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**Pro hac vice application forthcoming*

Counsel for Intervenor-Defendants

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' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Ahead of the 2024 election, proponents of Proposition 139 ("Prop. 139") assured Arizona voters that the proposed amendment represented a moderate, common-sense measure that would not upend the State's reasonable health and safety regulations. "There's state licensure requirements and medical ethics requirements that will remain exactly the same once Prop. 139 passes," proclaimed one leading proponent.[1] She added that Prop. 139 would "restore the law back to where it was before the Dobbs [decision] overturned Roe v. Wade. There's nothing tricky about it." Another proponent insisted that Prop. 139 "maintains all medical safeguards, certification and licensure requirements, and continues the patient safety standards that are in place now."[2] The lead campaign committee supporting Prop. 139 emphasized the important distinction that the amendment draws between pre-viability and post-viability abortions.[3] So too did the Secretary of State's ballot summary.[4]

With the election behind them, Prop. 139's proponents now claim that measure has swept away nearly every health-and-safety regulation relating to abortion. Informed consent laws that were upheld under *Roe v. Wade*? Invalid under Prop. 139. A statute prohibiting "force or threat of force" to compel a woman to undergo an abortion? Invalid under Prop. 139. A longstanding prohibition against racial discrimination in performing abortions? Invalid under Prop. 139. Safety rules that the National Abortion Federation—one of the leading pro-abortion organizations in America—deems medically necessary under many circumstances? Invalid under Prop. 139. The pre-existing "medical ethics requirements," "medical safeguards," and "patient safety standards?" All invalid under Prop. 139. And not

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[1] *Available at* https://www.kjzz.org/elections/2024-10-22/arizonas-15-week-abortion-law-leaves-some-women-behind-prop-139-proponents-say.
[2] *Available at* https://www.azcentral.com/story/opinion/op-ed/2024/07/07/arizona-abortion-ballot-initiative-constitution/74297043007/?utm_campaign=snd-autopilot&cid=twitter_azcentral.
[3] *Available at* https://www.arizonaforabortionaccess.org/what-is-prop-139.
[4] *Available at* https://azsos.gov/sites/default/files/docs/2024_0821_Final_2024_Ballot_Language_English.pdf.

only pre-viability. The Plaintiffs in this case seek to strike down all of these statutes in *all* of their applications, both pre-viability and post-viability. The Court should not go along with this brazen attempt to displace the will of Arizona voters.

For the reasons stated in detail below, Intervenor-Defendants Steve Montenegro, in his capacity as the Speaker of the Arizona House of Representatives, and Warren Petersen, in his capacity as the President of the Arizona State Senate, respectfully request that the Court deny Plaintiffs' preliminary injunction motion.

ARGUMENT

Plaintiffs are not entitled to a preliminary injunction. "To obtain a preliminary injunction, the movant must prove (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury or harm not remediable by damages, (3) a balance of hardships favoring that party, and (4) public policy favoring the injunction." *City of Flagstaff v. Arizona Dep't of Admin.*, 255 Ariz. 7, 12 ¶ 14 (App. 2023). "Alternatively, the movant can seek to prove one of two conjunctive pairings: (1) probable success on the merits and the possibility of irreparable harm, or (2) the presence of serious questions [on the merits] and the balance of hardships tipping sharply in the movant's favor." *Id.*

Here, none of these factors supports Plaintiffs' requested preliminary injunction. Plaintiffs are unlikely to succeed on the merits. *See* Part I, *infra*. Plaintiffs have failed to demonstrate that they are likely to sustain irreparable injury absent a preliminary injunction. *See* Part II, *infra*. And the remaining factors—the balance of hardships and public policy—also decisively counsel against a preliminary injunction. *See* Part III, *infra*.

I. Plaintiffs Have Not Demonstrated a Likelihood That They Will Prevail on the Merits of Any of Their Constitutional Challenges.

The Court should not grant a preliminary injunction, because Plaintiffs are not likely to prevail on the merits of their constitutional challenges. At the outset, Plaintiffs' claims fail for a fundamental and very straightforward reason: they have chosen to bring a broad facial challenge, but they cannot show that the challenged statutes are invalid in every application—a necessary prerequisite to prevailing on a facial challenge. This deficiency

alone disposes of all of Plaintiffs' claims. Setting aside that fundamental flaw in Plaintiffs' theories, each of their constitutional challenges fails on the merits for a variety of other reasons. Plaintiffs have not demonstrated any realistic chance that they will prevail on the merits of their claims, and so the Court should deny the requested preliminary injunction.[5]

A. Plaintiffs' facial challenge lacks merit, because their theory encompasses both pre-viability and post-viability abortions.

Plaintiffs have brought a *facial* challenge to the provisions at issue: they ask the Court to enjoin the challenged provisions in their entirety, without regard to the specific circumstances of any particular application. *See, e.g.*, Proposed Order Granting Plaintiffs' Motion for Preliminary Injunction; Compl., at 56-57 (prayer for relief). Thus, Plaintiffs' claims present "facial challenges, and that matters." *Moody v. NetChoice, LLC*, 603 U.S. 707, 743 (2024). "A facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid." *Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021). "The 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).

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). The legal significance of this pre-viability/post-viability distinction formed a core component of the election messaging by

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[5] The Legislative Intervenors reserve their right to defend the validity of the challenged provisions on additional grounds, beyond those addressed in this brief, at a later time based on expert testimony.

