 does not render

the Restrictions unconstitutional, Opening Br. at 21–22. Clearly, despite CI-128, private enforcement remains necessary.

Even though a finding in Providers’ favor on the second factor was warranted, the district court did not rule on the issue, instead stating that “the private attorney general doctrine is usually not applicable when a government agency represents a public interest and complies with its duties.” App.B05. It relied on *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989), and noted that the Attorney General is required to defend cases where the state is a defendant.

*Forward Montana* rejected this same reasoning. It noted that this Court has “awarded attorney fees against the State in prior cases,” and reiterated that “[t]he purpose of the Doctrine is to ‘provide an incentive for parties to bring public interest related litigation that might otherwise be too costly to bring.’” *Forward Mont.*, ¶ 24 (internal quotation marks, citation, and alteration omitted). The Court continued, “[i]f the Doctrine was eliminated where the Legislature has willfully disregarded its constitutional duties and purposefully passed unconstitutional laws, vindicating these important constitutional rights through litigation would not be feasible.” *Id.* Holding that the private attorney general doctrine does not apply because the Attorney General complied with his statutory duty to defend a law would eviscerate the doctrine.

*Dearborn Drainage Area*, the case cited by the district court, does nothing to undercut this conclusion. There, the Montana Department of Fish, Wildlife and Parks pursued a statutory water right claim that was ultimately unsuccessful. 240 Mont. at 40, 782 P.2d at 898–99. This Court rejected the prevailing party’s request for fees under the private attorney general doctrine because, when the agency (albeit unsuccessfully) pursued the water right claim, it “complied with its mandate and represented a public’s interest.” *Id.* at 43. In that context, the Court explained that the private attorney general doctrine “is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens.” *Id.* That case says nothing about a fees award when the State has failed to enforce its citizens’ constitutional rights. In fact, this Court has awarded fees in several cases where the State failed to enforce its citizens’ rights. *See generally, e.g., Forward Montana, Burns, Montrust.*

*Barrett* confirms this analysis. Although no opinion commanded a majority on the fees issue, Chief Justice McGrath explained that the second factor weighed against an award of fees in that case because “there was an independent entity of State government here who could have enforced its constitutional authority.” *Barrett*, ¶ 79 (McGrath, C.J., agreeing with the District Court decision as to attorney fees); *see also id.* ¶ 86 (Shea, J., affirming the District Court’s decision as to attorney fees) (same). He continued, “[w]hen the Attorney General is the only public agency

involved in a constitutional challenge, this consideration easily may be satisfied.” *Id.* ¶ 83 (McGrath, C.J.). Unlike *Barrett*, this is the easy case where the second factor is satisfied because the Attorney General is the only public agency involved in the constitutional challenge.

The district court also cautioned against “awarding fees against the State in a ‘garden variety’ declaratory judgment action that challenges the constitutionality of a statute.” App.B05 (quoting *W. Tradition P’ship v. Att’y Gen.*, 2012 MT 271, ¶ 17, 367 Mont. 112, 291 P.3d 545).<sup>11</sup> But this case is not a garden variety constitutional challenge. Rather, the record shows both DPHHS and the Legislature deliberately disregarded Medicaid patients’ constitutional rights. *Cf. Barrett*, ¶ 75 (McGrath, C.J.) (noting that the Legislature was not “on clear notice” that the laws were unconstitutional).

DPHHS was on notice the Rule was unconstitutional before its promulgation, and the Legislature was aware that HB 544 and 862 were unconstitutional. By the

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<sup>11</sup> *Forward Montana* expressed skepticism about this approach of departing from the three *Montrust* factors and injecting a separate requirement that a case not be a “garden-variety” constitutional challenge. *Forward Mont.*, ¶ 15. In *Forward Montana*, the district court concluded that all three *Montrust* factors weighed in favor of an award of fees, but declined to award attorney fees, holding that case was a “‘garden-variety’ constitutional challenge undeserving of attorney fees” under the private attorney general doctrine. *Id.* ¶ 11. Here, the district court did not rule one way or the other on the second *Montrust* factor, but rather placed its conclusion that awarding fees against the State is generally not justified in the middle of its analysis of the second and third factors.

time the Restrictions became law, *Jeannette R.* had bound DPHHS for over 25 years, and this Court had reaffirmed *Armstrong*'s holding that abortion restrictions are subject to strict scrutiny in *Weems I* in 2019 and *PPMT II* in 2022.

