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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PAUL A. ISAACSON, M.D., *et al.*,

Plaintiffs,

v.

STATE OF ARIZONA,

Defendant,

and

WARREN PETERSEN, *et al.*,

Intervenor-Defendants.

Case No. CV2025-017995

INTERVENOR-DEFENDANTS' MOTION TO DISMISS

(Assigned to The Hon. Greg Como)

INTRODUCTION

Plaintiffs seek to enjoin 14 different Arizona laws that protect the health and safety of women who choose to have an abortion. Plaintiffs' claims fail as a matter of law because of how they have been brought, when they have been brought, and who they have been brought against.

Plaintiffs' claims fail because they are facial challenges that improperly lump together both pre-viability and post-viability abortions, despite the significantly different standards that apply to each. Plaintiffs have failed to prove beyond a reasonable doubt that the challenged provisions are invalid in every application—the well-established standard for facial challenges.

Plaintiffs' claims also fail because they are not ripe. Plaintiffs have not shown a credible threat of enforcement needed for their challenges to proceed. Nor could they make this showing, since the Governor and the Attorney General—who together control the government enforcement of the challenged statutes—have made clear that they have no intention of enforcing any of the challenged provisions. Indeed, both have gone to great lengths to portray themselves as leading advocates for abortion in Arizona. There is no plausible chance that any person will face enforcement of any of the challenged provisions. Because there is no credible threat of enforcement, Plaintiffs' claims are not ripe.

Finally, one of Plaintiffs' claims fails because they sued the "State of Arizona," but they seek to enjoin a provision that creates a private right of action that is enforceable solely by private actors. Plaintiffs cannot sue and enjoin the State as a proxy for these hypothetical future private plaintiffs.

Plaintiffs have filed impermissibly broad facial challenges that are not ripe. Therefore, the Court should dismiss Plaintiffs' claims.

ARGUMENT

A defendant may move to dismiss a plaintiff's complaint for failure to state a claim upon which relief can be granted. Ariz. R. Civ. P. 12(b)(6). "When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the

well-pled factual allegations contained therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008). "[M]ere conclusory statements are insufficient to state a claim upon which relief can be granted." *Id.*

I. Plaintiffs' Claims Should Be Dismissed Because Plaintiffs Have Failed to Prove Their Facial Challenges.

Plaintiffs' claims "are facial challenges, and that matters." *Moody v. NetChoice, LLC*, 603 U.S. 707, 743 (2024). "A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *Morreno v. Brickner*, 243 Ariz. 543, 553 ¶ 40 (2018) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Under this "exacting," *Simpson v. Miller*, 241 Ariz. 341, 345 ¶ 7 (2017), standard, "[t]he fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *Stanwitz v. Reagan*, 245 Ariz. 344, 349 ¶ 19 (2018) (citation omitted); *see also Arizona Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 413 ¶ 26 (App. 2024).

Arizona courts "presume a statute to be constitutional and will not declare an act of the legislature unconstitutional unless convinced beyond a reasonable doubt that it conflicts with the federal or state constitutions." *Lisa K. v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 173, 177 ¶ 9 (Ct. App. 2012). The plaintiff "has the burden of establishing that it infringes upon a constitutional guarantee or violates a constitutional principle," and "every intendment must be indulged in favor of the validity of the statute." *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 370 (1974).

Plaintiffs have brought a facial challenge because their challenges are to specific abortion laws in their entirety. *See, e.g.*, Compl., ¶¶ 4-7, 14-34, 122-123, 222-234. Importantly, Plaintiffs do not limit their challenge to certain as-applied situations. Plaintiffs thus have the burden to prove beyond a reasonable doubt that no set of circumstances exists under which the relevant statutes would be valid. *See Morreno*, 243 Ariz. at 553 ¶ 40; *Lisa K.*, 230 Ariz. at 177 ¶ 9.

Plaintiffs' choice to bring a facial challenge to the statutes at issue undermines the merits of their claims. Article II, Section 8.1 draws a critical line at the point of "fetal viability." Before the point of fetal viability, a covered abortion regulation must satisfy a strict-scrutiny standard prescribed by the Constitution. *See* Ariz. Const. Art. II, § 8. But after the point of fetal viability, an abortion regulation violates the Constitution only if it "[d]enies, restricts or interferes with an abortion . . . that, in the good faith judgment of a treating health care professional, is necessary to protect the life or physical or mental health of the pregnant individual." Art. II, § 8.1(A)(2).

Under the plain language of the Constitution, a post-viability application of an abortion regulation runs afoul of Section 8.1 only under certain case-specific circumstances, *i.e.*, only if in that particular case a treating healthcare professional has, in his or her good faith judgment, determined that the abortion is necessary to protect the life or health of the mother. *Id.*; *see also Knapp v. Martone*, 170 Ariz. 237, 239 (1992) ("It is important to emphasize that Arizona courts must follow and apply the plain language of this new amendment to our constitution.").

