No. 14-15624

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Planned Parenthood Arizona, Inc.; William Richardson, M.D.; and William H. Richardson M.D., P.C., doing business as Tucson Women's Center,
Plaintiffs-Appellants

v.

Will Humble, Director of the Arizona Department of Health Services, in his official capacity,
Defendant-Appellee

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Civil Action No. 4:14-cv-01910-TUC-DCB
The Honorable David C. Bury, Senior Judge

_____

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the corporate Plaintiffs, Planned Parenthood Arizona, Inc., and Tucson Women's Clinic, disclose that they have no parent corporation, nor is there a publicly held corporation that owns 10 percent or more of their stock.

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction: The district court possessed jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

II. Court of Appeals Jurisdiction: This Court possesses jurisdiction under 28 U.S.C. § 1292(a)(1). This appeal is timely under Fed. R. App. P. 4(a)(1)(A). The district court entered its Order on March 31, 2014 ("Order") (Excerpts of Record ("ER") 001-014.) Plaintiffs-Appellants ("Plaintiffs") filed a notice of appeal the next day. (ER 015-17.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether Plaintiffs have raised serious questions regarding their claim that A.R.S. § 36-449.03 (E)(6) and its implementing regulation, A.A.C. § R9-10-1508(G) (collectively, "the Arizona law") (ER 121; ER 155), which on its face bans medication abortion but which Defendant-Appellee ("Defendant") claims allows some medication abortions, is unconstitutionally vague.

Whether Plaintiffs have raised serious questions regarding their claim that the Arizona law—which bans the only safe, non-surgical early abortion method for many or all women—imposes an undue burden on Arizona women seeking an abortion, both because it fails to serve the state's asserted interest and because it imposes a substantial obstacle on women seeking an abortion.

Whether Plaintiffs have raised serious questions regarding their claim that the

Arizona law—by banning the only safe, non-surgical early abortion method for many or all women—violates women's right to bodily integrity.

Whether Plaintiffs have raised serious questions regarding their claim that the Arizona law—by treating licensed abortion clinics differently than all other medical providers, including other abortion providers, and the medications used for abortion differently from all other medications—violates Plaintiffs' right to equal protection.

Whether Plaintiffs have satisfied the other factors for obtaining injunctive relief—a likelihood of irreparable harm, a balance of harms tipped sharply in Plaintiffs' favor, and a showing that an injunction would be in the public interest—by presenting undisputed evidence that the Arizona law would not further women's health and would harm thousands of Arizona women each year.

PERTINENT STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

A.R.S. § 36-449.03 (E)(6)

> The director shall adopt rules relating to the abortion procedure. At a minimum these rules shall require…. that any medication, drug or other substance used to induce an abortion is administered in compliance with the protocol that is authorized by the United States Food and Drug Administration and that is outlined in the Final Printing Labeling instructions for that medication, drug, or substance.

A.A.C. § R9-10-1508(G)

> A medical director shall ensure that any medication, drug, or substance used to induce an abortion is administered in compliance with the protocol authorized by the United States Food and Drug Administration and that is outlined in the final printing labeling instructions for that medication, drug, or substance.

United States Constitution, Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This appeal concerns an Arizona statute and regulation that ban or restrict medication abortion—a safe way to end an early pregnancy using medications alone—in contravention of the standard of care recommended by the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG"). Plaintiffs, who are Arizona health care providers, have challenged the Arizona law on multiple constitutional grounds and sought preliminary relief to prevent irreparable harm while these claims are adjudicated. The district court denied that necessary relief based on an incorrect understanding of the controlling constitutional law.

A. Medication Abortion Background

For years, Arizona women in the first nine weeks (through 63 days) of pregnancy as measured from the first day of their last menstrual period ("lmp") who sought abortion have been able to choose between a surgical abortion or medication abortion (a procedure using medications alone). Declaration of Bryan Howard ("Howard Decl.") ¶ 5; Declaration of Daniel Grossman, M.D. ("Grossman Decl.")

¶¶ 10-15. (ER 094; ER 047-48.)

Medication abortion is one of the safest procedures in contemporary medical practice, and carries a far lower risk of major complications than pregnancy and childbirth. Grossman Decl. ¶¶ 22-23; Declaration of William Richardson, M.D., ("Richardson Decl.") ¶ 11. (ER 050-51; ER 032-33.) The procedure involves a combination of two prescription drugs: mifepristone and misoprostol. Richardson Decl. ¶ 11. (ER 032-33.) Mifepristone works by blocking the hormone progesterone, which is necessary to maintain pregnancy, and misoprostol works by causing a woman's uterus to contract and expel the pregnancy, thereby completing the abortion. Grossman Decl. ¶¶ 10-13. (ER 047-48.)

For many women, medication abortion offers important advantages over surgical abortion. It allows them to avoid surgery, and to experience the abortion in a non-clinical setting (usually at home) with family or other loved ones. *Id*. ¶ 19; Richardson Decl. ¶ 12. (ER 049; ER 033.) Victims of rape, or women who have suffered sexual abuse, may choose it to retain more control over the experience and to avoid trauma from having instruments inserted into their bodies. Grossman Decl. ¶ 20; Richardson Decl. ¶ 14. (ER 059-50; ER 034.) It allows some women with abusive partners to conceal an abortion, which may keep them safer. Rebuttal Declaration of Beth Otterstein, RN, BSN ("Otterstein Decl.") ¶ 5. (ER 019-20.)

