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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., 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,

and

WARREN PETERSEN, President of the Arizona Senate; and STEVE MONTENEGRO, Speaker of the Arizona House of Representatives,

Intervenor-Defendants.

No. CV2025-017995

**STATE OF ARIZONA'S RESPONSE TO INTERVENORS' MOTION TO DISMISS**

(Assigned to Hon. Greg Como)

## INTRODUCTION

Plaintiffs challenge three categories of laws that govern abortion 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 scrutiny under the newly adopted article II, § 8.1 of the Arizona Constitution, which enshrined a fundamental right to abortion in the state.

Having determined that the challenged laws—as currently drafted—cannot survive scrutiny under the new constitutional provision, the State ultimately conceded their unconstitutionality, although on more limited grounds than Plaintiffs urge. *See generally* State Resp. to Pls.'s PI Mot. (June 23, 2025).

The legislative leaders intervened to defend the constitutionality of the statutes and regulations that Plaintiffs challenge but then moved to dismiss on threshold grounds. Intervenors argue that (1) the complaint fails to plead a facial challenge, (2) Plaintiffs' claims are unripe because there is no threat of enforcement, and (3) Plaintiffs lack standing to challenge the statutory private right of action authorized in A.R.S. § 13-3603.02(D).

Given the weighty interests at issue, the State writes to address several legal errors underlying Intervenors' arguments. Here, the State has an interest in the proper interpretation of the Constitutional Amendment to provide clarity to Arizonans and relevant government actors. And this case presents an important opportunity for the Court to issue such first-impression guidance. More generally, the State has a significant interest in the legal principles, implicated here, which apply when it defends Arizona statutes against constitutional claims in many other contexts.

For these reasons, and as explained herein, the State respectfully asks the Court to deny the motion to dismiss and resolve this case on the merits.

## DISCUSSION

### I. The Complaint properly pleads a facial pre-viability challenge.

In general, Intervenors correctly identify the normal rules for facial challenges in other contexts.[1] But they mistakenly apply those rules to the new constitutional text here, which establishes a distinct analytical framework.

To be sure, "in a typical facial challenge, [Arizona courts] require the challenger to demonstrate that under no set of circumstances can the law be enforced in a constitutional matter." *AZ Petition Partners LLC v. Thompson in & for Cnty. of Maricopa*, 255 Ariz. 254, 258 ¶¶ 17-18 (2023) (noting exception in speech context); *see, e.g.*, *Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021); *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Moreover, the State certainly agrees that challenged laws are generally entitled to a presumption of constitutionality, although "any presumption . . . falls away" when "a law burdens fundamental rights." *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 9 (2014).

These principles help avoid "speculative challenges," honor the separation of powers, and properly govern in the mine run of cases. *AZ Petition Partners*, 255 Ariz. at 258 ¶ 17.

But, as explained below, those principles have no application here because the Amendment expressly identifies a new analytical framework. And the challenged laws cannot be presumed constitutional under this new, later-in-time constitutional standard that the Legislature necessarily did not consider when it enacted the earlier statutes at issue.

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[1] With one exception. Intervenors argue (Mot. at 2) that Plaintiffs "have the burden to prove beyond a reasonable doubt" that the challenged laws are unconstitutional. That is incorrect. The Arizona Supreme Court "disapprove[d] the use of the 'beyond a reasonable doubt' standard for making constitutionality determinations" over a decade ago. *Gallardo*, 236 Ariz. at 87 ¶ 8.

### A. The Amendment establishes two distinct types of challenges.

Article II, § 8.1 recognizes "a fundamental right to abortion" and sets out a multi-part prohibition that "the state shall not enact, adopt or enforce" a law that does any of three things:

> 1. Denies, restricts or interferes with that right before fetal viability unless justified by a compelling state interest that is achieved by the least restrictive means.
>
> 2. Denies, restricts or interferes with an abortion after fetal viability 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.
>
> 3. Penalizes any individual or entity for aiding or assisting a pregnant individual in exercising the individual's right to abortion as provided in this section.

Ariz. Const. art. II, § 8.1(A)(1)-(3); *see id.* § 8.1(B)(2) (defining "fetal viability").