The text of the Rule itself shows DPHHS's awareness of its obligations under *Jeannette R.*, a point underscored by Providers' opposition to the Rule. Supp.App.A53. Providers also told DPHHS they planned to sue if the Rule went into effect and asked for either a delay or stay of enforcement pending a ruling. Supp.App.A71, 76. DPHHS rebuffed them at every turn, refusing even to provide a copy of the Rule after it was submitted for publication. Supp.App.A74, 79, 81, 84. As a result, Providers were forced to seek emergency relief the day the Rule was adopted. Supp.App.G031–032. DPHHS's actions show it deliberately chose to promulgate an unconstitutional regulation. .<sup>12</sup>

The Legislature likewise ignored clear precedent. The Legislature was closely involved with the promulgation of the Rule: it appropriated money for DPHHS to review Medicaid funding of abortion in 2021, Supp.App.F04 (SUMF ¶¶ 6–7), and

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<sup>12</sup> Moreover, DPHHS's stated reason for the Rule was pretextual. It stated that its review of Medicaid-reimbursed abortions caused it "grave concern," Supp.App.A45, and the State insisted to the district court that the review was conducted pursuant to its "legitimate right to prevent fraud," Supp.App.C07 (Tr. of Prelim. Inj. Proceedings, 15:16–18). However, a DPHHS official admitted that the review did not identify any forms that were incorrectly filled out, Supp.App.C11 (Tr. at 47:10–12), and DPHHS ultimately admitted in discovery that it has no knowledge of any credible allegations or investigations of Medicaid fraud by any Montana abortion provider. Supp.App.F15 (SUMF ¶¶ 62–63, 65).

held multiple committee hearings on these reviews, Supp.App.A45. HB 544 copies the Rule’s provisions nearly verbatim, and the Fiscal Note accompanying HB 544 expressly references the Rule. Supp.App.A88. Moreover, by the time HB 544 and 862 became law on May 15 and 16, 2023, the district court had issued a temporary restraining order explaining that the Rule violated the Montana Constitution.

This evidence of bad faith, although not required, *see Forward Mont.*, ¶ 30, supports an award of fees. The district court also made much of its conclusion that the State’s defense was made in good faith. App.B07. The Attorney General’s Office’s opposition to some of Providers’ counsel’s motions for admission *pro hac vice* was in bad faith. But even if the rest of its actions were taken in good faith, that does not excuse the bad faith of DPHHS and the Legislature. *Cf. Barrett*, ¶ 73 (McGrath, C.J.) (“[E]quitable considerations that could support the award of fees against the State [include] . . .the bad faith of the Attorney General in defending the law [and] the bad faith of the Legislature in enacting the law . . .”).

In short, the equities weigh in favor of granting fees because Providers, as private plaintiffs, bore the burden of litigating a challenge where the State deliberately chose to ignore Montanans’ constitutional rights.

**C. The Litigation Concerned Issues of Statewide Importance, and Many Montanans Will Benefit From It.**

The third factor considers “the number of people standing to benefit from the decision.” *Forward Mont.*, ¶ 15 (quoting *Montrust*, ¶ 66). The district court

concluded that although Montana Medicaid covered care for hundreds of patients in 2023, because Montana’s population is approximately 1.1 million, “the number of persons standing to benefit from this litigation is limited.” App.B06.<sup>13</sup>

This holding was erroneous. This Court has never “set a threshold number of people benefiting from the decision to support attorney fees under the Doctrine,” and has held that “clearly issues of statewide importance are sufficient to pass muster under the third factor.” *Forward Mont.*, ¶ 42. Here, “the litigation involves a challenge enforcing important constitutional restraints affecting all Montanans,” *id.*—namely, prevention of government overreach in the free exercise of the constitutional rights to privacy and equal protection. Indeed, “the people of this state . . . all benefit when constitutional interests are vindicated.” *Barrett*, ¶ 63 (Gustafson, J., disagreeing with the District Court Judgment as to attorney fees).

*Burns* technically affected a *single* candidate in a *single* county, but this Court concluded the third factor was satisfied because the litigant “defend[ed] the electoral process for the benefit of all Musselshell County voters, not merely to exercise his statutory rights to be heard in the proceedings and to be present and represented at any recount.” *Burns*, ¶ 23; *see also Barrett*, ¶ 77 (McGrath, C.J.) (citing *Burns* as an

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<sup>13</sup> The district court noted that the parties failed to include record citations to other evidence about the number of abortions Medicaid covers every year. The record reflects that Medicaid covered 666 abortions in Fiscal Year 2020, 752 in Fiscal Year 2021, and 5,614 over a ten-year period. Supp.App.E119.

example where a plaintiff made “a strong presentation of evidence under the three *Montrust* factors alone”).

Providers’ lawsuit prevented unconstitutional limitations on Medicaid patients’ exercise of the right to abortion. Hundreds of Montanans will benefit directly every year from the relief obtained, and hundreds of Montanans have already benefited during each of the nearly three years the Restrictions have been enjoined because of this case. But the benefits of ensuring that Medicaid patients have health care coverage for all their care—including abortion care—do not accrue only to those patients themselves; they also accrue to their families, their communities, and to all the people of the State.