For women with certain medical conditions, medication abortion is

significantly safer than a surgical abortion. Grossman Decl. ¶ 21; Richardson Decl. ¶¶ 13-15. (ER 049; ER 033-34.) These include women with certain physical anomalies, such as a stenotic cervix or large uterine fibroids, which make accessing the pregnancy using instruments difficult, thereby putting women at increased risk of complications. *Id.* Medication abortion is increasingly prevalent, chosen by a growing percentage of abortion patients each year. Grossman Decl. ¶ 17. (ER 049.)

The U.S. Food and Drug Administration ("FDA") approved mifepristone in 2000, under the brand name Mifeprex. Mifeprex's Final Printed Label ("FPL"), as produced by the manufacturer and approved by the FDA, outlines a regimen, tested in clinical trials in the 1990s, that was shown to be safe and effective for women with gestational ages through seven weeks of pregnancy (49 days lmp). Declaration of Lisa Rarick, M.D. ("Rarick Decl.") ¶ 10; Grossman Decl. ¶¶ 25-26. (ER 082; ER 051-52.) Under that regimen, a woman takes 600 mg of mifepristone at the health center, returns two days later to take misoprostol, and then returns to the clinic two weeks later for a follow-up visit. Grossman Decl. ¶ 25. (ER 051-52.)

Even by the time the FDA approved Mifeprex, which was a number of years after the clinical trials, newer research showed that a far lower dose of mifepristone combined with a different dose and manner of administering misoprostol was at least equally safe, had fewer side effects, *and was effective for an additional two weeks into pregnancy, through at least nine weeks* (63 days lmp). Grossman Decl. ¶ 27. (ER

052-53.) From the start, therefore, most providers prescribed a regimen different from the FPL regimen and offered medication abortion past seven weeks lmp. *Id*. Today, the overwhelming majority of abortion providers, Plaintiffs included, use a regimen through nine weeks lmp in which the patient takes 200 mg of mifepristone at the health center, self-administers misoprostol buccally (dissolving the pills between her cheek and gum) 24 to 48 hours later at a location of her choosing (most often at home), and then returns one to three weeks later for a follow-up visit. *Id*. ¶ 28; Richardson Decl. ¶ 22; Howard Decl. ¶¶ 5-7. (ER 053; ER 036-37; ER 094-95.)

The regimen Plaintiffs provide is supported by vast amounts of clinical data from hundreds of thousands of patients (as compared to the under 3000 patients studied in the FDA trials). Grossman Decl. ¶¶ 32-33, 36. (ER 054-55, 057.) ACOG and the AMA have endorsed this regimen, recently stating that it "make[s] medical abortion safer, faster, and less expensive, and result[s] in fewer complications as compared to the protocol approved by the FDA over 13 years ago." *Id*. ¶ 35. (ER 056.)

More specifically, the evidence-based regimen used by Plaintiffs is superior to the FPL regimen in the following ways: First, it is significantly more effective, both in ending the pregnancy and decreasing the need for surgical intervention to complete the procedure. Second, it is effective for longer in pregnancy, through at least nine weeks lmp, which is important because many women do not detect their pregnancies

until close to seven weeks lmp. Third, by allowing a woman to take misoprostol at home, it ensures that she can experience the drug's effects in a safe location, rather than in the car on the way home from the clinic. It also avoids the burdens of a medically unnecessary trip to the clinic, which is significant because the majority of Plaintiffs' patients are already parents and are working low-wage jobs with inflexible schedules, and also because many women in Arizona must travel far to reach the nearest abortion provider. Fourth, the lower mifepristone dosage reduces its side effects and significantly reduces its cost. *Id*. ¶¶ 32-35. (ER 054-57.)

B. The Challenged Law and Its Impact on Plaintiffs and Their Patients

In 2012, the Arizona legislature enacted House Bill 2036 ("HB 2036") which contained, among other things, the restriction on medication abortion at issue here. *See* A.R.S. § 36-449.03 (E)(6).[1] HB 2036 directed Defendant, without a time limitation, to adopt a regulation to implement the statute, which he did on January 27, 2014, with an effective date of April 1, 2014. A.A.C. § R9-10-1508(G). This statute and regulation require the medical director of a facility licensed as an abortion clinic to "ensure that any medication, drug or other substance used to induce an abortion is administered in compliance with the protocol that is authorized by the United States

[1] HB 2036 is part of a package of abortion restrictions, another part of which this Court already struck down in *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

Food and Drug Administration and that is outlined in the final printing labeling instructions for that medication, drug or substance." A.R.S. § 36-449.03(E)(6); A.A.C. § R9-10-1508(G).

Only licensed abortion clinics are subject to this law, not hospitals or physicians' offices. A.R.S. §§ 36-449.01-03 (setting out requirements for abortion clinics, including medication abortion restrictions); A.R.S. § 36-449.01(2) (defining "abortion clinic"). An abortion clinic that fails to comply is subject to a civil penalty, license suspension or revocation, or other enforcement actions by the Department of Health Services ("DHS"). A.R.S. § 33-449.03; A.A.C. § R9-10-110.

The Arizona law restricts abortion-inducing medications to use as "outlined in the final printing label instructions *for that medication,*" A.R.S. § 36-449.03(E)(6); A.A.C. § R9-10-1508(G) (emphasis added). This plain language makes it impossible to perform a medication abortion, because the second drug used in a medication abortion, misoprostol, is not labeled for use in abortion. *See* Argument § I.A, *infra*. Even if the Arizona law could be construed to allow medication abortion if provided according to the regimen outlined on the *Mifeprex* FPL (an "FPL mandate"), it would still ban the treatment entirely for women after seven weeks lmp.