Prop. 139's proponents, helping them to respond to criticisms that Prop. 139 would permit late-term elective abortion. *See, e.g.*, Arizona for Abortion Access, *What is Proposition 139?*.[6] The Secretary of State's summary of Prop. 139 similarly emphasizes the legal importance of the pre-viability/post-viability distinction.[7]

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. Art. II, § 8.1(A)(2); *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 and the record here, 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, and their preliminary-injunction evidence does not support that conclusion. 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. Thus, a facial challenge to post-viability abortion regulations under Section 8.1 necessarily fails. *See Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021).

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[6] *Available at* https://www.arizonaforabortionaccess.org/what-is-prop-139.

[7] *Available at* https://azsos.gov/sites/default/files/docs/2024_0821_Final_2024_Ballot_Language_English.pdf.

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 facial 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. Thus, they have no likelihood of success on the merits, and the Court should deny their request for a preliminary injunction.

B. Plaintiffs Have Not Established a Basis for Enjoining Any Portion of the So-Called "Reason Ban Scheme."

Plaintiff have challenged four separate statutes that they have collectively described as the "Reason Ban Scheme." For the reasons stated below, Plaintiffs have not shown that they are likely to prevail on the merits of their challenges to the various statutes comprising the so-called Reason Ban. Thus, the Court should deny the requested preliminary injunction.

1. Plaintiffs Have Not Established a Basis for Enjoining A.R.S. § 13-3603.02(A).

At the core of the so-called "Reasons Ban Scheme" are the anti-discrimination provisions of A.R.S. § 13-3603.02(A), which impose penalties on any person who:

> 1. Performs an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child. [or]
>
> 2. Performs an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child.

A.R.S. § 13-3603.02(A). Plaintiffs' challenge to § 13-3603.02(A) lacks merit for several reasons.

a. Applying the doctrine of constitutional avoidance, § 13-3603.02(A) does not implicate Article II, § 8.1.

As noted above, the anti-discrimination provisions of § 13-3603.02(A) form the core of the so-called Reasons Ban. The statute imposes penalties for performing an abortion where the provider knows that the abortion is sought based on discrimination on the basis of race, sex, or genetic abnormality. A.R.S. § 13-3603.02(A).[8] Plaintiffs contend that this anti-discrimination statute violates Article II, § 8.1 of the Arizona Constitution. In their telling, by enacting Section 8.1, the voters of Arizona enshrined an unfettered right to obtain and to perform abortion for the purpose of discriminating on the basis of race, sex, and disability.

At a minimum, the notion that the State has conferred—and will enforce—a broad right to engage in discrimination based on race, sex, and disability raises grave constitutional concerns under the Fourteenth Amendment to the United States Constitution. "State laws and regulations must . . . [be] free from invidious discrimination." *Hagans v. Lavine*, 415 U.S. 528, 539 (1974) (quotation omitted). To be sure, the Fourteenth Amendment does not prohibit purely private discrimination. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). However, "when the State has 'significantly' involved itself with invidious discrimination," the Fourteenth Amendment's equal-protection principles apply. *Aasum v. Good Samaritan Hosp.*, 542 F.2d 792, 794 (9th Cir. 1976) (quoting *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967)).

Plaintiffs argue that Section 8.1 grants them and their patients a state-conferred and state-enforced right to engage in certain forms of invidious discrimination that the Legislature has prohibited. The Supreme Court's decision in *Reitman v. Mulkey* highlights the serious constitutional issues raised by Plaintiffs' argument. In *Reitman*, the Supreme Court held that a California state constitutional provision regarding the leasing and sale of residential property, adopted by ballot proposition, violated the Fourteenth Amendment.

[8] The statute expressly provides that a woman who obtains an abortion based on discriminatory grounds does not face any civil or criminal liability. A.R.S. § 13-3603.02(F).

See 387 U.S. at 371-73. Prior to the ballot proposition, California statutes prohibited certain forms of housing discrimination. *Id.* at 372, 374. The ballot proposition, however, gave property owners "absolute discretion" as to whom they would sell or lease their property. *Id.* at 371. The ballot proposition thus invalidated the pre-existing anti-discrimination statutes. As the Supreme Court explained:

> The right to discriminate, including on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 377. Under those circumstances, the Supreme Court found that the ballot initiative significantly involved the State in private acts of invidious discrimination, thereby violating the Fourteenth Amendment.

Plaintiffs' challenge to the Reasons Ban raises comparable concerns here. Plaintiffs seek to challenge a pre-existing anti-discrimination statute. They effectively contend that Section 8.1 gives doctors and their patients absolute discretion over when to obtain an abortion, no matter the motivations or circumstances. They effectively contend that the right to discriminate—to terminate a pregnancy on the basis of race, sex, or disability—is "now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* At the very least, *Reitman* and similar cases raise serious questions about whether Plaintiffs' interpretation of Section 8.1 would violate the Fourteenth Amendment.

These grave constitutional questions implicate the doctrine of constitutional avoidance. Under that doctrine, when "there is substantial doubt whether" a provision violates the Constitution, courts "will first ascertain whether a construction of the [provision] is fairly possible by which the constitutional question may be avoided." *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (cleaned up). If an alternative interpretation would avoid the constitutional difficulty, then courts should adopt that alternative interpretation. An alternative interpretation that avoids constitutional doubt need

not be "the best one," so long as it "is at least fairly possible." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (cleaned up). Courts must interpret state law, "if possible, in order to avoid constitutional conflict." *Johnson Utilities, LLC v. Ariz. Corp. Comm'n*, 249 Ariz. 215, 236 ¶ 106 (2020).

