KRISTIN K. MAYES
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Alexander W. Samuels (No. 028926)
Hayleigh S. Crawford (No. 032326)
Luci D. Davis (No. 035347)
Office of the Arizona Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004-1592
(602) 542-3333
Alexander.Samuels@azag.gov
Hayleigh.Crawford@azag.gov
Luci.Davis@azag.gov
ACL@azag.gov

Attorneys for Defendant State of Arizona

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PAUL A. ISAACSON, M.D., on behalf of himself, his staff, and his patients; WILLIAM RICHARDSON, M.D., on behalf of himself, his staff, and his patients; and the ARIZONA MEDICAL ASSOCIATION, on behalf of itself, its members, and its members' patients,

Plaintiffs,

v.

STATE OF ARIZONA, a body politic,

Defendant.

No. CV2025-017995

DEFENDANT STATE OF ARIZONA'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Assigned to_____)

Plaintiffs challenge three categories of laws that govern the provision of abortion care in Arizona: the "Reason Ban Scheme," the "Two-Trip Scheme," and the "Telemedicine Ban Scheme." Compl. ¶¶ 4-5. Plaintiffs allege that these laws cannot survive under the newly adopted article II, § 8.1 of the Arizona Constitution, which enshrines a fundamental right to abortion in the state and establishes strict standards for evaluating restrictions on the same.

Although the State may not agree with all aspects of Plaintiffs' allegations, after careful analysis, the State agrees that these statutes and regulations cannot survive constitutional scrutiny under article II, § 8.1.

BACKGROUND

I. Constitutional Standard

Article II, § 8.1 enshrines a fundamental right to obtain an abortion and establishes two standards for evaluating a challenged law, depending on whether the law applies before or after fetal viability. Ariz. Const. art. II, § 8.1. "Fetal viability" means "the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures." Ariz. Const. art. II, § 8.1(B)(2).

Before fetal viability, a law cannot deny, restrict, or interfere with the right to an abortion "unless justified by a compelling state interest that is achieved by the least restrictive means." Ariz. Const. art. II, § 8.1(A)(1).

The "compelling state interest" definition has two conjunctive requirements. First, the law must have been enacted "for the limited purpose of improving or maintaining the health of an individual seeking abortion care, consistent with accepted clinical standards of practice and evidence-based medicine" (the "purpose prong"). Second, the law cannot "infringe on [the patient's] autonomous decision making" (the "autonomy prong"). Ariz. Const. art. II, § 8.1(B)(1)(a)-(b). Thus, for pre-viability laws that deny, restrict, or

interfere with the right to an abortion, a court must determine whether the law achieves a compelling state interest by satisfying the purpose prong and the autonomy prong, and whether the law does so in the most narrowly tailored way possible.[1]

II. Procedural History

On May 22, 2025, Plaintiffs filed their complaint and motion for a preliminary injunction, challenging the following statutes and regulations: **(1)** the Reason Ban Scheme, A.R.S. § 13-3603.02, A.R.S. § 36-2157, A.R.S. § 36-2158(A)(2)(d) and A.R.S. § 36-2161(A)(25); **(2)** the Two-Trip Scheme, A.R.S. § 36-2153(A), (F), A.R.S. § 36-2158(A), A.R.S. § 36-2156(A), A.R.S. § 36-2162.01, A.R.S. § 36-449.03(D)(3)(c), (G)(5), and A.A.C. R9-10-1509(A)(3)(b), (A)(4), (B), (E)(1); and **(3)** the Telemedicine Ban Scheme, A.R.S. § 36-2153(A), A.R.S. § 36-2156(A), A.R.S. § 36-2158(A), A.R.S. § 36-3604, A.R.S. § 36-2160(B), A.R.S. § 36-449.03(D), A.A.C. R9-10-1501(8), and A.A.C. R9-10-1509(A)–(E).

That same day, Plaintiffs sent a notice of unconstitutionality to the Attorney General's Office, which indicated that the notice was also provided to the Speaker of the Arizona House of Representatives and the President of the Arizona Senate pursuant to A.R.S. § 12-1841.

On June 3, the initially-assigned judge, the Honorable Randall H. Warner, held a status conference and set a briefing schedule for Plaintiffs' preliminary injunction motion, with the State's response due June 9 and Plaintiffs' reply due June 13.