Additionally, an FPL mandate would impose a set of burdens on women through seven weeks lmp that in most cases would amount to an effective ban. Specifically, to obtain a medication abortion, these women would have to make *four*

separate trips to an abortion facility over the course of two weeks: 1) for the state-mandated counseling and ultrasound; 2) for the mifepristone; 3) for the misoprostol; and 4) for the follow-up. They would have to pay hundreds of dollars more for the procedure, and face an increased risk of needing surgical follow up and increased side effects. Grossman Decl. ¶¶ 33-34, 51, 57; Howard Decl. ¶ 10; Richardson Decl. ¶ 33. (ER 055-56, 063, 065; ER 095-96; ER 040.) Moreover, many of these women would have to experience the effects of the misoprostol, including bleeding and cramping, either at the clinic or during their journey home, rather than (as is currently the case) in one private place. Grossman Decl. ¶ 56. (ER 064-65.)

In support of their motion, Plaintiffs presented data from Ohio, where an FPL mandate has been in force since 2011. Those data show that the burdens imposed by the FPL mandate are prohibitive for most women. Rebuttal Declaration of Timothy Kress, M.D. ("Kress Decl.") ¶¶ 4-6 (similar restrictions led to two-thirds reduction in medication abortion patients). (ER 025-26.)

The burdens imposed by the Arizona law, moreover, come on top of onerous pre-existing state restrictions. Already, before having an abortion in Arizona, a woman must travel to a clinic at least 24 hours beforehand, meet with a physician, undergo an ultrasound, hear a detailed description of the fetus, discuss her reasons for having an abortion, and undergo state-directed counseling. A.R.S. § 36-449.03 (D)(4), § 36-2153, & § 13-3603.02. Many women, moreover, must travel hundreds

of miles (each trip) to reach a provider. Howard Decl. ¶ 18. (ER 098.) Although advanced practice clinicians can safely provide early abortions, and had done so for years in Arizona, recent laws have prohibited this practice, *see* A.R.S. §§ 36-449.01-.03, A.R.S. § 32-2532, and A.A.C. §§ R9-10-1501-1514, thereby shrinking the network of licensed abortion clinics in the sixth-largest state from 16 to 10 (all concentrated in a few metropolitan areas). Howard Decl. ¶ 14; Grossman Decl. ¶ 52. (ER 096; ER 063.) These laws burden and stigmatize abortion patients and their providers, and this new law will compound these effects. Howard Decl. ¶ 19. (ER 098.)

Women in Northern Arizona will suffer in particular. This region, which is larger than most *states*, has only one licensed abortion clinic: Planned Parenthood of Arizona's ("PPAZ") Flagstaff clinic. *Id*. ¶ 18. (ER 097-98.) Due to the staffing and facilities requirements imposed by Arizona law on surgical abortion, this clinic only has the capacity to provide medication abortion. *Id.* ¶ 15. (ER 097.) Even if the Arizona law were an FPL mandate, and not a complete ban, many Northern Arizona women would be unable to access the inferior and more costly FPL regimen for medication abortion that would be available only through seven weeks lmp. As a result of this decrease in patient volume, the Flagstaff clinic would probably be forced to cease providing abortion services. *Id*. ¶ 18; Otterstein Decl. ¶¶ 18-20; Kress Decl. ¶¶ 4-6 (Ohio FPL mandate caused a health center that offered only medication

abortion to stop offering abortion all together); *see generally* Order at 13. (ER 097-98; ER 023-24; ER 025-26; ER 013.)

The next closest clinic in Arizona to Flagstaff is 134 miles away, in Glendale. Thus, as a result of the Arizona law, many or all Northern Arizona women will have to travel 321 miles roundtrip on average, and up to 744 miles from the farthest northern parts of the state, to reach a licensed Arizona abortion provider. Howard Decl. ¶ 18. (ER 097-98.) Arizona's 24-hour waiting period, along with the law challenged here, will force them to make this trip multiple times or to be away from home for an extended period. These extra trips, over longer distances, will require additional time away from home, children, and work, which will be particularly difficult for low-income women, women who live in rural areas, women with limited access to transportation, and victims of abuse. *Id*.; Grossman Decl. ¶ 56; Otterstein Decl. ¶¶ 9-11; Order at 13. (ER 097-98; ER 064-65; ER 020-21; ER 013.)

For many women, the additional travel time will be prohibitive. Rebuttal Declaration of Bryan Howard ("Howard Rebuttal Decl.") ¶ 6-7. (ER 029.) Plaintiffs' evidence on this point too was based on hard data. Once before, PPAZ was forced to suspend medication abortion services in Flagstaff, during the period after Arizona's ban on advanced practice clinicians performing abortions took effect, and while the Flagstaff clinic was still seeking a physician to perform them. *Id*. During that time, 48 percent fewer Northern Arizona women were able to obtain a medication abortion,

and 35 percent fewer were able to obtain any abortion at all, from any PPAZ clinic. *Id.*; *see also* Otterstein Decl. ¶ 21.[2] (ER 024.) In other cases, the added travel time will cause substantial delay, which itself increases medical risk. Grossman Decl. ¶¶ 6-7. (ER 045-36.)

C. Proceedings Below

In order to prevent these harms and to protect their and their patients' constitutional rights, Plaintiffs brought this action on March 4, 2014, and on March 6, 2014, they sought a temporary restraining order and/or a preliminary injunction to prevent the Arizona law from taking effect as scheduled on April 1, 2014.

