MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; and HELEN WEEMS, MSN, APRN-FNP, on behalf of themselves, their employees, and their patients, Plaintiffs, 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.	Cause No.: DDV-2023-592 **TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

/////

/////

Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Helen Weems (collectively, Providers), represented by Alex Rate, Jacqueline Harrington, Nina S. Riegelsberger, Tabitha Crosier, Hartley West, Iricel Payano, and Hillary Schneller move for a temporary restraining order enjoining enforcement of House Bill 937, 2023 Mont. Laws 492, pending a hearing on their motion for a preliminary injunction. Defendants the State of Montana, the Montana Department of Public Health and Human Services, and Charlie Brereton (collectively, the State), represented by Alwyn T. Lansing, Michael Noonan, and Emily Jones, oppose the motion. For the reasons that follow, the motion for a temporary restraining order will be granted.

DISCUSSION

A temporary restraining order with notice and a preliminary injunction are both governed by the following standards:

> (1) A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:
> (a) the applicant is likely to succeed on the merits;
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in the applicant's favor; and
> (d) the order is in the public interest.

Mont. Code Ann. § 27-19-201(1) (2023). This standard is intended to mirror the preliminary injunction standard established in *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008) and its progeny. *See id.* § 27-19-201(4). A temporary restraining order differs from a preliminary injunction in that it has a much shorter duration: whereas the latter generally applies for the whole length of the litigation the former is applied for a shorter duration meant to apply only

until all parties can be heard. *See* Mont. Code Ann. § 27-19-314; *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156 (D. Or. 2018). In either case, the burden is on the applicant to demonstrate the need for the relief sought. Mont. Code Ann. § 27-19-201(3). Thus, the Court examines below Providers' motion in light of each of the four preliminary injunction requirements.

1. Likelihood of Success on the Merits

The only matter before the Court today is the Providers' request for a temporary restraining order. On this procedural posture, the Court's primary concern is not the various constitutional challenges to the notion of licensure of abortion clinics. Rather, the Court's concern is what will happen to Providers and their patients on October 1, 2023, when HB 937 takes effect. Thus, the Court's Section 2(1) of House Bill 937 plainly and unambiguously prohibits abortion clinics from operating without a license: "A person may not operate or advertise the operation of an abortion clinic unless the person is licensed by the department." Statutes are construed "to implement the objectives the legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls." *In re Estate of Engellant*, 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218. Here, the plain language says that as of the effective date of HB 937, Providers cannot operate or advertise their services unless they are licensed by the Department of Public Health and Human Services (the Department).

The problem is that Providers are *not* licensed by the Department, and everyone agrees they cannot get a license by October 1. Before licenses can be issued, the Department must first promulgate rules. The Department, however, has neither adopted nor even publicly proposed temporary or final rules to

implement HB 937, nor has it otherwise given Providers guidance on how they can avoid violations of Section 2(1) in the interim. (*See* Truax Aff. ¶¶ 7–15, Dkt. 46 at 3–4; Weems Aff., ¶¶ 7–11, Dkt. 13 at 3–4.) Thus, on October 1, 2023, if Providers are "abortion clinics" within the meaning of HB 937, then they will be operating without a license in violation of the plain meaning of Section 2(1).

HB 937 does not itself specify any penalties, but it incorporates abortion clinics into the definition of healthcare facilities, *see* HB 937 § 5 (amending) Mont. Code Ann. § 50-5-101(26)(a)), which are required to be licensed under Mont. Code Ann. § 50-5-201(2). Operating a healthcare facility without a license violates Mont. Code Ann. § 50-5-111(1), and a facility that so operates can incur civil or criminal penalties or an injunction barring the facility from operating without a license. *See* Mont. Code Ann. §§ 50-5-112, 50-5-113(1)(a), 50-5-108.