Here, the Court can reasonably construe Section 8.1 to avoid any constitutional doubts. In particular, the Court reasonably could conclude that Section 8.1's "fundamental right to abortion" protects the decision whether to bear *a* child, but it does not guarantee a right to select *which* child a woman will bear, especially when that decision rests on expressly discriminatory grounds. Pre-*Dobbs* federal case law framed the right to abortion as protecting "the decision whether to bear or beget a child." *Casey*, 505 U.S. at 896 (plurality op.). "But there is a difference between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., joined by Barrett, J., dissenting from denial of rehearing en banc) ("*PPIK*"), *rev'd by Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U.S. 490 (2019). Notably, *Roe v. Wade* itself specifically disavowed the notion that the right to abortion permits a woman "to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason she alone chooses*." *Roe v. Wade*, 410 U.S. 113, 153 (1973) (emphasis added). Thus, Plaintiffs' argument that Section 8.1 surreptitiously establishes a right to perform abortions based on invidious discrimination goes far beyond the right previously recognized in *Roe* and its progeny. "Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as [Plaintiffs] advocate[], would constitutionalize the views of the 20th-century eugenics movement." *Box*, 587 U.S. at 511 (Thomas, J., concurring). At the very least, "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay [other abortion] statutes." *PPIK*, 917 F.3d at 536 (Easterbrook, J., joined by Barrett, J., dissenting from denial of en banc review).

The text of Section 8.1 provides no evidence that Arizona's voters intended to enact

a constitutional right to engage in certain forms of invidious discrimination. At a minimum, then, it "is at least fairly possible" that Section 8.1 guarantees a woman's right to choose whether to bear *a* child, but not the right to select a *particular child* to bear, particularly where that choice rests on the sorts of invidious discrimination that, in other contexts, the State vigorously seeks to stamp out. *See, e.g.*, Ariz. Const. Art. II, § 13; A.R.S. §§ 41-1463 (prohibiting invidious discrimination in employment), 41-1491.14 (prohibiting invidious discrimination in housing), 41-1492.02 (prohibiting invidious discrimination in public accommodation and commercial facilities); *Box*, 587 U.S. at 511 (Thomas, J., concurring) ("In other contexts, the Court has been zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination.").

Adopting this plausible interpretation of Section 8.1 would avoid the Equal Protection problems noted above: if the State has not conferred an enforceable right to engage in invidious discrimination, then the State has not significantly involved itself in that discrimination. *Cf. Aasum*, 542 F.2d at 794. Because this interpretation of Section 8.1 is "fairly possible" and avoids serious constitutional doubts, under the doctrine of constitutional avoidance, the Court should adopt that interpretation. *Hansen*, 599 U.S. at 781; *Johnson Utilities*, 249 Ariz. at 236 ¶ 106. And under that interpretation, Plaintiffs' challenge to the Reasons Ban fails. The so-called Reason Ban does not prohibit a woman from accessing an abortion, even for discriminatory reasons. Nor does it prohibit doctors from performing an abortion, even when a patient possesses an unstated discriminatory motivation for obtaining an abortion. It is only "the doctor's *knowing* participating in a woman's decision to abort her pregnancy" for discriminatory reasons that violates the Reason Ban. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021) (en banc) (upholding constitutionality of substantially similar Ohio law under pre-*Dobbs* federal standard). That prohibition does not implicate the right created by Section 8.1. *Compare id.* at 521-22 ("Even under the full force of H.B. 214, a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason. H.B. 214 does not prohibit her from choosing or obtaining an abortion for that, or any other, reason.

It bars a doctor from aborting a pregnancy when that doctor knows the woman's specific reason and that her reason is: the forthcoming child will have Down syndrome and, because of that, she does not want it."). Thus, the Court should deny the requested preliminary injunction.

b. Section 13-3603.02(A) would satisfy Section 8.1, even if the Court declines to apply the doctrine of constitutional avoidance.

Even if the Court were to find that § 13-3603.02(A) triggers review under Section 8.1, the statute satisfies the applicable level of scrutiny. With respect to pre-viability abortions, a statute satisfies Section 8.1 if it is "justified by a compelling state interest that is achieved by the least restrictive means." Ariz. Const. Art. II, § 8.1(A)(1). An enactment is justified by a "compelling state interest" if it (a) "Is enacted or adopted 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," and (b) "Does not infringe on that individual's autonomous decision making." *Id.* § 8.1(B)(1).

The Legislature enacted § 13-3603.02 to advance a compelling state interest. The legislative findings for the law provide that it "protects against coercive health care practices that encourage selective abortions of persons with genetic abnormalities." S.B. 1457, § 15 (2021). The legislative findings further incorporate research and empirical findings from the Sixth Circuit's en banc decision in *Preterm-Cleveland* and an amicus brief filed in *Box v. Planned Parenthood of Indiana and Kentucky*. *Id.* The amicus brief, for example, cites extensive evidence of "the pressure that some women experience from doctors to abort unborn children with Down syndrome." Brief of the State of Wisconsin, et al., *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, No. 18-483 (U.S.) ("*Box* Amicus Brief"), at 22 (citing, among other evidence, Korkow-Moradi, et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*, 28 J. Fam. Psychotherapy 193, 197 (2017); Goff, et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group*

Experiences, 51 Intellectual & Developmental Disabilities 446, 455 (2013)).[9] "For example, mothers of children with Down syndrome 'commonly express' that the medical information they receive in prenatal counseling is 'biased or overly negative.'" *Id.* (cleaned up) (quoting Kellog, et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Genetic Counseling 805, 810 (2014)). Plaintiffs cannot simply second-guess or disagree with these legislative findings. "[W]here there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *Arevalo*, 249 Ariz. at 373 ¶ 9.