In particular, Plaintiffs argued that they were likely to succeed on their claims that the Arizona law: (1) violates Plaintiffs' right to due process of law because it is impermissibly vague; (2) imposes an undue burden on their patients' Fourteenth Amendment right to choose abortion both because it fails to promote women's health

[2] This expected drop in Northern Arizona women's ability to obtain any kind of abortion is also supported by data from Defendant's own website, which shows that in 2012, the first full calendar year in which PPAZ Flagstaff was unable to offer abortion, the number of residents of Arizona's three northeastern counties (including Coconino County, where Flagstaff is located) who were able to obtain an abortion fell 31 percent compared to 2010, the last full calendar year in which PPAZ Flagstaff was providing abortions. *Compare* Abortions in Arizona (2012) at 29 (251 residents of Apache, Navajo, and Coconino counties), *available at* http://www.azdhs.gov/diro/reports/pdf/2012-arizona-abortion-report.pdf *and* Abortions in Arizona (2010) at 17, *available at* http://www.azdhs.gov/diro/reports/pdf/2010ArizonaAbortionReport.pdf (362 residents of Apache, Coconino, and Navajo counties).

and because it has the effect of placing a substantial obstacle in the path of women seeking abortions; (3) violates their patients' Fourteenth Amendment right to bodily integrity by failing to adequately justify the bodily intrusions it necessitates; and (4) violates Plaintiffs' right to equal protection of the laws because it singles out abortion clinics and abortion-inducing medications without any rational basis.

In support of their motion, Plaintiffs presented both fact and expert testimony that detailed why the Arizona law does not promote women's health as well as the obstacles and burdens it would cause their patients. In response, Defendant presented no evidence at all, relying instead entirely on HB 2036's conclusory findings. The district court held oral argument on March 26, and on March 31, the day before the Arizona law was to take effect, it denied Plaintiffs' motions both for a temporary restraining order and a preliminary injunction. (ER 001-014.)

The district court recognized that all the evidence presented showed that the Arizona law failed to serve the state's purported interest in advancing women's health, and that it in fact would likely harm women in a number of ways. Indeed, the district court acknowledged that the current regimen, which the Arizona law bans, is widely recognized—including by the AMA and ACOG—as "the best practices, 'evidence-based' medicine" and that it has "reduced or eliminated" risks associated with the procedure, risks which the Arizona legislature paradoxically cited as reasons to ban the current regimen. Order at 7-8. (ER 007-08.) The district court captured the

absurdity of the legislature's reasoning as follows: "[T]he risks associated with medication abortions, relied on by the State as the reason for *adopting* the [FPL] protocol, have been substantially reduced or eliminated by . . . [*Plaintiffs'* protocol], which will be *precluded* under [the law]." Order at 8 (emphases added). (ER 008.)

The district court also acknowledged that there is nothing unusual or questionable about developing new regimens based on clinical study, and that, to the contrary, this practice is common, and "is considered: 'Good medical practice and [in] the best interests of the patient.'" Order at 9. (ER 009.) In fact, the district court found that with the exception of the Arizona law, physicians are not only permitted but "*required* to use legally available drugs, biologics and devices according to their best knowledge and judgment." *Id.* (emphasis added) (quoting Rarick Decl. ¶ 18 (ER 084-085)). As the district court recognized, *id*. at 8 (ER 008), this is certainly the case, as with misoprostol, the second drug in the FPL regimen; it is labeled only for ulcer treatments, yet it now is used for a broad range of gynecological services. Grossman Decl. ¶ 30. (ER 054.)

With respect to the burdens, obstacles, and irreparable harms that the Arizona law would impose, the district court explained:

> [S]ome women, especially those in Flagstaff, will have greater difficulty securing medication abortions when the law is implemented. Women in northern Arizona, who are eight and nine weeks pregnant, will have to travel several hundred extra miles and may have to secure overnight lodging to obtain a surgical procedure because the clinic in Flagstaff only provides medication abortions. If the Flagstaff clinic closes

> entirely, all women in northern Arizona will have to do the same to obtain any abortion procedure. *As for all women throughout the state*, medication abortions will cost more and require more time and effort to secure. Women will have to make two trips to the clinic, instead of one. This obviously increases the difficulty in obtaining the procedure because it requires them to twice take off work, get day care, etc.

Order at 13 (emphasis added). (ER 013.) It also recognized that all of these burdens "may become substantial obstacles in the aggregate" to obtaining any abortion. *Id*. In contrast to this substantial evidence of harm to Plaintiffs' patients, the district court recognized that Defendant presented "no evidence" that the Arizona law would serve women's health, *id*. at 7, and no evidence of harm to him or the public interest in maintaining the status quo. (ER 007.)

Yet the district court found that all of this was insufficient for preliminary relief because it deemed Plaintiffs unlikely to succeed on the merits of any of their claims. In particular, the district court found that all of Plaintiffs' medical evidence was irrelevant because it was sufficient as a matter of law that the legislature *claimed* it was acting to promote women's health. Order at 3-4, 7. (ER 003-04, 007.) As to whether the law imposed a substantial obstacle, the district court held that Plaintiffs had not met their evidentiary burden. *Id.* at 12-13. (ER 012-13.) In two sentences, it rejected both Plaintiffs' bodily integrity and equal protection claims as "part and parcel" of their undue burden claims. *Id.* at 8. (ER 008.) And it found that the Arizona law is not vague, instead ruling that it is an FPL mandate because one legislative finding discusses the FPL. *Id.* at 8-10. (ER 008-10.)

The next day, Plaintiffs filed this appeal and moved this Court for emergency relief enjoining the Arizona law during their appeal. Pls.' Emergency Mot. Prelim. Inj., Apr. 1, 2014, ECF No. 3-1. On April 2, a motions panel of this Court stayed the law so it could consider Plaintiffs' motion, Order, Apr. 2, 2014, ECF No. 5, and on April 8, it issued an emergency injunction preventing the Arizona law from taking effect. The panel found that Plaintiffs had raised "serious legal questions regarding the proper application of the 'undue burden' standard to abortion regulations purporting to promote maternal health," and that "the balance of the hardships tips sharply in favor of the appellants, whose patients will likely suffer irreparable harm absent an injunction pending appeal because they will immediately lose access to a common abortion procedure as soon as the law takes effect." Emergency Order, Apr. 8, 2014, ECF No. 15 at 2 ("Emergency Order").