On June 9, President of the Arizona Senate Warren Petersen and Speaker of the House of Representatives Steven Montenegro intervened as defendants and filed a notice

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[1] A different standard applies to post-viability laws. After viability, a law cannot deny, restrict, or interfere with the right to an abortion if the abortion "is necessary to protect the life or physical or mental health of the pregnant individual" based on "the good faith judgment of a treating health care professional." Ariz. Const. art. II, § 8.1(A)(2). Because the challenged laws apply to pre-viability abortions, they must satisfy the compelling interest test. *See* Ariz. Const. art. II, § 8.1(A)(1).

of change of judge under Rule 42.1.

On June 10, the Intervenor-Defendants filed a stipulated motion to extend the deadlines for responses to the preliminary injunction to June 23, and for Plaintiffs' reply to two weeks after the date prescribed by Rule 7.1(a)(3).

On June 13, the case was reassigned to the Honorable Jennifer Ryan-Touhill.

On June 20, the Plaintiffs filed a notice of change of judge.

On June 23, Intervenor-Defendants filed another motion to extend the deadline for their response to the preliminary injunction motion to July 7.

DISCUSSION

I. The case can be decided as a matter of law.

As an initial matter, the State notes that the Court can resolve the present dispute as a matter of law.

Article II, § 8.1 mandates a new analysis for evaluating the validity of laws that deny, restrict, or interfere with the fundamental right to an abortion. In some cases, the analysis under article II, § 8.1 will involve questions of fact. But in other cases, laws will fail constitutional scrutiny as a matter of law. *See Reuss v. State*, No. CV2024-034624 (Maricopa Cnty. Super. Ct., Mar. 5, 2025) (granting plaintiffs' motion for judgment on the pleadings in challenge to A.R.S. §§ 36-2321–2326). And that is more likely when a law was passed before the amendment and thus written without regard for—or possibly even in direct tension with—the new constitutional considerations that apply.

As explained below, that is the case here. All of the statutes and regulations at issue were adopted before article II, § 8.1 and thus did not purport to achieve a compelling state interest (as defined by the amendment) or attempt to use the least restrictive means possible to do so. Nor do the laws actually satisfy those requirements, which is clear on the face of the challenged schemes.

II. None of the schemes satisfies all necessary constitutional requirements.

Plaintiffs contend that each of these schemes fails the pre-viability test because it denies, restricts, or interferes with abortion, is not justified by a compelling state interest, and, even if there were a compelling state interest, does not achieve that interest by the least restrictive means possible. While the State may disagree that each of the challenged schemes necessarily fails every factor of the pre-viability test, or that the challenged schemes fail the test in the ways that Plaintiffs identify, ultimately, the State agrees that each scheme fails to meet at least one of the required elements as a matter of law.

A. Reason Ban Scheme

The Reason Ban Scheme, on its face, seeks to limit an "individual's autonomous decision making" by prohibiting abortions based on the reason a patient seeks the abortion. Ariz. Const. art. II, § 8.1(B)(1)(b) (autonomy prong).

In addition, when it passed the most recent parts of the Reason Ban Scheme, the legislature identified three purposes that it called "compelling state interests" justifying the law, and it incorporated those reasons as justifications for earlier statutes. 2021 Ariz. Legis. Serv. Ch. 286 (S.B. 1457), § 15 (listing "three compelling state interests" regarding amendments to A.R.S. § 13-3603.02 regarding genetic abnormalities and finding "[a]ll three … also present for the similar prohibition" based on sex and race). None of those stated reasons is "for the limited purpose of improving or maintaining the health of an individual seeking abortion care, consistent with accepted clinical standards of practice and evidence-based medicine." Ariz. Const. art. II, § 8.1(B)(1)(a) (purpose prong).

B. Two-Trip Scheme

The Two-Trip Scheme does not satisfy the constitutional test in article II, § 8.1 in several respects. Among them, the plain text makes clear that it is expressly intended to create a "twenty-four-hour reflection period" to delay the provision of an abortion that a patient has already chosen, *e.g.*, A.R.S. § 36-2153(F), thus deliberately and necessarily infringing on the patient's autonomous decision making.

