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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' REPLY IN SUPPORT OF MOTION TO DISMISS

(Assigned to Hon. Greg Como)

INTRODUCTION

Plaintiffs' facial claims fail. Plaintiffs do not dispute that they seek to enjoin post-viability application of the challenged statutes. Because it is possible to conceive that post-viability abortions will occur and be covered by the challenged statutes, Plaintiffs have failed to meet their burden to "establish that no set of circumstances exists under which" the challenged statutes would be valid. *See State v. Arevalo*, 249 Ariz. 370, 373 ¶ 10 (2020).

Plaintiffs' claims also fail because they are not ripe. Plaintiffs and the State do not dispute that Attorney General Mayes will never enforce the challenged statutes. Neither Plaintiffs nor the State identify a single case, from any jurisdiction, relying on the statute of limitations to find a claim ripe despite a prosecutor's disclaiming future enforcement. The lack of potential civil enforcement, and the need to exhaust administrative remedies, further demonstrate that Plaintiffs' claims are not ripe.

Finally, Plaintiffs' claims fail because they lack standing. Plaintiffs' lawsuit against the "State of Arizona" does not bind private actors from exercising their private right of action or court personnel from processing those lawsuits. The Court should dismiss Plaintiffs' claims.

ARGUMENT

I. Appropriate Legal Standards

Pleading standard. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008), provides the standard for Rule 12(b)(6) motions. Plaintiffs erroneously rely on three Alabama decisions, which Arizona courts have never cited, to advance a "no set of facts" pleading standard. Pls.' Resp., at 1-2. However, the Supreme Court observed in *Cullen* that the same "no set of facts" language came from a federal "pleading standard broader than that adopted by Arizona." 218 Ariz. at 419 ¶ 8. *Cullen* noted that the Supreme Court of the United States had "retreated" from "the 'no set of facts' language as 'an incomplete, negative gloss on an accepted pleading standard.'" *Id.* at 420 ¶ 9 (citation omitted). Arizona's pleading standard was not affected by these federal changes, *see id.* at 420 ¶¶ 10-12, and "the standard described in ¶¶ 6 and 7 [of *Cullen*], therefore, continues to apply," *id.*

at 420 ¶ 12. The Court should disregard the Alabama cases and apply *Cullen*'s standard for Rule 12(b)(6) motions.

Burden. Plaintiffs could not identify any Arizona authority to dispute that they have the burden to prove "beyond a reasonable doubt" unconstitutionality at the motion to dismiss stage. Pls.' Resp., at 2. Instead, Plaintiffs only cite the Alabama "no set of facts" cases. *See id.* In Arizona, courts have required plaintiffs to prove their facial challenges "beyond a reasonable doubt" at the motion to dismiss stage. *See, e.g.*, *Holmes v. Allens Auto Servs. 2 LLC*, No. 1 CA-CV 19-0808, 2020 WL 5423094, at *1 ¶ 5 (Ariz. Ct. App. Sept. 10, 2020); *cf. Doty-Perez v. Doty-Perez*, 245 Ariz. 229, 233 ¶ 19 (Ct. App. 2018).

The State, on the other hand, argues that the "beyond a reasonable doubt" standard no longer applies to "constitutionality determinations." State Resp., at 3 n.1 (quoting *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8 (2014)). But the Supreme Court has continued to impose the burden on the party challenging a statute's constitutionality. *See Arevalo*, 249 Ariz. at 373 ¶ 9; *see also Driggers v. Driggers*, No. 1 CA-CV 22-0357 FC, 2023 WL 194745, at *1 ¶ 5 (Ariz. Ct. App. Jan. 17, 2023); *Arizona Republican Party v. Fontes*, No. 1 CA-CV 22-0388, 2023 WL 193620, at *3 ¶ 19 (Ariz. Ct. App. Jan. 17, 2023). And more recent cases have continued to apply the "beyond a reasonable doubt" standard in challenges to a statute's constitutionality. *See, e.g.*, *Holmes*, 2020 WL 5423094, at *1 ¶ 5; *State v. Thieme*, No. 1 CA-CR 16-0767, 2018 WL 359811, at *11 ¶ 54 (Ariz. Ct. App. Jan. 11, 2018); *State v. Crom*, No. 1 CA-CR 14-0751, 2015 WL 6953952, at *6 ¶ 29 (Ariz. Ct. App. Nov. 10, 2015). In any event, Plaintiffs do not succeed even under their own preferred standard.