Moreover, it is well-established in Montana that laws significantly inhibiting abortion access are presumptively unconstitutional and can only be enforced if they withstand strict scrutiny. *Armstrong v. State*, 1999 MT 261, ¶¶ 34, 41, 296 Mont. 361, 989 P.2d 364; *Weems v. State*, 2023 MT 82, ¶¶ 36–38, 412 Mont. 132, 529 P.3d 798 (reaffirming *Armstrong*'s holding). *Armstrong* held that regulations "which dictate how and by whom a specific medical procedure is to be performed" invade the right to privacy and can be justified only by "a compelling interest in" protecting patients or the public "from a medically acknowledged, *bona fide* health risk." *Armstrong*, ¶¶ 58–59 (emphasis in original). Thus, in *Armstrong,* the Court enjoined a statute prohibiting physician assistants from performing abortions. *Armstrong*, ¶ 66. This year, the Supreme Court enjoined the State from prohibiting nurse practitioners from performing

abortions. *Weems*, ¶¶ 46–49. In so holding, *Weems* highlighted the concern that "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." *Weems*, ¶ 50. These decisions are controlling authority that remains good law and binds this, Court.

Section 2(1) prohibits Providers who qualify as "abortion clinics" from continuing to operate as of October 1, 2023, and in doing so it exposes them to civil and criminal penalties and injunctions if they continue to operate. Under the above-cited cases, "remov[ing] qualified [providers] from the pool of health care providers from which women may choose to obtain lawful medical procedures" implicates "a patient's fundamental right of privacy." *See Weems*, ¶ 34. While there may or may not prove to be a compelling state interest in licensing abortion clinics—a question for another day—there is no compelling interest in imposing a mandatory licensure regime while issuing no licenses. Nor can the Court avoid the constitutional problems with Section 2(1) as written by engrafting onto it an implied impossibility defense, because that would require the Court to "insert what has been omitted." Mont. Code Ann. § 1-2-101.[1]

To be sure, that a law is on the books does not necessarily mean it will be enforced. Indeed, the State contends that this action is unripe because it contends enforcement is impossible until administrative rules are promulgated. (*See* Truax Aff. ¶ 15, Dkt. 46 at 4.)

/////

[1] The Court could more easily find legislative intent not to enforce Section 2(1) prior to promulgation of rules had the bill contained a transition clause, as is often the case with bills creating new regulatory structures. But instead, the legislature simply allowed the Act to take effect October 1, which notably gave the Department authority to promulgate temporary rules in advance of the effective date and is somewhat suggestive of a legislative contemplation that rules would be in force by the effective date of the Act. *See* Mont. Code Ann. § 2-4-303(2).

The judicial power of the courts is limited to cases and controversies, a requirement which requires the plaintiff to "clearly allege a past, present, or threatened injury to a property or civil right" that "would be alleviated by successfully maintaining the action." *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455. When the claim involves a threatened injury, the plaintiff must show "a genuine need to resolve a real dispute" that is an "actual, concrete conflict," as opposed to a "hypothetical, speculative, or illusory" dispute. *Reichert*, ¶ 54. In a pre-enforcement challenge of a statute carrying criminal penalties, the plaintiff "need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute" unless the fear of prosecution is "imaginary or wholly speculative." *Gryczan v. State*, 283 Mont. 433, 445, 942 P.2d 112, 119 (1997) (quoting *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979). In other words, there must be a "legitimate and realistic fear" of prosecution. *Id.* at 446, 942 P.2d at 120. This can be shown by, among other things, the recent enactment, amendment, or refusal to repeal the challenged statute. *See Gryczan*, 283 Mont. at 443–444, 942 P.2d at 118–119. Also, relevant (though not dispositive) is a disavowal of enforcement by the State. *Id.* at 445, 942 P.2d at 120; *but see Mont. Immigrant Justice All. v. Bullock [MJIA]*, 2016 MT 104, ¶¶ 24–25, 383 Mont. 318, 371 P.3d 430 (upholding standing for the pre-enforcement challenge of an immigration referendum even though the sitting Attorney General had "foresworn" enforcement of the referendum).