This language establishes a burden-shifting framework with distinct inquiries depending on whether a law implicates the pre-viability right to abortion or post-viability access. Put differently, the Amendment creates two categories of challenges and paths to relief: one to remedy infringements of the right to a pre-viability abortion, and one to vindicate the right to a post-viability abortion that is necessary to protect the patient's life or health.

In all cases, the initial burden is on the plaintiff to start. A plaintiff bringing a claim under this section must show the State has "enact[ed], adopt[ed], or enforce[d]" a law that either "[d]enies, restricts or interferes with" the fundamental right to a pre- or post-viability abortion as protected under § 8.1(A)(1) or (2), or that "[p]enalizes" another person for "aiding or assisting" someone in exercising their protected right. Ariz. Const. art. II, § 8.1(A)(1)-(3); *cf. Giss v. Jordan*, 82 Ariz. 152, 158 (1957) ("Burden is on him who attacks constitutionality of legislation.").

If a plaintiff establishes that the State has enacted, adopted, or enforced such a law,

then the burden shifts to the State. The State must show that the challenged law satisfies the relevant inquiry under the pre-viability standard in § 8.1(A)(1) or the post-viability standard in (A)(2), depending on which claim the plaintiff asserts. *Cf. Simpson v. Miller*, 241 Ariz. 341, 347 ¶ 22 (2017) (stating that "strict scrutiny … requires that the government demonstrate a compelling interest to which the restriction is narrowly tailored"); *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) ("It is the state's burden to demonstrate that 'its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.'" (citation omitted)).

So, if a plaintiff asserts a claim under § 8.1(A)(1) and shows that a law works to deny, restrict, or interfere with the right to a pre-viability abortion, then the State must show that the law is justified by "a compelling state interest"—as the Amendment defines that term—and achieves that interest "by the least restrictive means." Ariz. Const. art. II, § 8.1(A)(1), (B)(1)(a)-(b).[2]

If a plaintiff asserts a claim under § 8.1(A)(2) to a law that applies post-viability, the State must show that the law will not (or did not) deny, restrict, or interfere with the right to an abortion that, in a treating provider's good faith judgment, is or was "necessary to protect" the patient's life or health. Ariz. Const. art. II, § 8.1(A)(2).

Thus, the Amendment is unique among Arizona's Constitutional provisions by establishing the precise standard to be used when evaluating challenged laws. *Compare* Ariz. Const. art. II, § 8.1, *with e.g.*, Ariz. Const. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."), § 6 ("Every person may freely

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[2] The "compelling state interest" definition has two conjunctive requirements. Under the first part ("the purpose prong"), 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." Under the second part ("the autonomy prong"), the law cannot "infringe on [the patient's] autonomous decision making." Ariz. Const. art. II, § 8.1(B)(1)(a)-(b).

speak, write, and publish on all subjects, being responsible for the abuse of that right."), § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

That detailed voter-approved language necessarily displaces any standards that might come into play in other contexts.

**B. Intervenors collapse the Amendment's pre- and post-viability rights.**

Intervenors assert (Mot. at 3-4) that "Plaintiffs' choice to bring a facial challenge to the statutes at issue undermines the merits of their claims" because they did not "distinguish between pre-viability and post-viability applications of abortion regulations," and the challenged laws could constitutionally apply to post-viability abortion. That argument misunderstands the constitutional text, which supplies two separate categories of challenges and standards by which to judge those challenges. It also ignores the lack of post-viability applications of the challenged laws.

To start, the State agrees with Intervenors that, in theory, "post-viability abortion regulations" could be constitutional (Mot. at 3)—so long as they do not deny, restrict, or interfere with abortions that are necessary to protect the patient's life or health, Ariz. Const. art. II, § 8.1(A)(2). But that is not the case before the Court.

As the State reads the complaint, Plaintiffs claim that the challenged laws facially violate § 8.1(A)(1) by unjustifiably denying, restricting, or interfering with the right to a *pre-viability* abortion. *See generally* Compl. ¶¶ 222-34. That is, as the State understands it, the complaint does not attack the laws as to post-viability abortions under the separate right and standard in § 8.1(A)(2). Indeed, Plaintiffs disclaim providing post-viability abortions in Arizona at all. Compl. ¶ 49.