Presumption. The State also argues that the presumption of constitutionality "falls away" when "a law burdens fundamental rights." State Resp., at 3 (quoting *Gallardo*, 236 Ariz. at 87 ¶ 9). True, Arizona courts have not applied the presumption of constitutionality to the freedom of speech, freedom of religion, or the right to vote. *See Gallardo*, 236 Ariz. at 87 ¶ 9; *In re Matter of Wood*, 257 Ariz. 549, 554 ¶ 11 (Ct. App. 2024). However, Arizona courts have continued the "strong presumption in favor of a statute's constitutionality" for

fundamental rights created by recent amendments to the Arizona Constitution. *See, e.g.*, *Kestenbaum v. Ford*, No. 1 CA-CV 23-0071, 2023 WL 6845128, at *4 ¶ 19 (Ariz. Ct. App. Oct. 17, 2023) (involving the fundamental right to recover damages for injuries, which was approved by voters in 2012). The Supreme Court also applies the presumption if "the law in question touches only peripherally" on the fundamental right. *Gallardo*, 236 Ariz. at 87-88 ¶ 9. Because most of the statutes at issue only peripherally touch abortion, which was addressed by a recent constitutional amendment, the Court may continue to presume the statutes' constitutionality.

Dismissal. Finally, Plaintiffs wrongly assert that their case cannot be dismissed even if facing a meritorious motion to dismiss. Pls.' Resp., at 6 n.4. In fact, a motion to dismiss may result in dismissal of claims alleging facial unconstitutionality of state statutes. *See Mills v. Arizona Bd. of Tech. Registration*, 253 Ariz. 415, 425 ¶ 32 (2022). Like the plaintiff in *Mills*, Plaintiffs' declaratory judgment claims are subject to "the standing and ripeness doctrines." *Id.* at 423 ¶ 25. Federal decisions differentiating between facial and as applied challenges when considering a remedy after final judgment, *see* Pls.' Resp., at 6 n.4, do not apply to a motion to dismiss determination.

Plaintiffs' claims fail and should be dismissed under any pleading standard, burden, and presumption that the Court applies.

II. Plaintiffs' Facial Claims Fail

A. Plaintiffs must meet the normal standard for facial challenges.

The State agrees that, "[i]n general, Intervenors correctly identify the normal rules for facial challenges in other contexts."[1] State Resp., at 3. Without citing a single case, the State then argues that Article II, § 8.1 displaced these rules. *See id.* at 6. To the contrary, the Supreme Court has indicated that the normal rules requiring the plaintiff to "establish that no set of circumstances exists under which the [a]ct would be valid" govern no matter

[1] Intervenors already addressed the one exception cited by the State. *Compare* State Resp., at 3 n.1 *with* Argument I, *supra*.

what level of scrutiny applies. *See Arevalo*, 249 Ariz. at 373, 375 ¶¶ 10, 15 (setting forth normal rules before identifying all levels of scrutiny) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The Supreme Court also has applied the normal rules for facial challenges to voter-approved propositions. *See Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021); *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018); *see also Arizona Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 413 ¶ 26 (Ct. App. 2024). Article II, § 8.1 does not include any provision addressing facial challenges, and its standard of review does not affect how the Court should evaluate this facial challenge under Supreme Court precedent.

Plaintiffs argue that the normal rules for facial challenges do not apply in the strict scrutiny context. Pls.' Resp., at 2-3. Importantly, strict scrutiny is not the appropriate level of review because Intervenors move to dismiss Plaintiffs' claims based on their post-viability applications, which are not subject to strict scrutiny.[2] *See* Ariz. Const. art. II, § 8.1(A)(2); *see also* State Resp., at 5 (explaining different levels of scrutiny for challenges to laws that apply pre-viability versus post-viability). Even if strict scrutiny did apply, Plaintiffs' argument that the Supreme Court "has never concluded that *Salerno* applies in the strict scrutiny context," Pls.' Resp., at 2, is meaningless since the Court also has never concluded that it does not apply.[3] Instead, as previously mentioned, the Supreme Court has indicated that *Salerno* would apply in a strict scrutiny case. *See Arevalo*, 249 Ariz. at 373, 375 ¶¶ 10, 15; *see also Arizona Republican Party*, 2023 WL 193620, at *3 ¶ 18 (applying *Salerno* standard in challenge to voting laws). And the Supreme Court has never indicated that Arizona applies *Salerno* differently than federal courts on the level of scrutiny, and federal courts have applied *Salerno* in the strict scrutiny context. *See, e.g.*, *W. States Paving Co. v. Washington State Dep't of Transp.*, 407 F.3d 983, 991 (9th Cir. 2005); *Sherbrooke*

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[2] Thus, Plaintiffs' argument about "black-letter law," and the out-of-state cases upon which it relies, *see* Pls.' Resp., at 3 & n.1 and accompanying text, is inapplicable here.