HB 937—and the prohibition on operating unlicensed abortion clinics—is a brand-new law enacted just months ago. Prior to this action, the State declined to clearly state it did not intend to enforce Section 2(1) against Providers in response to inquiries. On August 8, 2023, Plaintiff Helen Weems

emailed Tara Wooten, the Department's Healthcare Facility Program Manager for the Licensure Bureau, about impending rulemaking. Wooten responded that rulemaking was in process, and that "[d]eadlines, and variances from then if needed, will be reviewed and discussed internally among DPHHS agencies." (*See* Mem. of Law in Supp. of Pls.' App. for Temp. Restraining Or. & Prelim. Inj., Ex. 1, Dkt. 9.) Similarly, counsel for Providers emailed multiple attorneys with the Attorney General's Office on August 16 to ask whether "clinics that provide abortion care [may] continue to do so without facility licensure," citing concerns about the impending October 1 effective date and absence of proposed rules. In the email, Providers asked, "Would the State consider agreeing not to enforce HB 937 and any regulations until ninety days after final regulations are published?" (*See id.* Ex. 2, Dkt. 8.) Counsel for the State responded:

> DOJ is not involved in DPHHS's rulemaking process, nor have we been in communication with DPHHS regarding any rulemaking on HB 937, other than to pass along your request for information. Additionally, HB 937 will go into effect October 1 as the Legislature intended.

(*Id.*) Neither communication gave Providers any assurance that they could safely continue to operate after October 1.

Now that litigation has commenced, the Department has acknowledged difficulties with enforcing HB 937 in the absence of rulemaking, stating that "DPHHS and OIG are not able to enforce HB 937." (Truax Aff. ¶ 15, Dkt. 46 at 4.) Given the totality of the foregoing, however, this is insufficient to defeat the Providers' claim of legitimate and reasonable fear of enforcement, particularly in light of the holding in *MJIA* that an even more direct disavowal

did not render that case unripe. *See MJIA*, ¶ 25 ("[I]f the State's disavowal was enough to deprive MJIA of standing in this case, the invocation of disavowal. . . would enable the State in any case to negate a claim of standing premised on the threat of future injury."). Here, there is not an express disavowal of enforcement—at best, the State has acknowledged only the difficulty of enforcement—and the Department's position does not, in any event, prevent local county attorneys from attempting to charge Providers under Mont. Code Ann. § 40-5-113(1)(a) should they continue to operate between October 1 and the establishment of licensure rules. *See MJIA*, ¶ 24. Thus, the claim with which the Court is today concerned—the effect of Section 2(1) prior to the enactment of licensing rules—appears to present a ripe dispute.

The State also argues that the action is unripe because rules have not yet been promulgated. *Cf.* Mont. Code Ann. § 27-19-103(9) (2023) (prohibiting injunctions preventing the Secretary of State from issuing rules). However, the Court does not understand Providers as seeking such an injunction; rather, Providers challenge and seek to enjoin the statute itself, including the statutory prohibition on operating without a license. Moreover, Providers' overarching challenge is to the very notion of a mandatory licensure system containing the elements set forth in Sections 2(2), 2(3), and 3(2) of HB 937.

The Court need not delve into the merits of Providers' objections to HB 937 to find that they nevertheless appear to present an actual, concrete, non-hypothetical controversy. Likewise, in finding Providers likely to succeed in establishing the narrow proposition that Section 2(1) HB 937 violates the right to individual privacy in the absence of a means of obtaining a license, the Court deems it unnecessary to offer any prediction of whether HB 937's licensure

requirement is otherwise unconstitutional on any of the grounds advanced by Providers. *See State v. Tome*, 2021 MT 229, ¶ 31, 405 Mont. 292, 495 P.3d 54 ("The 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'" (quoting *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part))). Those questions need not be confronted until, at a minimum, the parties can be heard on the request for a preliminary injunction.

2. Irreparable Injury

Plaintiffs have shown irreparable injury if Section 2(1) of House Bill 937 is not temporarily enjoined pending a hearing. Constitutional infringement is itself a form of irreparable injury in most cases. *See de Jesus Ortega Melendras v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *Planned Parenthood of Mont. v. State*, 2022 MT 57, ¶ 60, 409 Mont. 378, 515 P.3d 301. Additionally, unless Section 2(1) is enjoined, on October 1, 2023, Providers will be putting themselves at legal and financial risk by continuing to operate in the absence of a license. Abortion services are necessarily time-sensitive in nature, particularly as abortions become more invasive as the pregnancy progresses. A chill on abortion services because of legal uncertainty over the effect of HB 937 causes the clinics and their patient's irreparable injury for preliminary injunction purposes. *See Planned Parenthood* ¶ 60 (various bills limiting abortion access constituted irreparable injury).