**D. In the alternative, this Court should hold that Providers are entitled to fees under the UDJA.**

The UDJA independently authorizes attorneys’ fees and costs when “necessary or proper.” The “threshold question” is “whether the equities support an award.” *City of Helena v. Svee*, 2014 MT 311, ¶ 20, 377 Mont. 158, 339 P.3d 32 (internal quotation marks omitted).

The equities favor Providers. “One equitable consideration is whether the parties are similarly situated.” *Town of Kevin v. N. Cent. Mont. Reg’l Water Auth.*, 2024 MT 159, ¶ 17, 417 Mont. 325, 553 P.3d 392. They are not. Providers retained pro bono non-profit public interest attorneys—and Montana attorneys with experience litigating reproductive rights issues—to challenge a law preventing

Medicaid patients from accessing abortion care. The State, by contrast, was abundantly resourced and able to engage both the staff and attorneys of the Montana Attorney General’s Office and private attorney Emily Jones to represent it. *Cf. Upper Mo. Waterkeeper*, ¶ 20 (“[T]he record supports the District Court’s conclusion that seven local residents and a nonprofit organization lack the resources to be similarly situated to a state agency and a county government.”). Further, Providers sought no monetary gain, and the State enacted and vigorously defended unconstitutional laws. *See W. Tradition P’ship*, ¶¶ 14–20; *see also Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576.

The district court stated Providers failed to satisfy the UDJA’s requirement that fees be requested “by petition to a court having jurisdiction to grant the relief.” App.B07. This was error. Providers’ complaint and amended complaint both requested “[a]n order awarding Plaintiffs attorney’s fees and costs pursuant to the Declaratory Judgment Act.” Supp.App.A34, B39. That suffices under the UDJA. Moreover, the court cited no authority for the proposition that Providers’ motion for fees was insufficient because it was styled as a motion and not a petition.

The district court also concluded that “the State’s defense was . . . grounded in constitutional principles and in an effort to enforce interests the executive deemed equally significant to its citizens.” App.B09 (quoting *W. Tradition P’ship*, ¶ 20). But as addressed earlier, this case involved DPHHS and the Legislature deliberately

ignoring the rights of Montanans, as recognized in this Court’s longstanding precedents. *See supra* pp. 35–37.

The remaining question is whether Plaintiffs can satisfy the three-part “tangible parameters test.” *Davis v. Jefferson Cnty. Election Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 412 P.3d 1048. This test does not “define the exclusive circumstances justifying an award,” but rather “simply constitutes guidance” on the application of the UDJA. *Upper Mo. Waterkeeper*, ¶ 21 (internal quotation marks, citation, and alteration omitted); *see also Town of Kevin*, ¶ 16 (“[T]his analytical framework [does] not . . . define the exclusive circumstances justifying an award of attorney fees as necessary or proper.”). The tangible parameters test considers whether “(1) the defendant possesses what the plaintiff sought in the declaratory relief action; (2) it is necessary to seek a declaration showing the plaintiffs are entitled to the relief sought; and (3) the declaratory relief sought was necessary to change the status quo.” *Town of Kevin*, ¶ 16. There need not be a “tangible object” at issue for “the tangible parameters to weigh in the plaintiff[s]’ favor.” *Upper Mo. Waterkeeper*, ¶ 29.

All three factors are satisfied here. Under the first two factors of the test, Providers had no alternative avenue to prevent enforcement of the unconstitutional Restrictions, and their success restored abortion access for Medicaid patients statewide. The district court found the third factor was not satisfied because “the

litigation did not alter the status quo between the parties themselves.” App.B10. This directly contravenes this Court’s holdings. In *Upper Missouri Waterkeeper*, this Court upheld a determination that a declaratory judgment changed the status quo when the declaration, *inter alia*, caused an agency to alter its guidance and change its rules. *See Upper Mo. Waterkeeper*, ¶ 27. In this case, the declaratory judgment changed the rights of Montana Medicaid patients, allowing them to exercise their constitutionally protected right to obtain an abortion. Requiring a change between the parties themselves would penalize abortion providers for suing to vindicate the rights of their patients—contrary to the UDJA’s purpose of acting as “a mechanism to obtain a determination of rights.” *Id.* ¶ 32.

Plaintiffs are therefore entitled to an award of reasonable attorneys’ fees and costs under 27-8-313, MCA.

## CONCLUSION

For the foregoing reasons, the district court’s summary judgment order should be affirmed. The district court’s order on attorney fees should be reversed and remanded to the district court for a determination of the appropriate fees award.

Respectfully submitted this 23rd day of January, 2026.



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## CERTIFICATE OF COMPLIANCE

The undersigned, Raph Graybill, certifies that the foregoing brief complies with the requirements of Rule 11, M. R. App. P., is double spaced, except for footnotes, quoted, and indented material, and it is proportionally spaced utilizing a 14-point Times New Roman typeface. The total word count for this document is 9,952 words, as calculated by the undersigned's word processing program.



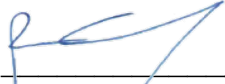
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