[3] To support their argument, Plaintiffs cited a case that did not involve a facial challenge but instead addressed the standard of review for pretrial release conditions. *See Samiuddin v. Nothwehr*, 243 Ariz. 204, 209 ¶ 17 (2017).

Turf, Inc. v. Minnesota Dep't of Transp., 345 F.3d 964, 971 (8th Cir. 2003).[4]

Plaintiffs also incorrectly submit a modified form of the *Salerno* test. Pls.' Resp., at 3 (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024)). Arizona has evaluated a statute's "plainly legitimate sweep" only under the overbreadth doctrine for First Amendment challenges. *See, e.g.*, *State v. Musser*, 194 Ariz. 31, 32 ¶ 6 (1999). According to *Salerno* itself, the Supreme Court of the United States "[has] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. "As this is not a First Amendment challenge, the 'plainly legitimate sweep' standard is simply inapplicable." *Behar v. Pennsylvania Dep't of Transp.*, 791 F. Supp. 2d 383, 391 (M.D. Pa. 2011); *cf. AZ Petition Partners LLC v. Thompson in & for Cnty. of Maricopa*, 255 Ariz. 254, 258 ¶¶ 17-18 (2023) (finding the "typical facial challenge" standard "may be relaxed in the First Amendment context"). Even if it did apply, Plaintiffs do not explain how they have shown that the challenged laws lack a "plainly legitimate sweep," nor do they explain how the analysis under this standard would differ here from the *Salerno* standard. Ultimately, the challenged laws have a plainly legitimate sweep for the same reason that they satisfy the *Salerno* standard: the laws are indisputably valid in a large number of applications.

B. Plaintiffs have failed to meet the standard for facial challenges.

Plaintiffs facially challenge the laws at issue in every application, *see* Compl., Prayer for Relief (A), and they do not argue otherwise, *see* Pls.' Resp., at 1. Plaintiffs "were, consequently, required to show the [challenged laws are] unconstitutional in all applications." *Arizona Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 413 ¶ 26 (Ct. App. 2024). Plaintiffs contend in a footnote that the statutes at issue are unconstitutional post-

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[4] It would be especially surprising if *Salerno* were categorially inapplicable to strict scrutiny cases since the substantive legal standard applied in *Salerno* was a form of heightened scrutiny that at least some courts have equated with strict scrutiny. *See, e.g.*, *Kay v. Reno*, 94 F. Supp. 2d 546, 550 (M.D. Pa. 2000) ("*Salerno* sets forth the appropriate strict scrutiny analysis.").

viability "for the same reasons" as pre-viability.[5] Pls. Resp., at 5 n.3. This is insufficient. Plaintiffs cannot rely on their pre-viability arguments because the Constitution "supplies two separate categories of challenges and standards by which to judge those challenges." State Resp., at 6. Plaintiffs also have provided no showing of unconstitutionality post-viability. As the State notes, post-viability abortion regulations could be constitutional. *Id.*

Arizona Creditors Bar Association is on point. In that case, the plaintiffs "challenged only the Saving Clause's application to particular wage garnishments—those where the judgment being enforced was obtained pre-Act but the garnishment proceeding is initiated post-Act." *Arizona Creditors Bar Ass'n*, 257 Ariz. at 413 ¶ 26. Because the plaintiffs did not show that the statute was "unconstitutional in all applications," the Court of Appeals held that their facial challenge failed. *Id.* Like that case, Plaintiffs' failure here to demonstrate invalidity in all circumstances, especially post-viability, dooms their challenge in its current form.[6] *See Stanwitz v. Reagan*, 245 Ariz. 344, 349–50 ¶ 20 (2018); *Arizona Creditors Bar Ass'n*, 257 Ariz. at 413 ¶ 26; *Driggers*, 2023 WL 194745, at *1 ¶ 7.