3. Balancing of Equities

A narrow injunction that prohibits the enforcement of Section 2(1) for now while a licensure process is developed is justified by a balancing of the equities. Balancing the equities requires the Court to "balance the competing

claims of injury and. . . consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)). In weighing the equities, the Court also remains mindful that because preliminary injunctions are extraordinary remedies, they should be no broader than necessary to minimize harm to provide necessary relief. *Gearhart Indus. v. Smith Int'l*, 741 F.2d 707, 715 (5th Cir. 1984); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (equitable remedies should be tailored "to fit the nature and extent of the constitutional violation").

Here, the prohibition established by Section 2(1) and the fear of enforcement outlined above stand to have a significant detrimental impact on Providers' operations and on their patients' access to services should it force Providers to curtail or close their operations. By contrast, a narrow temporary restraining order merely "preserves the regulatory status quo" pending further action by the Court. *See Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in chambers); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1985) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). Such a restraint does not inhibit the Department from proceeding with rulemaking, nor does it meaningfully impact its execution of the public policy goals of the legislature before the parties can be fully heard in this litigation, for the Department concedes the enforcement difficulties in the absence of administrative rules. It would, however, give Providers sufficient assurance that they can continue operations while the Department effectuates the legislature's command that they develop a licensure

process. Accordingly, the balance of the equity tips is in the Providers' favor.

4. Public Interest

In a public law action brought against the State, the balance of equities and public interest elements merge. *Porretti v. Dzurenda*, 11 F. 4th 1037, 1050 (9th Cir. 2021). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Riley's Am. Heritage Famrs v. Elsasser*, 32 F. 4th 707, 731 (9th Cir. 2022). Because the Court concludes that Providers have shown a likelihood of success on the merits, irreparable injury and that the balance of equities tips in their favor, they have also established that a narrow temporary restraining order is in the public interest.

5. Breadth

As noted above, injunctions should be no broader than necessary to afford a party complete relief. The Court is not considering today a preliminary injunction that will endure throughout the litigation, but a temporary restraining order aimed at protecting the parties' positions until a hearing can be held. Given these considerations, the Court concludes that for now, it is necessary only to temporarily enjoin Section 2(1) of HB 937 and to enjoin the State and its agents from bringing any enforcement or other adverse actions against Providers for the continued operation of abortion clinics after October 1.

Accordingly,

IT IS ORDERED:

1. Until further order of the Court, the State and its officers, employees, agents, successors, and assigns are **TEMPORARILY RESTRAINED** and **ENJOINED** from enforcing Section 2(1) of HB 937 against Providers. Neither the State, its officers, employees, agents, successors, or

assigns, or any other public official empowered to act in the name of the State may take any adverse action against Providers, including but not limited to enforcement measures under Mont. Code Ann. §§ 50-5-108 through -114, for operating or advertising an "abortion clinic" within the meaning of HB 937 without possessing a license issued by the Department pursuant to HB 937.

2. Pursuant to this Court's previous order, on **October 30, 2023, at 9:00 a.m.,** Providers will appear and show cause, if any, why a preliminary injunction should be issued. Four hours are reserved for the hearing, to be divided equally among the adverse parties.

3. A written undertaking is waived in the interests of justice.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

cc: Alex Rate, via email at ratea@aclumontana.org
Jacqueline Harrington, via email at Jacqueline.harrington@dechert.com
Nina S. Riegelsberger, via email at nina.riegelsberger@dechert.com
Tabitha Crosier, via email at tabitha.crosier@dechert.com
Hartley West, via email at Hartley.west@dechert.com
Iricel Payano, via email at Iricel.payano@dechert.com
Hillary Schneller, via email at hschneller@reprorights.org
Austin M. Knudsen, Po Box 201401; Helena, MT 59620
Alwyn Lansing, via email at alwyn.lansing@mt.gov
Michael Noonan, via email at Michael.noonan@mt.gov
Emily Jones, via email at emily@joneslawmt.com