STANDARD OF REVIEW

Although this Court reviews the denial of a preliminary injunction for an abuse of discretion, *see Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007), the relevant question on this appeal is whether the district court applied the wrong legal standards in finding that Plaintiffs "ha[d] not established serious questions going to the merits." Order at 14.[3] (ER 014.) That is a question on which

[3] The district court failed to separately analyze whether the undisputed hardships resulting from the law were irreparable, and instead simply ruled that, because it

this Court applies de novo review, *Perfect 10, Inc.*, 508 F.3d at 1157. As for the district court's factual findings, this Court reviews them for clear error. *Id.*

SUMMARY OF ARGUMENT

A preliminary injunction is warranted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). Any assessment of the merits at this stage is necessarily provisional, as both parties have had only a limited opportunity to develop the record. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 788 (7th Cir. 2013) (affirming preliminary injunction against abortion restriction, while acknowledging that "[e]vidence presented at trial may critically alter the facts found by the district judge on the basis of the incomplete record compiled in the first month of the suit").

The motions panel, after reviewing the record below, found that Plaintiffs had met this standard for purposes of preserving the status quo pending this appeal. The same logic supports preserving the status quo while the case proceeds to trial. As the panel recognized, Plaintiffs have demonstrated irreparable harm, as well as a balance of harms tipped sharply in their favor, "because [their patients] will immediately lose

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found no "serious questions" as to the law's constitutionality, there was no irreparable harm. Order at 14. (ER 014.)

access to a common abortion procedure as soon as the law takes effect." Emergency Order at 2.

Plaintiffs also have more than met the requirement that they raise "serious questions" regarding the merits of their claims; in fact, they have shown that they are likely to succeed on these claims. At the outset, Plaintiffs disagree with Defendant and the district court that the Arizona law is an FPL mandate. They maintain it bans medication abortion entirely, but at a minimum, it is unconstitutionally vague because it does not give sufficient guidance to physicians as to how to legally perform medication abortion.

Regardless of how the Arizona law is construed, Plaintiffs are likely to succeed on their claim that it violates women's fundamental liberty interest, protected by the Fourteenth Amendment, in deciding whether to continue a pre-viability pregnancy. *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 845-56 (1992); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 539 (9th Cir. 2004). Under the clearly-established law of this Circuit, an abortion restriction that a state justifies as promoting women's health is unconstitutional if it either does not actually further women's health or imposes a substantial burden on women seeking an abortion. *Eden*, 379 F.3d at 540. Because the Arizona law is likely to fail on both counts, and also to violate women's right to bodily integrity by forcing them to undergo unwanted and unnecessary surgery (as well as take unnecessary medication that

comes with increased side effects), Plaintiffs are likely to succeed on the merits of their patients' claims. Additionally, Plaintiffs themselves are likely to succeed on the merits of their claim that the Arizona law denies them the equal protection of the laws, by subjecting licensed abortion clinics to a restriction, for no valid reason, that does not apply to any other provider (including other abortion providers).

ARGUMENT

I. Plaintiffs Have Made a Strong Showing that They Are Likely to Succeed on the Merits

A. The Arizona Law is Unconstitutionally Vague

The plain language of the Arizona law bans medication abortion entirely. As noted in the Statement of the Case § B, *supra*, the Arizona law allows abortion-inducing medications to be used only "in compliance with the protocol that is authorized by the . . . [FDA] and that is outlined in the final printing labeling instructions *for that medication*." A.R.S. § 36-449.03 (E)(6); A.A.C. § R9-10-1508(G) (emphasis added). This limitation makes it impossible to perform a medication abortion for two independent reasons.

First, the second drug used in a medication abortion, misoprostol, is not labeled for use in abortion. The use "outlined" in its FPL is for the treatment of gastric ulcers. Under the Arizona law, therefore, it cannot be used for medication abortion at all. Statement of the Case § B, *supra*; *see also* Order at 8-9. (ER 008-09.) Second, there is no medication abortion drug "protocol" that is "authorized" by the

FDA. A.R.S. § 36-449.03 (E)(6); A.A.C. § R9-10-1508(G). The FDA does not authorize drug protocols. Rarick Decl. ¶ 8. (ER 081.) *See also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-51 (2001) (holding that the FDA does not regulate the practice of medicine and off-label use is generally permitted).

It was for these reasons that the Oklahoma Supreme Court and a North Dakota district court construed essentially identical statutes to ban medication abortion entirely, even though the defendants in those cases also disclaimed any intent to ban medication abortion. *Cline v. Okla. Coal. for Reprod. Justice*, 313 P.3d 253 (Okla. 2013); *see also MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205, slip op. at 21 (N.D. E. Cent. Jud. Dist. Ct. July 15, 2013) (finding that a similar law would ban medication abortion because "[t]here was is no getting around" the fact that "[t]he medication required to complete the procedure is not labeled for this use"); *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205, slip op. at 53 (N.D. E. Cent. Jud. Dist. Ct. Feb. 16, 2012) (noting Defendants' position).