Given the plain language of Section 8.1, Plaintiffs cannot prevail on a facial challenge that encompasses post-viability applications of abortion regulations. As the parties challenging the constitutionality of state statutes, Plaintiffs bear the burden of proving their invalidity. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020). In the context of this facial challenge, that burden requires a showing that *every* post-viability abortion is, in the good faith judgment of a treating healthcare provider, necessary to protect the life or health of the mother. *See* Art. II, § 8.1(A)(2). Plaintiffs have not argued that this is the case. Indeed, such a contention would be facially implausible. Post-viability abortion regulations are plainly constitutional in a wide range of applications, namely, situations where the abortion is not medically necessary to protect the health or life of the mother.[1] Thus, a

[1] To be clear, by presenting arguments premised on the facial nature of Plaintiffs' arguments, the Legislative Intervenors do not intend to concede that the challenged provisions are invalid in any of their applications. However, Plaintiffs have opted for

facial challenge to post-viability abortion regulations under Section 8.1 necessarily fails. *See Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021).

This deficiency dooms the entirety of Plaintiffs' case. Plaintiffs made the strategic choice not to distinguish between pre-viability and post-viability applications of abortion regulations. Instead, Plaintiffs have opted to lump together all applications of abortion regulations into a single, undifferentiated challenge. As described above, Plaintiffs cannot demonstrate that every post-viability application of abortion regulations violates Section 8.1. Because those post-viability applications are a subset of the applications that Plaintiffs challenge, Plaintiffs *a fortiori* cannot demonstrate that every application of the challenged provisions violates Section 8.1. And because Plaintiffs cannot demonstrate that every application of the challenged provisions violates Section 8.1, their facial challenge necessarily fails. *Fann*, 251 Ariz. at 433 ¶ 18. As a matter of law, Plaintiffs cannot prevail on their claims, which thus should be dismissed.

II. Plaintiffs' Claims Should Be Dismissed Because They Are Not Ripe.

A plaintiff cannot obtain relief unless she has standing to assert her claims and those claims are ripe. *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003); *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). Arizona applies the ripeness doctrine "as a matter of sound judicial policy" to "prevent[] a court from rendering a premature decision on an issue that may never arise." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279–80 ¶¶ 35-36 (2019) (citation omitted).

Under both doctrines,[2] where a plaintiff brings a pre-enforcement constitutional challenge to a law, the plaintiff must establish that she "face[s] a real threat of being prosecuted for violating the [challenged law]." *Id.* at 280 ¶ 39 (citing *Babbitt v. United*

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strategic reasons to bring only a facial challenge, and so the Legislative Intervenors will respond to the challenge that Plaintiffs have actually brought, rather than to hypothetical as-applied challenges that Plaintiffs could have brought but did not.

[2] In the context of a pre-enforcement constitutional challenge, "[r]ipeness is analogous to standing," and the issues can be analyzed together. *Town of Gilbert v. Maricopa Cnty.*, 213 Ariz. 241, 244 ¶ 8 (App. 2006).

Farm Workers Nat'l Union, 442 U.S. 289 (1979)); *see also Babbitt*, 442 U.S. at 298 (requiring that a plaintiff establish "a credible threat of prosecution [under the challenged statute]" in order to bring a pre-enforcement challenge); *State v. Okun*, 231 Ariz. 462, 466 ¶ 17 (App. 2013) (holding that argument that state statute was unconstitutional was "not ripe" "[i]n the absence of any actual or threatened prosecution"); *Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa Cnty.*, 92 Ariz. 231, 234–35 (1962) (parties stipulated that prosecution "was likely" unless Planned Parenthood curtailed its activities). Here, Plaintiffs have not established a real or credible threat that they—or women who might seek abortions from them—will face any enforcement action under the challenged statutes.[3] To the contrary, all available evidence demonstrates that no relevant state actors will enforce any of the challenged statutes against either Plaintiffs or women who might seek abortions from Plaintiffs.

There is no credible risk of *criminal* enforcement of any of the challenged provisions. On June 22, 2023, Governor Katie Hobbs issued Executive Order 2023-11, titled "Protecting Reproductive Freedom and Healthcare in Arizona" (the "Executive Order").[4] The Executive Order dictates that the Arizona Attorney General would assume full and exclusive authority to prosecute criminal violations of the State's abortion laws. *Id.*, ¶ 1.[5] The import of the Executive Order is clear: there is absolutely no risk of criminal enforcement of any of the State's abortion laws. As a contemporaneous public statement from Attorney General Kris Mayes emphasized, the Executive Order "means Arizonans can seek abortions and access reproductive health care—without interference or fear of criminal

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[3] The Legislative Defendants specifically dispute that Plaintiffs have third-party standing to assert any rights of women who might seek abortions.