Protecting women against coercion to undergo a medical procedure plainly advances the health of a pregnant woman. For one thing, it protects a woman's mental health, which undoubtedly would be harmed if she were improperly coerced into making the significant and irreversible decision to terminate her pregnancy. Section 8.1 itself acknowledges that mental health constitutes a cognizable interest. *See* Ariz. Const. Art. II, § 8.1(A)(2). Moreover, while Plaintiffs may dispute *how much* risk is associated with abortion, they do not and cannot dispute that abortion carries risk of complications, injury, and even death under certain circumstances. A measure that prevents coercion protects a woman from facing these risks to her physical health where she has not given voluntary and informed consent to assuming them. Protecting pregnant women from coercion constitutes a "legitimate interest[]," and § 13-3603.02 "furthers this interest." *Preterm-Cleveland*, 994 F.3d at 532.

For similar reasons, § 13-3603.02 does not infringe on a pregnant woman's autonomous decision making. To the contrary, because § 13-3603.02 seeks to prevent coercion, the statute directly *advances* a woman's autonomy. "Coercion" is literally an antonym of "autonomy." *See* "Autonomy." *Merriam-Webster.com Thesaurus*, Merriam-

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[9] Available at https://www.supremecourt.gov/DocketPDF/18/18-483/72184/20181115122354603_18-483%20Brief%20of%20States%20of%20Wisconsin%20et%20al%20Supporting%20Petitioners.pdf.

Webster, https://www.merriam-webster.com/thesaurus/autonomy. Moreover, as described above, § 13-3603.02 does not prohibit a woman from obtaining an abortion, even for discriminatory reasons. Instead, § 13-3603.02 imposes a limited prohibition against a doctor performing an abortion where the doctor *knows* that the woman seeks an abortion based on invidious discrimination. *See* § 13-3603.02(A); *see also Preterm-Cleveland*, 994 F.3d at 521-22. As it relates to obtaining the abortion itself, § 13-3603.02(A) does not constrain a pregnant woman's autonomy at all.

Section 13-3603.02(A) also constitutes the least restrictive means for advancing the State's compelling interest in preventing coercion. It is telling that Plaintiffs do not point to any less restrictive means to advance the State's anti-coercion interest. The State need not dream up—and then shoot down—a host of hypothetical alternative options. But the State will address one foreseeable proposed alternative: a simple prohibition against coercion by abortion providers. That hypothetical statute would not constitute a workable alternative. When applying strict scrutiny, courts limit their consideration to "workable" alternatives. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013). The Legislature has found, based on medical scholarship, that the coercion faced by pregnant women often "takes the form of the 'subtle shading of information by counselors against persons with Down syndrome.'" *Box* Amicus Brief at 22 (quotation omitted). Given the subtle nature of the coercion that the statute seeks to address, it would be effectively impossible to set out generally applicable *ex ante* restrictions that give providers sufficient notice to permit them to comply with the regulations. Such an alternative is not workable and may raise a host of constitutional problems of its own. The Court should deny the requested preliminary injunction.

c. Plaintiffs' challenge to § 13-3603.02(A) is not ripe.

A plaintiff can obtain relief only if her claim is ripe. *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). Plaintiffs neither allege nor present evidence suggesting that either (a) pregnant women seek abortions for reasons of the baby's sex or race or (b) that the

Plaintiffs would, in fact, perform an abortion under such circumstances. Any dispute about § 13-3603.02(A)'s prohibition against discrimination based on race or sex is thus entirely hypothetical and not ripe. *Compare NAACP v. Horne*, No. 13-cv-1079, 2013 WL 5519514, at *4 (D. Ariz. Oct. 3, 2013) (rejecting challenge to § 13-3603.02(A) based on lack of standing where plaintiffs did not contend that abortions actually were sought on basis of race or sex), *aff'd* 626 F. App'x 200 (9th Cir. 2015).

2. Plaintiffs have identified no basis for enjoining § 13-3603.02(B)(1).

In both their Complaint and their proposed preliminary-injunction order, Plaintiffs ask the Court to enjoin § 13-3603.02 in its entirety, without specifically addressing each provision separately. Plaintiffs offer absolutely no argument or evidence regarding § 13-3603.02(B)(1). Indeed, they entirely ignore its existence. That provision penalizes any person who "[u]ses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion or an abortion because of a genetic abnormality of the child." A.R.S. § 13-3603.02(B)(1).

There is no plausible argument that this provision violates Section 8.1. A prohibition against violence (or the threat of violence) against pregnant women plainly operates to protect the health of such women. A prohibition against violence (or the threat of violence) against pregnant women also plainly does not undermine those women's autonomy. To the contrary, the prohibition directly advances and preserves their autonomy. Finally, no less-restrictive means would be workable: *any* violence or threat of violence against pregnant women to coerce them into undergoing an abortion would defeat the State's compelling interests. Section 13-3603.02(B)(1) does not violate Section 8.1, and the Court should not enjoin that provision.