Omitting a challenge regarding the right to a post-viability abortion under (A)(2) does not defeat a facial challenge regarding pre-viability infringements under (A)(1). Those two subparts identify distinct rights with different contours, applicable standards, and claims. By collapsing them as inseparable in any and all facial challenges under

§ 8.1, Intervenors disregard the Amendment's plain text and structure.

Regardless, to the extent Plaintiffs also purport to seek a declaration regarding the constitutionality of the challenged laws in the post-viability context under § 8.1(A)(2), that still would not warrant dismissal because Plaintiffs clearly have standing to seek a declaration under § 8.1(A)(1).

Relatedly, even accepting Intervenors' incorrect reading of the Amendment's framework—and their broader reading of Plaintiffs' complaint—their vague references (Mot. at 4) to "post-viability applications" are unavailing and do not support dismissal. Precedent makes clear that "the proper focus of [a facial] constitutional inquiry is [actions] that the law actually authorizes [or prohibits], not those for which it is irrelevant." *Morreno v. Brickner*, 243 Ariz. 543, 548 ¶ 17 (2018) (citation omitted). But here, all or nearly all of the challenged laws' actual applications are pre-viability. Intervenors identify no possibly constitutional post-viability applications of the challenged laws that are legally or practically feasible. Put differently, they identify no instance where the laws would require or prohibit conduct that was not otherwise required or prohibited. At most, Intervenors theorize about *irrelevant* applications where the challenged laws would not matter.

To explain, Arizona already bans post-viability abortions that are not "necessary to preserve the life or health of the woman" or are due to "a medical emergency." A.R.S. § 36-2301.01(A)(1), (B). And Plaintiffs have not challenged that post-viability ban. Thus, under current law, the only post-viability abortions that lawfully occur in Arizona are in medical emergencies or when necessary to preserve the life or health of the mother. But the laws that Plaintiffs have challenged are either inapplicable in medical emergencies—and therefore irrelevant to such post-viability abortions—or are otherwise irrelevant post-viability. *E.g.*, A.R.S. § 13-3603.02(A) ("Except in a medical emergency…."); A.R.S. § 36-2153(A) ("Except in the case of a medical emergency…."); 

A.R.S. § 36-2158(A) (same).[3]

In other words, the laws Plaintiffs challenge "only ha[ve] practical significance under Arizona law until viability" and those pre-viability abortions are "the situations in which [the laws] actually [are] determinative" in restricting or interfering with the fundamental right. *Cf. Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013). Those pre-viability situations under (A)(1) are the only ones at issue in this case.

## II. The controversy is ripe for resolution.

Next, Intervenors argue (Mot. at 4-8) that Plaintiffs' claims are unripe because they face no threat of criminal enforcement, citing the Governor's Executive Order and the Attorney General's public statements.[4]

To be clear, although the EO is a lawful and binding exercise of the Governor's authority, neither the EO nor the Attorney General's exercise of prosecutorial discretion can rewrite or repeal statutes. Absent a court order, those prohibitions and penalties remain on the books and are capable of enforcement within the relevant statute of limitations. In addition, criminal enforcement is not the only potential threat associated with violating the challenged statutes.

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[3] The State does not suggest that the Amendment's "necessary to protect the life or physical or mental health" language is coterminous with the statutory "medical emergency" exception. To the contrary, on its face, the current "medical emergency" definition (*see* A.R.S. §§ 36-2151(9), 36-2321(7)) that appears throughout Titles 13 and 36 refers to a narrower subset of the post-viability abortions the Amendment now protects. But the constitutional implications of that difference are not at issue here.