[4] *Available at* https://azgovernor.gov/sites/default/files/executive_order_2023_11.pdf. The court may take judicial notice of this Executive Order. *See Myers v. Arizona Dep't of Econ. Sec.*, No. 1 CA-UB 22-0111, 2023 WL 3960256, at *4 (Ariz. Ct. App. June 13, 2023). "Public records regarding matters referenced in a complaint[] are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012).

[5] Plaintiffs have not disputed the legality of the Executive Order. Notably, they also have not included any County Attorney as a defendant in this action.

prosecution."[6]

That is because Attorney General Mayes has repeatedly made clear that she will not enforce the State's abortion laws. Her Office's official website declares that "Attorney General Mayes will not bring or authorize prosecutions against medical personnel who provide abortion care, nor against patients seeking abortion care."[7] Elsewhere, Attorney General Mayes has proclaimed that she "will not prosecute women, doctors, PAs, nurses, midwives, doulas or pharmacists for providing or receiving reproductive services."[8] Attorney General Mayes has wholly disavowed any enforcement of the abortion regulations challenged in this litigation. Under these circumstances, Plaintiffs do not face any credible threat of criminal enforcement of the challenged statutes.

The Executive Order vesting the Attorney General full and exclusive authority to prosecute criminal violations of the State's abortion laws separates this case from an earlier challenge that one of the Plaintiffs brought to part of a statute at issue here. *Isaacson v. Mayes*, 84 F.4th 1089, 1100 (9th Cir. 2023). In *Isaacson*, the Ninth Circuit weighed heavily that "one or more county attorneys agree that they are not bound by the Attorney General's disavowal and will attempt to enforce" the challenged Arizona abortion law. *Id.* The Executive Order, which was not addressed by the Ninth Circuit, changed this consideration. Under the current circumstances, Plaintiffs do not face any credible threat of criminal enforcement of the challenged statutes.

The Complaint also identifies two non-criminal enforcement mechanisms for the challenged statutes, but there is no credible risk of enforcement under those provisions either. Plaintiffs contend that the Arizona Department of Health Services ("ADHS") could take action against them for violating the challenged statutes. Compl., ¶¶ 217-218. The

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[6] *Available at* https://www.azag.gov/press-release/attorney-general-mayes-statement-anniversary-overturning-roe-v-wade. The court may take judicial notice of a statewide officer's website. *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 403 ¶ 12 n.1 (2020).

[7] *Available at* https://www.azag.gov/issues/reproductive-rights/ag-actions.

[8] *Id.* at 4.

Director of ADHS is "appointed by the governor" and "shall serve at the pleasure of the governor." A.R.S. § 36-102(C). Like Attorney General Mayes, Governor Hobbs has made clear that she has no intention of enforcing the State's abortion laws. Governor Hobbs has insisted that she "will never stop fighting to protect reproductive freedom. Arizona women should not have to live in a state where politicians make decisions that should be between a woman and her doctor."[9] She has also emphasized: "Let me be clear: I will do everything in my power to protect our reproductive freedoms, because I trust women to make the decisions that are best for them, and know politicians do not belong in the doctor's office."[10] She has apparently joined the Reproductive Freedom Alliance,[11] which boasts that the state governors who are members "are strengthening reproductive rights within [their] states using every tool, from executive actions and budgets, to legislative reforms, appointments, and regulations."[12] In the Executive Order, Governor Hobbs decried "unnecessary restrictions and bans on reproductive healthcare [that] impede personal freedom and are harmful to health, safety, and economic well being." *Id.* And as noted above, Governor Hobbs issued that Executive Order for the specific purpose of preventing enforcement of the State's abortion laws. Under these circumstances, it is entirely implausible that the ADHS—whose leadership is appointed by, and serves at the pleasure of, Governor Hobbs—would enforce the challenged statutes.

Finally, Plaintiffs point to the possibility that the Arizona Medical Board ("AMB") could impose professional discipline against Plaintiffs and other physicians for violating the challenged statutes. Compl., ¶ 217. Plaintiffs invoke a purely speculative and hypothetical possibility that the AMB might impose professional discipline. *Cf. Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 545 (6th Cir. 2021) (holding that plaintiffs lacked

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[9] *Available at* https://azgovernor.gov/office-arizona-governor/news/2024/05/governor-katie-hobbs-statement-senates-vote-repeal-1864-total-0

[10] *Available at* https://azgovernor.gov/office-arizona-governor/news/2024/05/governor-katie-hobbs-signs-bill-law-officially-repealing-1864

[11] *Available at* https://reprofreedomalliance.org/alliance-members/

[12] *Available at* https://reprofreedomalliance.org/our-work/

standing where they relied on the mere *possibility* that a state medical board might take disciplinary action against them). Plaintiffs do not point to any facts suggesting that there is a credible risk that the AMB might indirectly enforce the challenged statutes through disciplinary proceedings. The AMB's publicly available disciplinary orders do not reflect any instances of professional discipline for violations of state abortion laws. Under these circumstances, there is only an entirely speculative and hypothetical possibility that the AMB might indirectly enforce the challenged statutes.[13] Thus, there is no credible risk that Plaintiffs will face any enforcement of the challenged statutes in the absence of a preliminary injunction.