Instead of demonstrating unconstitutionality post-viability, Plaintiffs claim post-viability considerations are "immaterial" because "[t]here are no providers of post-viability abortions in Arizona." Pls.' Resp., at 5. But even assuming that is currently the case,[7] courts routinely reject facial challenges based on "conceivable," "hypothetical," or

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[5] Plaintiffs do not reconcile how this footnote argument is consistent with their position that footnote arguments are waived. *See* Pls.' Resp., at 9 n.5.

[6] Because Plaintiffs are "the master of [their] claim," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), the State cannot recharacterize Plaintiffs' Complaint for them, *see* State Resp., at 6. But if the Court interpreted the Complaint like the State, the challenge would still fail to satisfy *Salerno*, as Intervenors would explain if Plaintiffs amended their Complaint in that manner. Moreover, under this narrower Complaint, the challenged statutes could not be enjoined in post-viability applications because that would be outside the Complaint's new scope.

[7] In 2021, Arizona reported more than 200 abortions at 21 weeks or greater. *Abortions in Arizona: 2021 Abortion Report*, Arizona Dep't of Health Services (Dec. 31, 2022), at 17 Table 10, *at* https://www.azdhs.gov/documents/preparedness/public-health-statistics/abortions/2021-arizona-abortion-report.pdf. Last year, a baby lived when born just hours after the 21-week mark. Taylor Vessel, *Iowa boy born at 21 weeks is now the world's most premature baby*, Iowa Stead Family Children's Hospital (July 23, 2025), *at* https://uihc.org/childrens/patient-story/iowa-boy-born-21-weeks-now-worlds-most-premature-baby.

"theoretical" applications of a statute. *See, e.g.*, *Lyle v. Dist. of Columbia*, No. 24-7102, 2025 WL 2118478, at *2 (D.C. Cir. July 29, 2025) ("Because we can readily identify a 'hypothetical scenario' for which the inspection provisions are lawful, Lyle's facial challenge fails."); *Simon v. City & Cnty. of San Francisco*, 135 F.4th 784, 797 (9th Cir. 2025) (resolving facial challenge by evaluating whether challenged policy "is unconstitutional in every conceivable application" (quotation omitted)); *United States v. Perez-Gallan*, 125 F.4th 204, 215-16 (5th Cir. 2024) (relying on "a hypothetical case" in which statute would be constitutional to reject a facial challenge to the statute); *United States v. Mgmt. Consulting, Inc.*, 636 F. Supp. 3d 610, 619 (E.D. Va. 2022) (explaining that a facial challenge "requires that there be no other, theoretical set of circumstances in which the law could be constitutionally applied" (cleaned up)). Proponents of Proposition 139 recognized that post-viability abortions to women facing medical emergencies might occur because they included post-viability provisions in the Proposition. *See* Ariz. Const. art. II, § 8.1(A)(2). A.R.S. § 36-2301.01 also contemplates post-viability abortions, and it is conceivable that a post-viability abortion could occur pursuant to—or in violation of—this statute.

Research confirms that post-viability abortions occur. Although it recognized that limited contemporary data exists, the Kaiser Family Foundation reported that a 1992 study estimated that 320 to 600 abortions occur per year after 26 weeks gestation, and that there had been an increase in the clinics providing abortions after 24 weeks—at least 60 such clinics existed in 2023—following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). *See* Ivette Gomez *et al.*, *Abortions Later in Pregnancy in a Post-Dobbs Era*, Kaiser Family Foundation (Feb. 21, 2024).[8] Plaintiffs claim that "medication abortion is not available" post-viability, Pls.' Resp., at 5, but some sources suggest otherwise. *See Medical abortion after 24 weeks' gestation*, National

[8] *Available at* https://www.kff.org/womens-health-policy/abortions-later-in-pregnancy-in-a-post-dobbs-era/.

Guideline Alliance (Sept. 2019);[9] *see also* P.C. Ho *et al.*, *Misoprostol for the termination of pregnancy with a live fetus at 13 to 26 weeks*, 99 INT'L J. OF GYNECOLOGY & OBSTETRICS S178 (Dec. 2007).[10] Based on the constitutional and statutory provisions applying to post-viability abortions, and the evidence that post-viability abortions occur, it is entirely conceivable that the statutes at issue will have post-viability application.