3. Plaintiffs have identified no basis for enjoining § 36-2161(A)(25).

Plaintiffs ask the Court to enjoin A.R.S. § 36-2161(A)(25). Section 36-2161(A) requires abortion providers to provide a report to the State Department of Health Services for each abortion that is performed. *See* A.R.S. § 36-2161(A). "The report shall not identify the individual patient by name or include any other information or identifier that would

make it possible to identify, in any manner or under any circumstances, a woman who has obtained or sought to obtain an abortion." *Id.* The report is not filed until after an abortion has been performed. *Id.* § 36-2161(D). The challenged provision of § 36-2161 requires that the report state "[w]hether any genetic abnormality of the unborn child was detected at or before the time of the abortion by genetic testing, such as maternal serum tests, or by ultrasound, such as nuchal translucency screening, or by other forms of testing." *Id.* § 36-2161(A)(25).

Plaintiffs have not offered any argument or evidence as to how this provision violates Section 8.1. It does not. Regulations that govern providers' responsibilities in the aftermath of an abortion generally bear, at most, an attenuated nexus to abortion access itself. *Cf. Box*, 587 U.S. at 492 (holding that, absent evidence of a burden on abortion access, state law concerning the handling of fetal remains was subject to rational basis review, even under pre-*Dobbs* federal law). Section 36-2161(A)(25)'s modest post-abortion reporting requirement does not impose burden or barrier at all to a woman's ability to obtain an abortion or a doctor's ability to perform an abortion. The Court should deny the requested preliminary injunction.

4. 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 v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). 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.

5. Plaintiffs have identified no basis for enjoining the remaining provisions of the "Reasons Ban Scheme."

The remaining components of the so-called "Reasons Ban Scheme" simply implement the substantive provisions described above. *See* A.R.S. § 13-3603.02(C), (E)-(G); § 36-2157; § 36-2158(A)(2)(d). Their validity rises and falls with those substantive provisions. Because the substantive provisions are valid for the reasons described above, so too are these implementing provisions.

C. Plaintiffs Have Not Identified a Basis to Enjoin the Informed Consent Statutes.

Plaintiffs can obtain the injunction they seek only upon establishing that, in ***all*** of its possible applications, each of the challenged laws both (1) "denies, restricts or interferes with [the right to abortion] before fetal viability," and (2) is not "justified by a compelling state interest that is achieved by the least restrictive means." Ariz. Const. art. II, § 8.1(A)(1). Their evidentiary offering falls far short of that threshold.

As noted above, the Informed Consent Statutes are comprised of multiple distinct, albeit related, provisions. Because courts considering facial challenge must "try to limit the solution to the problem" by crafting the narrowest feasible remedy, *Ayotte*, 546 U.S. at 328, each must be evaluated separately.

1. Disclosure Provisions

Plaintiffs seek to enjoin, in their entirety, the State's informed consent statutes. Those statutes require abortion providers to disclose certain objective facts to women before performing an abortion. *See* A.R.S. §§ 36-2153(A), 36-2158(A). The information that must be disclosed includes "[t]he nature of the proposed procedure" and "[t]he immediate and long-term medical risks associated with the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion." A.R.S. § 36-2153(A)(1)(b), (c). Plaintiffs seek to enjoin the requirement to provide such information in any situation. Plaintiffs also seek to enjoin the requirement that women receive information about alternatives to abortion, state-provided resources and public benefits, and scientific information about the "anatomical and physiological characteristics of the unborn child." A.R.S. §§ 36-2153(A), 36-2158(A). With respect to the Department of Health website and related materials to which Plaintiffs direct much ire, the statute provides that the physician must inform the mother that they are ***available***; it does not mandate that the mother actually access or review them. *See* A.R.S. §§ 36-2153(A)(2)(f)-(g); 36-2158(A)(2)(b).

These basic informed-consent provisions do not trigger any scrutiny at all under Section 8.1, because they do not deny, restrict, or interfere with abortion access. Compliance with the requirements involves only a *de minimis* amount of time, and they are consistent with the sorts of informed-consent protocols that providers should be using regardless of what state law prescribes. The mere communication of information that some women may deem relevant to pregnancy-related decisions "cannot be classified as an interference with the right" to obtain an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1992) (plurality op.).

Even if the disclosure provisions did trigger strict scrutiny under Section 8.1, they

would easily satisfy that standard. Arizona's law is modeled on a statute that the U.S. Supreme Court sustained concomitantly with its reaffirmation of a fundamental abortion right. *See Casey*, 505 U.S. at 881 (describing Pennsylvania statute that imposed 24-hour waiting period and required disclosures about informational resources "describing the fetus" and abortion alternatives). While Article II, Section 8.1 repudiates the interest in unborn life acknowledged in *Casey*, the Supreme Court separately affirmed the disclosure requirements on the additional grounds of maternal health, finding that "[i]t cannot be questioned that psychological well-being is a facet of health." 505 U.S. at 882. The *Casey* Court explained that

> most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Id.

The disclosure provisions thus advance a compelling state interest in preserving the mental health of pregnant women. Those provisions also do not impinge on the autonomy of pregnant women. To the contrary, by arming them with a more complete set of potentially relevant information, these provisions advance women's autonomy. And the disclosure provisions are narrowly tailored to accomplish this purpose. They require only a *de minimis* time commitment, and they do not prevent women or abortion providers from raising or addressing other issues that they may believe to be relevant to the decision whether to undergo an abortion. Thus, the disclosure provisions would satisfy Section 8.1's strict-scrutiny standard.