Moreover, the six-month gap separating the adoption of Article II, Section 8.1 from the Plaintiffs' filing of this action also bespeaks a lack of urgency that undermines their claim of irreparable harm. *See Del. State Sportsmen's Ass'n., Inc. v. Del. Dep't. of Safety & Homeland Sec.*, 108 F.4th 194, 206 (3d Cir. 2024) ("Delay in seeking enforcement of [a plaintiff's] rights . . .tends to indicate at least a reduced need for such drastic, speedy action" as a preliminary injunction).

Plaintiffs have failed to establish a credible threat of enforcement necessary. Therefore, this case must be dismissed because it is not ripe.

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[13] To the extent that Plaintiffs seek to enjoin a hypothetical enforcement of the challenged statutes through disciplinary action by the AMB, their claims would also be barred for failure to exhaust administrative remedies. "A litigant must exhaust a statutorily prescribed administrative remedy before seeking judicial relief from actual or threatened injuries." *Mills v. Arizona Bd. of Tech. Registration*, 253 Ariz. 415, 420 ¶ 11 (2022). The exhaustion doctrine applies even to a constitutional challenge to a potential professional-licensing action, so long as the applicable licensing regime "either require[s] formal proceedings if informal efforts to resolve issues are unsuccessful or permit[s] the professional to initiate such proceedings." *Id.* at 421 ¶ 17. The Supreme Court offered several examples of professional licensing regimes that satisfy this standard, one of which was A.R.S. § 32-2934(H). *Id.* Section 32-1451(H) and (I)—which apply to physicians like Plaintiffs—are substantively identical to § 32-2934(H), which applies to homeopathic and integrated-medicine providers. *Compare* A.R.S. § 32-1451(H), (I), *with* A.R.S. § 32-2934(H). Thus, before bringing a constitutional challenge to a potential licensing action by the AMB, a physician like Plaintiffs must exhaust his or her administrative remedies before the AMB. *See Mills*, 253 Ariz. at 420-22 ¶¶ 11-22. Here, Plaintiffs have not availed themselves of *any* administrative procedures before the AMB. Thus, any challenge to a hypothetical future enforcement of the challenged statutes by the AMB is barred. *See id.*

III. Plaintiffs Lack Standing to Challenge § 13-3603.02(D).

Plaintiffs seek an injunction against § 13-3603.02(D). However, they lack standing to challenge that provision. A plaintiff cannot obtain relief unless she has standing to assert her claims. *Bennett*, 206 Ariz. at 524 ¶ 16. To establish standing, "a party must show that their requested relief would alleviate their alleged injury." *Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*, 249 Ariz. 396, 406 ¶ 25 (2020). Here, Plaintiffs have only sued one Defendant: the "State of Arizona." Their Complaint seeks injunctive relief only against that single defendant. And their proposed preliminary injunction seeks an injunction only against "Defendant the State of Arizona, and all of its officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with Defendant."

Critically, however, no state actors have rights under § 13-3603.02(D), and no state actors have authority to enforce rights arising under § 13-3603.02(D). That provision creates a private right of action that is enforceable solely by private actors. *See* A.R.S. § 13-3603.02(D). An injunction against the State would have no impact on the conduct of the wholly private actors who exclusively possess rights under § 13-3603.02(D). For this reason, the relief that Plaintiffs seek in this case would not "alleviate their alleged injury." *Arizonans for Second Chances*, 249 Ariz. at 406 ¶ 25. Instead, Plaintiffs must raise their challenge to § 13-3603.02(D) in response to an actual lawsuit filed by a private party having rights under that section. Plaintiffs cannot sue the State as a proxy for those hypothetical future private plaintiffs. As the U.S. Supreme Court explained in rejecting a similar challenge, "under traditional equitable principles, no court may lawfully enjoin the world at large or purport to enjoin challenged laws themselves." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021) (holding that courts would lack authority to enjoin "any and all unnamed private persons who might seek to bring their own . . . suits"). Plaintiffs lack standing to challenge § 13-3603.02(D), and thus the Court should deny the requested preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint.

RESPECTFULLY SUBMITTED this 7th day of July, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2025, I electronically transmitted the attached document to the Clerk's Office using the AZTurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following AZTurboCourt registrants:

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