Plaintiffs and the State both rely on A.R.S. § 36-2301.01 to argue that the statutes at issue are "irrelevant" post-viability. Pls.' Resp., at 4-5; State Resp., at 7-8.[11] This reasoning misunderstands *Salerno* and *City of Los Angeles v. Patel*, 576 U.S. 409 (2015). *Patel* dictates that, in applying *Salerno*, a court "consider[s] only applications of the statute in which it actually authorizes or prohibits conduct." 576 U.S. at 418. *Patel* excludes from consideration only those instances in which a statute "do[es] no work." *Id.* at 419. The mere fact that a post-viability abortion is illegal under § 36-2301.01 does not mean that the challenged laws do not also prohibit conduct surrounding that post-viability abortion. The State can punish the same underlying conduct under multiple legal provisions. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Mayes*, 257 Ariz. 137, 149 ¶ 50 (2024) (emphasizing that "the legislature may proscribe the same conduct through multiple laws and our criminal statutes are replete with examples of multiple laws applying to the same conduct"); A.R.S. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both . . . ."). Thus, the challenged laws still "do work" when applied to an abortion that also violates § 36-2301.01. For this reason, the Court cannot exclude those applications when applying the *Salerno* standard. *See State v.*

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[9] *Available at* https://www.ncbi.nlm.nih.gov/books/NBK561113/.

[10] *Available at* https://www.sciencedirect.com/science/article/abs/pii/S0020729207005103.

[11] At the same time, the State suggests that the statutory post-viability medical exception is not "coterminous" with the constitutional post-viability standard, and it ominously notes that "the constitutional implications of that difference are not at issue here." State Resp., at 8 n.3. Plaintiffs and the State cannot attempt to salvage their facial challenge now by relying on a statute that they may facially challenge (or not defend) later. This potential future challenge makes it even easier to conceive of a set of circumstances in which the statutes at issue in this case could have application in the future.

Flores, 679 S.W.3d 232, 249 (Tex. App. 2023) (rejecting an argument similar to that advanced by Plaintiffs and the State here, explaining that "[t]he State's ability to prosecute under other statutes does not mean its ability to prosecute under this statute is irrelevant to the [*Salerno*] analysis").

Accordingly, Plaintiffs have failed to establish that no set of circumstances exist under which all the challenged statutes would be valid.[12]

III. Plaintiffs' Claims Are Not Ripe

Plaintiffs and the State both contend that Plaintiffs' claims are ripe, and they offer two basic arguments in favor of this position. *See* Pls.' Resp., at 9-12; State Resp., at 8. With respect to criminal enforcement of the challenged statutes, they acknowledge that the Governor's Executive Order vests the Attorney General with the practical ability to control all prosecutions under the challenged statutes. And they do not dispute that Attorney General Mayes will never enforce those statutes criminally. Where the official having the authority to prosecute violations of a statute disclaims future enforcement, this fact alone demonstrates that a challenge to the statute is not ripe. *See, e.g.*, *D.L.S. v. Utah*, 374 F.3d 971 (10th Cir. 2004) (finding that plaintiff lacked standing to challenge statute where prosecutor stated that he would not file charges based on the conduct that plaintiff intended to engage in).

Notwithstanding this well-established principle, Plaintiffs and the State claim that the risk of future enforcement remains because the statute of limitations stretch into the term of a future Attorney General. Pls.' Resp., at 9; State Resp., at 8. In other words, they invoke the possibility that a future Attorney General might adopt a different enforcement policy. This argument conflicts with basic principles of standing and ripeness. Where a plaintiff brings a pre-enforcement constitutional challenge to a law, she must demonstrate that she "face[s] a real threat of being prosecuted for violating the [challenged law]." *Brush & Nib*

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[12] Contrary to Plaintiffs' claims, Pls.' Resp., at 5-6, the Intervenors have disputed that the challenged provisions are invalid in any of their applications, including pre-viability. *See* Mot. to Dismiss, at 3 n.1.

Studio, LC v. City of Phoenix, 247 Ariz. 269, 280 ¶ 39 (2019). "A mere possibility of future enforcement will not do; the likelihood of future enforcement must be 'substantial.'" *Arizona v. Yellen*, 34 F.4th 841, 854 (9th Cir. 2022) (quoting *California v. Texas*, 593 U.S. 659, 670 (2021)); *see also, e.g.*, *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) ("The mere *possibility* of prosecution . . . does not amount to a 'credible threat' of prosecution.").