[4] Although Intervenors now appear to concede the validity of the Governor's Executive Order 2023-11, prior statements from legislative leadership had questioned its legality. For example, Speaker Montenegro's predecessor publicly stated that "[t]he governor cannot unilaterally divert statutory authority to prosecute criminal cases from Arizona's 15 county attorneys to the attorney general." Ray Stern, *Arizona Gov. Hobbs signs executive order to limit abortion prosecution*, AZ Central (June 23, 2024), https://www.azcentral.com/story/news/politics/arizona/2023/06/23/arizona-gov-hobbs-signs-executive-order-to-limit-abortion-prosecution/70348934007/. Given these past statements, the State appreciates Intervenors' acknowledgment that the Executive Order is, in fact, legally valid and binding.

## III. The State cannot empower private citizens to engage in conduct that the State itself is constitutionally prohibited from doing.

Intervenors argue (Mot. at 9) that Plaintiffs lack standing to challenge A.R.S. § 13-3603.02(D) because "no state actors have rights … [or] authority to enforce rights arising under" the statute. In other words, Intervenors say that once the Legislature has statutorily empowered private citizens to take some action—even if the State itself is prohibited from taking the same action—then no facial challenge can be brought against the State to challenge that law on its face. Not so.

Section 13-3603.02(D) authorizes certain relatives of a woman who receives an abortion to "bring a civil action on behalf of the [fetus] to obtain appropriate relief" for violations of § 13-3603.02(A) and (B). Plaintiffs' complaint asserts that the prohibitions in subsections (A) and (B) are unconstitutional. If the State lacks authority to enact and enforce the prohibitions in § 13-3603.02(A)-(B) itself, then it lacks authority to empower private individuals to engage in the same conduct. *Cf. 257-261 20th Ave. Realty, LLC v. Roberto*, 307 A.3d 19, 34 (N.J. Super. Ct. App. Div. 2023) ("The government cannot confer to a third-party a greater entitlement to property than that to which the public entity is entitled."), *aff'd by* 327 A.3d 1177, 1192 (N.J. 2025) (holding that "private lienholders acting pursuant to the [statutory scheme the State created] can be considered state actors").

Put differently, the Legislature cannot delegate authority it does not have. So, just as a court can declare administrative rules void if promulgated pursuant to an unconstitutional statutory delegation, *see generally Roberts v. State*, 253 Ariz. 259, 268-69 ¶¶ 34-36 (2022), a court can declare a statute creating a private right of action void if the statute is based on an unconstitutional prohibition that the State itself lacks authority to enact or enforce. Plainly, Plaintiffs can seek a declaratory judgment to that end.

The Fifth Circuit's decision in *Allstate Insurance v. Abbott*, 495 F.3d 151 (5th Cir. 2007) is illustrative. In that case, Texas passed an insurance reform law that "create[d] a

private cause of action in 'any person aggrieved by a violation of the statute'" with the possibility of civil monetary penalties. *Id.* at 157. The regulated insurance companies sued to challenge the law, and "the State Defendants … argu[ed] that causation and redressability [for standing were] lacking." *Id.* at 158-59.

The Fifth Circuit had no trouble finding standing, stating that "[b]ecause the state itself [was] a party, causation and redressability [were] easily satisfied." *Id.* at 159. After all, "the state passed [the law]" that "[threaten[ed] [the companies] with private civil law suits and civil penalties." *Id.* And therefore, "[a] declaration of unconstitutionality directed against the state would redress [the companies'] injury because it would allow [the companies] to avoid these penalties and lawsuits." *Id.*

The same is true here. Plaintiffs have standing to seek a declaration that the prohibitions in A.R.S. § 13-3603.02(A)-(B) are unconstitutional, and therefore the private cause of action in (D) to enforce those unconstitutional prohibitions is likewise invalid.

Intervenors' contrary argument, if accepted for the first time in Arizona, would have truly unsettling implications for future cases, in this context and others. Intervenors ask this Court to hold that the State may use private citizens to do what would plainly violate constitutional rights if done by the State. That end-run around constitutional rights should not be accepted by any court, and supplies no reason to dismiss here.

## CONCLUSION

The Court should deny Intervenors' motion to dismiss and resolve the case on the merits.

RESPECTFULLY SUBMITTED this 15th day of August, 2025.

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I hereby certify that the foregoing document was electronically filed and served through AZTurboCourt this 15th day of August, 2025, to:

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