The district court here reached a different conclusion from these other courts, finding that the Arizona law could be read more narrowly than written because a separate statutory finding "expresses the clear legislative intent" to allow misoprostol to be used in accordance with the *mifepristone* label. Order at 10. (ER 010.) In

reaching this result, the district court overlooked contrary indications of intent.[4] The district court also ignored controlling precedent that, although it should endeavor to construe a law consistent with its drafters' intent, any "construction of a state statute adopted by a federal court must be a reasonable and readily apparent gloss on the language" that is not inconsistent with its "plain meaning." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 & n.15 (9th Cir. 2013) (quoting *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 925, 932 (9th Cir. 2004)). *Accord Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) (in construing a state statute, a court does not "insert missing terms into the statute," "adopt an interpretation precluded by [its] plain language" or "rewrite [it] to conform it to constitutional requirements") (citations omitted) (reviewing cases); *cf. MKB Mgmt. Corp.*, slip op. at 19 ("Although [banning medication abortion] may not have been the legislature's intent, the language they adopted leaves no room for other interpretation").

The district court and Defendant's construction depends on reading the final "that" out of the Arizona law, and replacing it with the word "any." This is not a

[4] Although the legislative findings refer to the Mifeprex FPL regimen, they do not endorse that regimen as safe. To the contrary, they state that "mifepristone presents significant medical risks to women," HB 2036 § 9.A.12, and include lengthy paragraphs detailing various harms which allegedly befall people who take it, *id* §§ 9.A.12-14. (ER 139.) These findings are hardly consistent with an intent to allow (let alone mandate) that patients take *three times* the necessary dosage of mifepristone (which is what Defendant and the district court claim the law does).

gloss on the statute's text but rather a judicial rewriting, which this Court has cautioned against: "Arizona asks us not to adopt a narrowing construction, but rather to replace a nonsensical statutory element with a different element. Rewriting the statute is a job for the Arizona legislature, if it is so inclined, and not for this court." *Whiting*, 732 F.3d at 1021; *see also Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025 n.2 (9th Cir. 1999), *amended* 193 F.3d 1042 (9th Cir. 1999). This Court should conclude, like the Oklahoma Supreme Court, that the Arizona law bans medication abortion entirely.

However, if this Court disagrees that the plain language of the Arizona law dictates that result, then Plaintiffs are likely to succeed on their claim that the law is unconstitutionally vague. Vague laws offend due process in two ways. First, they fail to provide the persons targeted by the statute with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, by failing to provide explicit standards by which to assess conduct, vague laws "impermissibly delegate[] basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." *Id*. at 108-09.

The Arizona law is subject to "a more stringent vagueness test" because "it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 499 (1982); *Colautti v.*

Franklin, 439 U.S. 379, 393-94 (1979). Indeed, this Court has recognized that, "[g]iven the potential for harassment of abortion providers, it is particularly important that enforcement of any unconstitutionally vague provisions of [an abortion regulation] scheme be enjoined." *Eden*, 379 F.3d at 554; *see also Forbes v. Napolitano*, 236 F.3d 1009, 1011-13 (9th Cir. 2000) *amended*, 247 F.3d 903 (9th Cir. 2000), 260 F.3d 1159 (9th Cir. 2001) (statute was impermissibly vague because prohibited and permitted medical procedures were not clearly distinct).[5]

The Arizona law fails this test. As explained above, it is unclear how a physician could perform a medication abortion in compliance with the law. Moreover, because the Arizona law lacks a definition of "induce," it is also unclear whether misoprostol, used after mifepristone in medication abortion, is "used to induce an abortion" at all, or whether only the mifepristone falls within the purview of the Arizona law, because only mifepristone is clearly used with that intent. Richardson Decl. ¶¶ 25-27; *see also* Grossman Decl. ¶¶ 11-12 (explaining two-step regimen). (ER 037-38; ER 047-48.)

The result is that physicians are left in a quandary, not knowing how to perform a (theoretically) legal medical procedure, *see* Richardson Decl. at ¶¶ 26-27, Grossman Decl. at ¶ 50, and may cease to do so rather than risk the possibility of

[5] This new law is hardly the first time Arizona has enacted an unconstitutionally vague abortion restriction. *See, e.g., Eden*, 379 F.3d 531; *Forbes*, 236 F.3d at 1013; *Lawall*, 180 F.3d at 1033.

having licensing proceedings instituted against themselves and their clinics by current or future DHS authorities and/or the Medical Board. (ER 037-38; ER 063.) *See Forbes*, 236 F.3d at 1013. Due process prohibits such a result where persons "of common intelligence must necessarily guess at [a law's] meaning and differ as to its application." *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (citations omitted).

Finally, to the extent that Plaintiffs and Defendant have each offered plausible interpretations of the Arizona law that "may be determinative" of this case, the proper course is not to adopt Defendant's interpretation, as the district court did here. Rather, the question should be certified to the Arizona Supreme Court. *See* A.R.S. § 12-1861 (allowing the Arizona Supreme Court to answer questions certified to it any federal court). Indeed, this is precisely what both the U.S. Supreme Court and the Sixth Circuit did when confronted with similar laws. *See Cline v. Okla. Coal. for Reprod. Justice*, 133 S. Ct. 2887 (2013) *certified questions answered*, 313 P.3d 253 (Okla. 2013) (U.S. Supreme Court certifying question to Oklahoma Supreme Court); *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 408 (6th Cir. 2008) *certified question answered sub nom. Cordray v. Planned Parenthood Cincinnati Region*, 911 N.E.2d 871 (Ohio 2009) (Sixth Circuit certifying question to Ohio Supreme Court).

B. The Arizona Law Violates a Woman's Right to Choose Abortion

Women have a fundamental liberty interest, protected by the Fourteenth

Amendment, in deciding whether to continue a pre-viability pregnancy. *Casey*, 505 U.S. at 845-46; *Eden*, 379 F.3d at 539. An abortion restriction that the state justifies as promoting women's health is unconstitutional if it either does not actually further women's health, or has the effect of imposing a substantial obstacle on women seeking an abortion. *See Eden*, 379 F.3d at 540 ("[I]n the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions *and* fail to serve the purported interest very closely, or at all."). The Arizona law fails on both accounts.