Here, the risk of future criminal enforcement identified by Plaintiffs and the State is not real or substantial. Instead, it rests entirely on an impermissible "speculative chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). In particular, this theory speculates that (1) Attorney General Mayes will not serve another term as Attorney General; (2) the officer who replaces Attorney General Mayes will adopt an enforcement policy diametrically opposed to that of Attorney General Mayes; and (3) that new Attorney General will also devote the Office's resources to prosecuting past violations that Attorney General Mayes had opted not to pursue. Each of those predictions is entirely speculative, and yet Plaintiffs' ripeness theory requires all three of them to construct a real threat of enforcement. This speculative theory falls far short of the standard necessary to establish the ripeness of a pre-enforcement challenge. *See Brush & Nib*, 247 Ariz. at 280 ¶ 39.[13]

Tellingly, neither Plaintiffs nor the State identify a single case, from any jurisdiction, relying on the statute of limitations to find a claim ripe despite a prosecutor's disclaiming future enforcement. To the contrary, courts have specifically rejected the notion that standing or ripeness can rest on the possibility that a prosecutor's "political successors might repudiate [the prosecutor's] policy" of non-enforcement. *Winsness v. Yocom*, 433 F.3d 727, 733 (10th Cir. 2006) (explaining that "it is not necessary for defendants in such

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[13] Notably, *if* these speculative possibilities were to materialize in the future, Plaintiffs' claims presumably would become ripe at that time, and Plaintiffs could raise their constitutional challenge then. Thus, if and when the Plaintiffs actually face a plausible risk of enforcement, they will have their chance to seek pre-enforcement review. But it is entirely possible that the risk of enforcement will not arise, either in whole or in part. And ripeness doctrine exists precisely to "prevent[] a court from rendering a premature decision on an issue that may never arise." *Brush & Nib*, 247 Ariz. at 280 ¶ 36.

cases to refute and eliminate all possible risk that the statute might be enforced. It is the plaintiff's burden to demonstrate an 'actual or imminent, not conjectural or hypothetical' threat that the statute will be enforced against him" (quotation omitted)).[14] The speculative possibility of future criminal enforcement, by an entirely hypothetical future Attorney General, does not support the ripeness of Plaintiffs' claims.[15]

Nor does the speculative possibility of civil enforcement of the challenged statutes establish ripeness. On this front, neither Plaintiffs nor the State point to any basis to expect future enforcement beyond the mere fact that the challenged statutes are on the books. But "[t]he mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Winsness*, 433 F.3d at 732. Plaintiffs and the State point to no reason to believe that a "real threat" of civil enforcement exists. *Brush & Nib*, 247 Ariz. at 280 ¶ 39. To the contrary, in light of the clear, public positions taken by the Governor, it is almost implausible that any civil enforcement will occur. Plaintiffs have not established that their constitutional claims are ripe.

Plaintiffs' passing citation to the Ninth Circuit's decision in *Isaacson v. Mayes*, 84

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[14] Plaintiffs do cite *Planned Parenthood Ariz., Inc. v. Brnovich*, 254 Ariz. 401, 407 (App. 2022). But *Planned Parenthood* did not address either ripeness or standing, and thus it has no bearing on this issue. *See id.* at 407. Moreover, Plaintiffs' citation is not quite accurate when it asserts that *Planned Parenthood* was "vacated on other grounds" by the Supreme Court. The discussion cited by Plaintiffs was central to the Court of Appeals' holding that read A.R.S. Title 36 in harmony with A.R.S. § 13-3603 and found that a contrary interpretation would violate due process. *See id.* But the Supreme Court specifically disavowed reading Title 36 in harmony with § 13-3603. *Planned Parenthood Ariz. Inc. v. Mayes*, 257 Ariz. 137, 148 ¶¶ 42-43 (2024). And the Supreme Court expressly rejected the notion that such a result would violate due process. *Id.* at 149-50 ¶¶ 48-53.

[15] Taken to its logical conclusion, Plaintiffs' theory would mean that a prosecutor's commitment not to enforce a challenged law could *never* defeat ripeness because the identity of the Attorney General could change at any time, even before the end of her term. For example, just this year, the offices of Attorney General in Florida and Missouri unexpectedly changed mid-term, and a change in Alaska will occur later in August. Thus, one Attorney General who has disclaimed enforcement could be replaced at any time by a successor with different enforcement views before the statute of limitations expire. Because Plaintiffs' theory would authorize essentially all pre-enforcement challenges—a position contrary to well-established law—that theory lacks merit.