2. In-Person Requirement

Because the statutory ultrasound requirement (discussed below) is facially valid, the in-person nature of the counseling session—which can be completed during the same visit—does not impose any additional burden and thus does not independently restrict or

interfere with abortion access. And even if it did, the Court of Appeals has recognized that "telephonic consultation" can be "inferior to in-person consultation during which the interviewer could perceive the condition and comportment of the patient, in furtherance of the state's interest in the woman's health." *Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 275 ¶ 34 (App. 2011).

3. Ultrasound Requirement

"[T]he provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as 'medically necessary' for the mother and fetus." *Texas Med. Providers Performing Abortion Services v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012). Notably, the Plaintiffs fail to meaningfully controvert the medical necessity of routine pre-abortion ultrasounds. Dr. Nichols in fact confirmed that it is his "general practice to perform an ultrasound directly before an in-clinic abortion." Nicholson Decl. ¶ 40. While he adds that "an ultrasound is not necessary in every case," this qualifier does not aid (and, if anything, discredits) Plaintiffs' facial challenge, which entails proving that a mandated ultrasound can ***never*** be consistent with maternal health and autonomy.

The medical necessity of the ultrasound requirement is especially uncontestable under certain circumstances, as demonstrated by the clinical guidelines of the National Abortion Federation ("NAF")—guidelines that Plaintiffs themselves cite as authoritative in this area. *See* Compl., ¶ 143. For example, with respect to D&E abortions, NAF's clinical guidelines provide that "[g]estational age ***must*** be verified by ultrasonography . . . ***prior to*** the termination of a pregnancy clinically estimated to be more than 14 weeks from LMP." Nat'l Abortion Fed'n, *2024 Clinical Policy Guidelines for Abortion Care* (2024) ("NAF Guidelines"),[10] at 36 (emphases added). With respect to medication abortions, NAF's

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[10] *Available at* https://prochoice.org/wp-content/uploads/2024-CPGs-FINAL-1.pdf. To be clear, the Legislative Intervenors do not intend to endorse the NAF clinical guidelines. However, Plaintiffs treat the NAF clinical guidelines as authoritative. *See* Compl., ¶ 143. And NAF bills itself as "the professional association of abortion providers." https://prochoice.org. Thus, if even the NAF clinical guidelines treat a practice as medically necessary under certain circumstances, it is unclear how Plaintiffs could contest the validity of a statute that calls for that practice under those circumstances. The Legislative

clinical guidelines dictate that "[g]estational age ***must*** be verified by ultrasonography . . . ***prior to*** the termination of a pregnancy clinically estimated to be more than 14 weeks from LMP." *Id.* at 42 (emphases added). And as another example, with respect to abortion by aspiration, NAF's clinical guidelines dictate that, "[w]hen gestational age cannot be reasonably determined by other means, ultrasonography should be used." *Id.* at 29. Under at least these circumstances, there can be no serious dispute that requiring ultrasonography is narrowly tailored to advance a compelling state interest in protecting a pregnant woman's health.

These undisputably permissible applications of the ultrasound requirement necessarily defeat Plaintiffs' facial challenge. Plaintiffs have opted to bring a facial challenge to A.R.S. § 36-449.03(D)(4) and § 36-2156(A). As noted above, "[a] facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid." *Fann*, 251 Ariz. at 433 ¶ 18. As the NAF clinical guidelines demonstrate, at a minimum, there are several important circumstances under which the ultrasound requirement would not violate Section 8.1. Thus, Plaintiffs' facial challenge to § 36-449.03(D)(4) and § 36-2156(A) necessarily fails.

4. 24-Hour Waiting Period

A modest 24-hour waiting period enhances informed decision-making and fortifies long-term psychological health by ensuring that a pregnant woman can absorb, reflect on, and incorporate information learned during the counseling session and ultrasound into a deliberate decision to continue or terminate the pregnancy. *See Casey*, 505 U.S. at 883, 887 (finding that disclosure requirements, which included a 24-hour waiting period, promoted "mature and informed" decision-making and "facilitates the wise exercise of" abortion rights).

Intervenors specifically reserve their right to contest any aspect of the NAF clinical guidelines through expert testimony.

5. Rh Testing

Plaintiffs challenge two provisions relating to Rh testing. A.R.S. § 36-449.03(D)(3)(c) requires the Director of the Department of Health Services to adopt rules that "require . . . appropriate laboratory tests, including . . . Rh typing, unless reliable written documentation of blood type is available." To implement this statutory obligation, the Director has adopted a regulation requiring that, before a provider performs an abortion, the provider must perform "Rh typing, unless the patient provides written documentation of blood type acceptable to the physician." A.A.C. § R9-10-1509(A)(3)(B). These provisions do not violate Article II, Section 8.1.

As an initial matter, both the statute and the implementing regulation contemplate many circumstances where no Rh typing will be required at all, because the patient can provide alternative documentation that the abortion provider finds acceptable. In those cases, the Rh typing regulations impose absolutely no barrier at all to obtaining or performing an abortion. As a result, under those circumstances, the regulations do not deny, restrict, or interfere with abortion access and cannot violate Section 8.1. And because there are at least some circumstances where the Rh typing rules would not violate Section 8.1, Plaintiffs' facial challenge to those rules necessarily fails. *See Fann*, 251 Ariz. at 433 ¶ 18.