1. The Arizona law serves no health purpose

In support of their preliminary injunction motion, Plaintiffs presented evidence that regardless of how the Arizona law is construed, its real world effect, at a minimum, would prevent about two-thirds of the women who seek medication abortion from obtaining it entirely, and force the remaining few to undergo an outdated, less-effective procedure. *See* Statement of the Case § B, *supra*. Plaintiffs presented evidence that the Arizona law will not help women and, indeed will affirmatively harm them. In response, Defendant presented *no* evidence at all, relying only on the legislature's findings, which the district court acknowledged were nonsensical. Order at 6-8. (ER 006-08.)

On this record, there can be no question that Plaintiffs are likely to succeed in

showing that the law serves no health purpose and therefore violates women's Fourteenth Amendment rights. As the Oklahoma Supreme Court recently held in striking down a similar restriction, such laws "[are] **so completely at odds with the standard that governs the practice of medicine** that [they] can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do." *Cline*, 313 P.3d at 262; *see also MKB Mgmt. Corp.*, slip op. at 35 ("The legislative mandate that physicians [] follow this flawed and outmoded protocol would force them to expose their patients to unnecessary risks, to abandon current standards of care, and to compromise fundamental canons of ethics. It would also foreclose further advances in evidence-based medicine.").

Specifically, with respect to a woman's right to choose, this Court has explained: "[I]n the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation" is unconstitutional because it "fail[s] to serve the purported interest." *Eden*, 379 F.3d at 540; *see also Casey*, 505 U.S. at 900-901 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976) (considering whether challenged regulations were "reasonably directed to the preservation of maternal health")). For this reason, *Eden* instructs courts to "[take] care to *verify* that the law could be reasonably understood to promote [the asserted state interest] in some legitimate fashion." 379 F.3d at 540 (emphasis added) (citing *Casey*, 505 U.S. at 882).

To determine whether a restriction actually serves a purported health interest, this Court does not blindly defer to legislatures, but considers the medical evidence presented by the parties and their experts as well as the standard of care, as shown in physicians' practices and the statements of the nation's major medical organizations. *See e.g., Eden*, 379 F.3d at 542 (reciting plaintiffs' evidence that abortion is a very low-risk procedure, and that it entails equal or less risk than other procedures not similarly regulated in Arizona); *McCormack v. Hiedeman*, 694 F.3d 1004, 1016 n.8, 1017 n.9 (9th Cir. 2012) (citing American Psychological Association and ACOG reports regarding mental health in the context of abortion and women's obstacles to abortion access); *see also Van Hollen*, 738 F.3d at 798 (state defending an abortion restriction justified on medical grounds must produce "evidence . . . that the medical grounds are legitimate").

In taking this approach, this Court has followed Supreme Court precedent. *See Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (upholding abortion restrictions that "appear to be generally compatible with accepted medical standards governing outpatient second trimester abortions," including those set by ACOG); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 435-37 (1983) (concluding that the state's justification for an abortion restriction was "convincingly undercut[]" by

"present medical knowledge," including that expressed in ACOG standards).[6]

The district court ignored this clear binding precedent, reasoning that all Defendant needed do is *assert* that the Arizona law serves women's health for it to be constitutional. Order at 3-4 (finding that "the law reflects a legitimate purpose" because the legislature said so). (ER 003-04.) But under this standard, *Eden*'s instruction that a court "verify" that a law serves women's health, which was based on *Casey*, would be meaningless. The district court's approach even runs counter to *Gonzales v. Carhart*, 550 U.S. 124 (2007), upon which it relied. There, the Supreme Court upheld an abortion restriction, but cautioned *against* the very sort of blind deference the district court applied here, stating that "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake," and "[u]ncritical deference to Congress' factual findings in these cases is inappropriate." 550 U.S. at 165-66.

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[6] As this Court recognized in *Eden*, "*Casey* largely dealt with a law aimed at promoting fetal life," and the plurality's disagreement with previous case law focused on "the strength of the state interest in fetal protection." 379 F.3d at 539, 544. Thus, although *Akron* and *Simopolous* were decided before *Casey*, they remain good law for the factors relevant to evaluating abortion restrictions justified on the grounds of protecting women's health (as opposed to the interest in fetal life, which is not at issue here). *See Casey*, 505 U.S. at 883 (overruling earlier cases only "to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed"); *id*. at 858 ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection"); *id*. at 870 (reaffirming the "central premise" of *Akron* with respect to the commitment to *Roe*'s "essential holding").

The district court's reliance on *Gonzales* was also in error because the Supreme Court's decision there was clearly based on the particular procedure at issue, and on the Court's view that the procedure itself severely and uniquely harmed the government's interest in potential life. 550 U.S. at 145-46. As the district court here recognized, Defendant is not claiming (nor could he) that the Arizona law in any way protects potential life. Order at 3. (ER 003.)

The district court also relied on the Fifth and Sixth Circuit decisions upholding medication abortion restrictions in whole or in part. Order at 5-8 (citing *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012); *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, ___ F.3d ___, 2014 WL 1257965 (5th Cir. Mar. 27, 2014). (ER 005-08.) Yet, neither court's analysis can be squared with *Eden*. Far from "verifying" that the law served the asserted state interest, the Sixth Circuit failed even to *consider* this question, and the Fifth Circuit expressly held that—contrary to *Casey*, *Gonzales*, and *Eden*—it is not a question that courts are even free to ask, *Abbott*, 2014 WL 1257965 at *7 (holding that, in actually looking at facts, the district court "took the wrong approach").