In addition, much—perhaps most—of the information that patients are required to listen to under the Two-Trip Scheme has nothing to do with the medical procedure or health-and-safety considerations, failing the purpose prong. *E.g.*, A.R.S. § 36-2153(A)(1)(f) ("The probable anatomical and physiological characteristics of the [fetus] at the time the abortion is to be performed."), (A)(2)(a) ("Medical assistance benefits may be available for prenatal care, childbirth and neonatal care."), (b) ("The father of the unborn child is liable to assist in the support of the child, even if he has offered to pay for the abortion."); A.R.S. § 36-2158(A)(1)(a) ("Perinatal hospice services are available and the physician has offered this care as an alternative to abortion.").

C. Telemedicine Ban Scheme

Finally, the blanket Telemedicine Ban Scheme is, at a minimum, not "the least restrictive means" to achieve whatever legislative goal might arguably satisfy the compelling state interest test. *See* Ariz. Const. art. II, § 8.1(A)(1). On its face, the ban sweeps in all telehealth patient-provider interactions and all circumstances for mailing medication, rather than targeting any specific situations or contexts that will "improv[e] or maintain[] the health of" the patient. *See* Ariz. Const. art. II, § 8.1(B)(1)(a).

This is not to say, however, that the legislature could never legislate on the subjects addressed by these laws in a way that could satisfy constitutional scrutiny. But for present purposes, the challenged laws must fall as a matter of law.

CONCLUSION

The State concedes that, as written, the challenged schemes cannot satisfy the pre-viability test established by article II, § 8.1. In light of the State's concession, the State opposes the complaint's request for attorneys' fees, Compl. at 57, and respectfully asks the Court to exercise its discretion to deny a fee award. *See Defs. of Wildlife v. Hull*, 199 Ariz. 411, 428 ¶ 66 (App. 2001) (exercising discretion not to award fees against Attorney General, who conceded the unconstitutionality of the challenged law).

RESPECTFULLY SUBMITTED this 23rd day of June, 2025.

KRISTIN K. MAYES
ATTORNEY GENERAL

By /s/ Luci D. Davis
Alexander W. Samuels
Hayleigh S. Crawford
Luci D. Davis
Office of the Arizona Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004-1592

Attorneys for Defendant State of Arizona

I hereby certify that the foregoing document was electronically filed and served through AZTurboCourt this 23rd day of June, 2025, to:

Kristine J. Beaudoin
Rahgan N. Jensen
Isabella Stoutenburg
PERKINS COIE LLP
2525 East Camelback Road, Suite 500
Phoenix, Arizona 85016-4227
Telephone: 602.351.8000
KBeaudoin@perkinscoie.com
RJensen@perkinscoie.com
IStoutenburg@perkinscoie.com
DocketPHX@perkinscoie.com

Attorneys for Plaintiffs

Gail Deady*
Caroline Sacerdote*
Olivia Roat*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, New York 10038
Telephone: 917.637.3600
gdeady@reprorights.org
csacerdote@reprorights.org
oroat@reprorights.org

Laura Bakst*
CENTER FOR REPRODUCTIVE RIGHTS
1600 K Street NW, 7th Floor
Washington, D.C. 20006
Telephone: 202.628.0286
lbakst@reprorights.org

Attorneys for Paul A. Isaacson, M.D. and William Richardson, M.D.

Jared Keenan
Lauren Beall
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA
P. O. Box 17148
Phoenix, Arizona 85011
Telephone: 602.650.1854
jkeenan@acluaz.org
lbeall@acluaz.org

Rebecca Chan*
Alexa Kolbi-Molinas*
Johanna Zacarias*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: 212.549.2633
rebeccac@aclu.org
akolbi-molinas@aclu.org
jzacarias@aclu.org

Attorneys for Arizona Medical Association

Kory Langhofer
Thomas Basile
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Telephone: 602.382.4078
kory@statecraftlaw.com
tom@statecraftlaw.com

Justin D. Smith*
Michael C. Martinich-Sauter*
JAMES OTIS LAW GROUP, LLC
530 Maryville Centre Drive, Suite 230
St. Louis, Missouri 63141
Telephone: 816.678.2103
Justin.Smith@james-otis.com
Michael.Martinich-Sauter@james-otis.com

Attorneys for Intervenor-Defendants

**Application for admission pro hac vice forthcoming*

/s/ *M. McGrath*