In addition, under at least certain circumstances, there can be no serious dispute that mandatory Rh typing would satisfy the strict scrutiny imposed by Section 8.1. The National Abortion Federation's *Clinical Policy Guidelines for Abortion Care* expressly provide that "Rh status testing must be offered to all people with unknown Rh status over 12 weeks from the last menstrual period (LMP) and anti-D immune globulin must be offered to patients over 12 weeks who are Rh negative. . . If anti-D immune globulin is not administered in the facility, other arrangements for administration must be documented." NAF Guidelines, at 12. Plaintiffs cite this very source as evidence of when Rh typing is medically necessary. *See* Compl., ¶ 143. At a minimum, then, there can be no serious doubt that for patients beyond 12 weeks from LMP, is medically necessary to protect the health of women. Thus, in a significant set of circumstances—that is, essentially all pregnancies beyond 12 weeks—

the Rh typing regulations would not violate Section 8.1. Plaintiffs' facial challenge to the Rh typing rules thus fails. *See Fann*, 251 Ariz. at 433 ¶ 18.

Plaintiffs also object to the fact that the State requires medically necessary Rh typing to occur before an abortion, rather than up to 72 hours after the abortion. But they provide no explanation of how changing the timing of the Rh typing would reduce the purported burden faced by women or doctors. Indeed, Plaintiffs' reasoning rests on the notion that it would be less burdensome if women were to make an *additional* visit to the abortion provider. Plaintiffs have not substantiated this counterintuitive claim. Moreover, this alternative timing requirement would not adequately advance the State's interests. In particular, the requirement would be entirely unenforceable: there would be no way to guarantee that patients would return several days after receiving their abortion to undergo Rh typing, and this would defeat the State's interest in ensuring that women have an opportunity to address the potentially serious health consequences of untreated Rh-negative status. Plaintiffs' timing objection thus does not affect the validity of the Rh typing regulations. The Court should deny the preliminary injunction.

6. Reporting Requirement

Plaintiffs also challenge A.R.S § 36-2162.01, which merely requires providers to document and report to the Department of Health certain information concerning the administration of disclosures and ultrasounds. As discussed above, post-hoc reporting mandates on providers do not in any articulable sense encumber women seeking abortions. They accordingly do not deny, restrict, or interfere with abortion access.

D. Plaintiffs have not established a basis to enjoin the Telemedicine Provisions.

Plaintiffs challenge a number of statutes that, lumped together, they describe as the "Telemedicine Ban Scheme." *See, e.g.*, Compl., ¶ 4(c). Plaintiffs have brought a facial challenge to each of those provisions. For the reasons described below, Plaintiffs' facial challenge to each of these provisions fails.

1. Plaintiffs have not identified a basis to enjoin the generally applicable informed-consent, ultrasound, and patient examination requirements in the context of medication abortion.

Plaintiffs classify the generally applicable informed-consent, ultrasound, and patient-examination statutes as part of the so-called "Telemedicine Ban Scheme." *See* Compl., ¶ 4(c). For the reasons described above, Plaintiffs' facial challenges to these statutes fail. Some of those challenges are especially meritless in the context of medication abortions, as reflected by the NAF clinical guidelines. For example, in the context of medication abortions, NAF's clinical guidelines direct that "[g]estational age ***must be verified by ultrasonography*** . . . prior to the termination of a pregnancy clinically estimated to be more than 14 weeks from LMP." NAF Guidelines at 42 (emphasis added). NAF's guidelines similarly dictate that, for a medication abortion after the first trimester, "physical examination ***must be performed***." *Id.* (emphasis added). Plaintiffs thus seek to enjoin the application of Arizona statutes under circumstances where NAF characterizes the required procedures as medically necessary. Even in the context of medication abortion, Plaintiffs have not shown that the challenged statutes violate Section 8.1 in every application. Thus, their facial challenge necessarily fails. *See Fann*, 251 Ariz. at 433 ¶ 18.

2. Plaintiffs have not identified a basis to enjoin § 36-3604 or § 36-2160(B).

Plaintiffs bring a facial challenge to enjoin all applications of A.R.S. § 36-3604, which provides that "[a] health care provider shall not use telehealth to provide an abortion." A.R.S. § 36-3604(A). Plaintiffs' facial challenge to § 36-3604 fails, because Plaintiffs cannot demonstrate that "no set of circumstances exists under which the statute would be valid." *Fann*, 251 Ariz. 425 at ¶ 18.

First, on its face, § 36-3604 applies more broadly than medication abortions; it applies to all abortions. *See* A.R.S. § 36-3604(A), (C); *see also* A.R.S. § 36-2151(1). Abortions can be provided in a number of ways, including aspiration and D&E procedures. Plaintiffs do not contend—could not credibly contend—that aspiration or D&E abortions could be safely performed via telemedicine, such as by a doctor remotely talking a patient through performing the procedure on herself. Such procedures can only occur safely in a

healthcare setting. *See* NAF Clinical Guidelines at 36 ("Abortion by dilation and evacuation (D&E) is a safe outpatient procedure ***when performed by appropriately trained clinicians in medical offices, freestanding clinics, ambulatory surgery centers, and hospitals***." (emphasis added)). Thus, § 36-3604 is plainly valid under a number of circumstances, *e.g.*, where the abortion will be provided via aspiration or D&E procedures, and thus Plaintiffs' facial challenge to the statute fails. *Fann*, 251 Ariz. 425 at ¶ 18.