F.4th 1089 (9th Cir. 2023), does not alter the analysis. As an initial matter, *Isaacson* considered only the ripeness of certain federal law challenges to a subset of the statutes challenged here.[16] *Isaacson*'s analysis (such as it is) focuses on considerations specific to those particular statutes, such as the recent enactment of those statutes and litigation-related statements made by certain agencies regarding whether they would enforce those statutes. *See id.* at 1101. Those considerations (nearly two years old now) have no bearing on the risk of the many other statutes challenged here being enforced. Moreover, even if *Isaacson* had considered all the statutes challenged in this case, it would not support Plaintiffs' position. *Isaacson*'s cursory discussion of civil enforcement cannot be squared with prevailing case law regarding pre-enforcement challenges. *Compare id.* at 1101 (emphasizing that the State has "the power to penalize physicians and revoke their licenses") *with, e.g.*, *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1211 (9th Cir. 2022) (finding that parties lacked standing to challenge FTC policy, despite the fact that the FTC had the power to impose "serious civil penalties"). Because *Isaacson*'s holding reflects an outlier that is inconsistent with other ripeness cases (including contemporaneous decisions from the Ninth Circuit), it does not constitute persuasive authority.

Isaacson's analysis is also distinguishable, because the circumstances considered by the Ninth Circuit differ critically from those before this Court. For one thing, the Ninth Circuit did not consider the fact that the Governor's repeated public pronouncements make it entirely implausible that any state agency reporting to her will enforce any of the challenged statutes. When the Ninth Circuit decided *Isaacson*, it was at least conceivable that the Department of Health Services ("ADHS") might enforce the challenged statutes. In light of the Governor's subsequent public statements, one would have to deny all available information to believe that ADHS will pursue such enforcement.

Isaacson also did not consider the fact that any challenge to hypothetical civil

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[16] In particular, *Isaacson* considered only A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D) and 13-702(D). *See* 84 F.4th at 1094.

enforcement by the AMB would be barred by the doctrine of exhaustion of administrative remedies. A claim is not ripe where a plaintiff has failed to exhaust her administrative remedies. *See, e.g.*, *U S West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 197 Ariz. 16, 19-20 ¶ 9 (Ct. App. 1999) ("If a party has not exhausted its administrative remedies, the controversy is not ripe for review and the court will not intervene in the dispute."). Plaintiffs insist that they need not exhaust administrative remedies before challenging a licensing action by the AMB. *See* Pls.' Resp., at 10-11 n.6. They reason that "the Court, not AMB, has authority to provide the relief Plaintiffs seek." *Id*. But Plaintiffs ignore the fact that the exhaustion doctrine applies—even to constitutional claims—if 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." *Mills*, 253 Ariz. at 421 ¶ 17. The relevant licensing regime here satisfies that standard, and it is indistinguishable from the statutes cited by *Mills* as examples of statutory regimes that would require exhaustion. *Compare* A.R.S. § 32-1451(H), (I) (AMB statute), *with* A.R.S. § 32-2934(H) (cited by *Mills*, 253 Ariz. at 421 ¶ 17). "Requiring the professional to exhaust administrative remedies in these situations is warranted because there is a prescribed remedy that, if pursued, would enable the professional to raise any constitutional claims in a subsequent appeal to the superior court." *Mills*, 253 Ariz. at 421 ¶ 17. Because Plaintiffs did not exhaust any administrative remedies, their claims are barred by the exhaustion doctrine to the extent that they rest on the speculative possibility that the AMB might enforce the challenged statutes. *Id.*[17] As a result, Plaintiffs' claims are not ripe, *U S West*, 197 Ariz. at 19-20 ¶ 9. The Ninth Circuit did not consider this fundamental issue, and thus its reliance on potential enforcement by the AMB has no bearing here. Ultimately, there is

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[17] Moreover, the limited factual basis on which *Isaacson* relied is distinguishable. *Isaacson* placed considerable stock in the fact that the challenged provisions "were only recently enacted" at the time of the decision (in 2023), which purportedly created uncertainty about whether those laws would be enforced. *Isaacson*, 84 F.4th at 1101. Now, however, the Court has two years of data that the Ninth Circuit lacked. And those two years show a complete lack of civil enforcement of any of the challenged statutes—indeed, a complete lack of appetite by the relevant government actors to civilly enforce the challenged statutes.

simply no non-speculative reason to suspect that the State will civilly enforce any of the challenged statutes. Under those circumstances, Plaintiffs' claims simply are not ripe.