Second, the NAF Clinical Guidelines suggest that even medication abortions should be performed in a healthcare setting after the first trimester. In particular, the clinical guidelines state that "[m]edication abortion is a safe and effective method for termination of pregnancies beyond the first trimester ***when performed by trained clinicians in medical offices, freestanding clinics, ambulatory surgery centers, and hospitals***." NAF Clinical Guidelines, at 42 (emphasis added). This directive contrasts with the guidelines' discussion of medication abortion during earlier phases of pregnancy. *See* NAF Clinical Guidelines at 17 (asserting that, in the context of "Early Medication Abortion," "[p]roviding medication abortion by telemedicine is a safe option"). Plaintiffs have not shown how Section 8.1 prohibits a requirement that medication abortions after the first trimester must occur in a healthcare setting—a position at odds with NAF's clinical guidelines. *Cf. Arevalo*, 249 Ariz. at 373 ¶ 9 (noting that "the challenging party bears the burden of proving [a statute's] unconstitutionality"). Because § 36-3604 is, at a minimum, valid in the context of medication abortions after the first trimester, Plaintiffs' facial challenge to the statute fails. *Fann*, 251 Ariz. 425 at ¶ 18.

Finally, a requirement that medication abortions occur under the in-person care of a healthcare provider would satisfy the strict scrutiny imposed by Section 8.1(A)(1). That requirement advances a compelling state interest. Among other compelling interests, the State has a compelling interest in ensuring that a pregnant woman is not coerced into taking an abortion pill by another person, such as a spouse, partner, abuser, or trafficker. *See, e.g.*,

Melanie Israel, Heritage Foundation, *Abortion Pills, Coercion, and Abuse* (Dec. 1, 2023).[11] This state interest directly advances the health of a pregnant woman: it protects her physical and mental health by ensuring that she does not undergo pharmacological treatment, resulting in the irreversible termination of her pregnancy, without her full consent. *Cf.* Ariz. Const. Art. II, § 8.1(B)(1)(a). This state interest also directly advances a pregnant woman's autonomous decision making, rather than infringing on it. *Cf. id.* § 8.1(B)(1)(b). And § 36-3604 is narrowly tailored to advance this interest. If a woman undergoes a medication abortion in the presence of her healthcare provider, that provider can assess and ensure that she is not doing so under duress or coercion. The provider lacks the ability to do so if the provider communicates with the patient exclusively through remote means. Thus, § 36-3604 is narrowly tailored to accomplish the State's compelling interest.

For the foregoing reasons, Plaintiffs' facial challenge to § 36-3604 fails. *Fann*, 251 Ariz. 425 at ¶ 18. As a result, Plaintiffs' facial challenge to § 36-2160(B) fails as well. That provision prohibits "providing an abortion-inducing drug via courier, delivery or mail service." A.R.S. § 36-2160(B). This provision operates to enforce § 36-3604's telemedicine provision. It prevents patients from undergoing a medication abortion in unsafe conditions outside a healthcare setting. As described above, under at least a large number of circumstances, a requirement that medication abortions occur in a healthcare setting satisfies Section 8.1. Thus, § 36-2160(B)—which implements that requirement—must also be valid in a large number of circumstances. Plaintiffs' facial challenge to § 36-2160(B) fails. The Court should deny the requested preliminary injunction.

II. Plaintiffs Have Not Shown That They Will Be Irreparably Injured Absent a Preliminary Injunction.

Plaintiffs have not established any credible risk that they—or women who might seek abortions from them—will face any enforcement action under any of the challenged statutes. To the contrary, all available evidence demonstrates that no relevant state actors

[11] *Available at* https://www.heritage.org/life/commentary/abortion-pills-coercion-and-abuse.

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").[12] 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.[13] 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 prosecution."[14]

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."[15] 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."[16] 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 Complaint also identifies two non-criminal enforcement mechanisms for the challenged statutes, but there is no credible risk of enforcement under those provisions

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[12] *Available at* https://azgovernor.gov/sites/default/files/executive_order_2023_11.pdf.
[13] 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.
[14] *Available at* https://www.azag.gov/press-release/attorney-general-mayes-statement-anniversary-overturning-roe-v-wade
[15] *Available at* https://www.azag.gov/issues/reproductive-rights/ag-actions
[16] *Id.* at 4.

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 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."[17] 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."[18] She has apparently joined the Reproductive Freedom Alliance,[19] 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." [20] 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

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[17] *Available at* https://azgovernor.gov/office-arizona-governor/news/2024/05/governor-katie-hobbs-statement-senates-vote-repeal-1864-total-0
[18] *Available at* https://azgovernor.gov/office-arizona-governor/news/2024/05/governor-katie-hobbs-signs-bill-law-officially-repealing-1864
[19] *Available at* https://reprofreedomalliance.org/alliance-members/
[20] *Available at* https://reprofreedomalliance.org/our-work/

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 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.[21] 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).

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[21] 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. The Remaining Equitable Factors Support the State.

The remaining equitable factors—the balance of hardships and public policy—both strongly counsel against the requested preliminary injunction. With regard to the balance of hardships, a preliminary injunction would impose substantial harm on the State and its legitimate interests. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up); *see also Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018) (discussing irreparable harm, and noting that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). That principle applies with particular force here, where the challenged statutes implement fundamental health and safety interests, as described above.

The public-policy factor similarly counsels against a preliminary injunction. "[S]tatements of public policy must be made by the people through the legislature." *Local 286, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 41 (1954); *see also Sherring v. Industrial Comm'n of Arizona*, 245 Ariz. 254, 258 ¶ 14 (App. 2018) (recognizing "the principle that public policy is determined by the legislature, not the courts"). Thus, the challenged statutes themselves reflect fundamental public policies that must be taken into account in the equitable analysis.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for a Preliminary Injunction.

RESPECTFULLY SUBMITTED this 7th day of July, 2025.

By: */s/ Andrew Gould*

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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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