Finally, Plaintiffs do not explain how their post-viability claims can be ripe based on their facial challenge defenses that "[t]here are no providers of post-viability abortions in Arizona," Pls.' Resp., at 5, and "medication abortion is not available at such gestation," *id.* Indeed, Plaintiffs' own arguments establish that their claims lack ripeness.

For these reasons, the Court should dismiss all of Plaintiffs' claims, without prejudice to Plaintiffs refiling if a real, credible, and imminent risk of enforcement arises.

IV. Plaintiffs' Claims Lack Standing to Challenge Statutes That Are Exclusively Enforceable by Private Parties Rather Than the State.

Plaintiffs seek to block a private right of action solely enforceable by private litigants, not by state actors, *see* A.R.S. § 13-3603.02(D), by "[e]njoining court personnel from docketing and maintaining lawsuits under Section 13-3603.02(D)," Pls.' Resp., at 8. But Plaintiffs do not contend that the mere "docketing and maintaining [of] lawsuits" is unlawful simply because (in Plaintiffs' view) those lawsuits would be subject to a meritorious constitutional defense. *See id.*; *cf.*, *e.g.*, A.R.S. § 12-283(F) (requiring the clerk of the Superior Court to maintain the docket); A.R.S. § 12-137(B) ("A judge may not refuse to accept an assigned case unless good cause exists or a court rule or ethical consideration requires or allows for refusal."). Such a position would lead to absurd results, since the courts would engage in unconstitutional action every time they docketed and adjudicated a lawsuit subject to a meritorious constitutional defense.

Even though docketing and maintaining lawsuits are lawful activities, Plaintiffs contend that enjoining court personnel would "provide complete relief to Plaintiffs." Pls.' Resp., at 8. However, "[i]t is of course well-settled law that an injunction will not issue to restrain a lawful act." *Jones v. Santa Cruz Cnty.*, 72 Ariz. 374, 378 (1951); *see also* A.R.S. § 12-1802(4), (6). Thus, Plaintiffs' theory of redressability rests on the issuance of an injunction that Arizona law prohibits. *Id.* None of the non-Arizona cases cited by Plaintiffs or the State considered this fundamental principle of Arizona law, and thus those cases do

not govern here. *See* Pls.' Resp., at 7-8; State Resp., at 9-10.

Citing *Sears v. Hull*, Plaintiffs also invite the Court to waive the standing requirement altogether. Pls.' Resp., at 7. But as noted in *Sears*—a case that refused to waive standing in a constitutional challenge—"[t]he paucity of cases in which [the Supreme Court has] waived the standing requirement demonstrates both [its] reluctance to do so and the narrowness of this exception." 192 Ariz. 65, 71 ¶ 25 (1998). Plaintiffs make no effort to explain how this litigation falls within the "narrow[]" exception. The Court should not abandon fundamental legal principles based on Plaintiffs' conclusory and undeveloped assertions.

Plaintiffs also claim that the issue of standing is "beside the point," because the private rights of action are not severable from other statutes challenged by Plaintiffs. Pls.' Resp., at 6. But while Plaintiffs quote the general standard for severability, they offer no argument at all regarding how that general standard applies to the statutes at issue in this litigation. *Id.* Plaintiffs' undeveloped and conclusory argument overlooks the fundamental principle that the severability inquiry ultimately seeks "to determine the intent of the lawmakers who enacted the statute in order to give full effect to their intent." *State v. Patel*, 251 Ariz. 131, 138 ¶ 28 (2021) (cleaned up). Here, the Legislature has made its intent clear through an express severability clause in the legislation that enacted § 13-3603.02. *See* S.B. 1457, § 18 (2021). When the Legislature enacts an express severability clause within the very legislation at issue, "there is no question that severability is intended." *State v. Watson*, 120 Ariz. 441, 452 (1978); *see also Selective Life Ins. Co. v. Equitable Life Assur. Soc'y*, 101 Ariz. 594, 599 (1967) ("The courts will generally give effect to [severability] clauses whenever possible."). Thus, if the Court invalidates other portions of § 13-3603.02 (which it should not), the Court should give effect to the Legislature's express intent that those provisions should be severed from the remainder of the statute.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 22nd day of August, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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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