Once the proper standard under *Eden* and *Casey* is applied, the Arizona law is likely to fail because, as the district court itself recognized, there currently is *no* evidence that the law is reasonably directed at promoting women's health, and plentiful evidence that it in fact harms women. Order at 7. (ER 007.) The record

establishes that medication abortion is safe and effective, with extremely low complication rates that are comparable to those associated with surgical abortion; and that, for some women, it is the medically-indicated option to ensure their health or safety. *See* Order at 7, 11. (ER 007, 011.) Additionally, pregnancy itself is risky, and a woman facing an unintended pregnancy is exposed to risk no matter what decision she makes thereafter. Medication abortion is far safer than continued pregnancy and childbirth. Grossman Decl. ¶¶ 22-24. (ER 050-51.)

By preventing most or all women from choosing a medication abortion, the Arizona law harms their health by reducing their ability to access abortion, Grossman Decl. ¶¶ 5-9. (ER 045-47.) Assuming the law is an FPL mandate, it forces them to use an outdated, less effective regimen that entails a greater risk of side effects and failure, thus also harming women's health, *see* Statement of the Case § B, *supra*; *see also* Order at 7, 11-13. (ER 007, 011-13.)

As noted above, Defendant has yet to present any evidence at all to refute these facts, choosing thus far to rely instead only on the Arizona's legislature's findings. But those findings show that the Arizona law not only is "poorly drafted," but is also "a pretext for anti-abortion regulation," *Eden*, 379 F.3d at 540. The findings claim that mifepristone is "dangerous," but the law mandates that women take *three times more* of this "dangerous" medication than is necessary. HB 2036 § 9.B.2. (ER 139.)

This plainly irrational result is unsurprising given that the findings were copied essentially verbatim from those drafted by Americans United for Life, which is a group committed, not to improving health care for women, but "to end[ing] abortion." *See* Americans United For Life, Abortion-Inducing Drug Safety Act: Model Legislation and Policy Guide for the 2012 Legislative Year, http://www.aul.org/wp-content/uploads/2012/01/Abortion-Inducing-Drugs-Safety-Act-2012-LG.pdf (last visited Mar. 24, 2014); Americans United for Life, Recognition of the Unborn and Newly Born, http://www.aul.org/issue/legal-recognition/ (same).[7]

Because the evidence presented to the district court at this preliminary stage shows that the Arizona law does nothing to actually further women's health, the district court erred in finding that Plaintiffs had "not established serious questions going to the merits." Order at 14. (ER 014.) To the contrary, Plaintiffs are substantially likely to succeed on their claim that by failing to promote (and indeed, by harming) women's health, the Arizona law violates their patients' right to choose abortion.

[7] Plaintiffs presented evidence discussing each of the medical findings made by the legislature and explaining why they are scientifically inaccurate, misleading, and/or irrelevant to the actual terms of the Arizona law, and in some cases why the findings even support *Plaintiffs'* position. *See* Grossman Decl. ¶¶ 36-48. (ER 057-62.)

2. The Arizona law imposes a substantial obstacle

Even a law that furthers women's health is unconstitutional if it has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Eden*, 379 F.3d at 539-40 (quoting *Casey*, 505 U.S. at 877). The district court erred in finding that the Arizona law was unlikely to have this effect.

First, the Arizona law bans a common method of first trimester abortion—which has become the chosen method of nearly half of eligible patients—either entirely or after seven weeks lmp. A ban on a safe, effective, commonly-used abortion method imposes an impermissible burden. *See Stenberg v. Carhart*, 530 U.S. 914, 915-46, 924 (2000) (striking down a ban on "the most commonly used" second trimester procedure); *Danforth*, 428 U.S. at 78; *cf. Gonzales*, 550 U.S. at 135, 156 (federal ban on "partial-birth abortion" upheld where it would not "prohibit the vast majority of" "the usual abortion method" in the second trimester). This is all the more true where, as here, the method banned is so qualitatively different from the remaining alternative. *See* Otterstein Decl. ¶ 4-5; Richardson Decl. ¶¶ 12-15. (ER 019-20; ER 033-34.)

Even if it were permissible for a state to ban a common abortion method (and the only non-surgical method available) for no medical reason, the Arizona law would still be unconstitutional because of its likely effects on women seeking abortion. In assessing whether an allegedly health-based restriction creates a

"substantial obstacle," this Court has made clear some of the factors that must be considered. *Eden*, 379 F.3d at 541-43. These include whether the law would impose a "significant increase in the cost of abortion," whether it would "limit[] the supply of abortion providers," whether it would restrict the hours during which clinics could provide services, and whether it would discourage the provision of abortion in a state by the "stigmatizing of abortion practice and usurping [providers'] ability to exercise medical judgment." *Id*. (remanding to district court to consider whether provisions of challenged law, in aggregate, would create such obstacles). Plaintiffs have produced evidence of all of these effects, *see* Statement of the Case § B, *supra*, which is more than sufficient to satisfy their burden on a motion for preliminary relief.

Moreover, this Court also held in *McCormack* that a law's effect must be considered within the context of pre-existing restrictions. 694 F.3d at 1016-17 (discussing "overburdened path that . . . pregnant women . . . face when deciding whether to obtain an abortion," including cost, distance, arrangements for childcare, and harassment by protesters); *see also Van Hollen*, 738 F.3d at 796 ("When one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered.").[8] Additionally, as *Casey*'s use of the term

[8] The requirement that courts should consider the cumulative burdens imposed by a regulatory regime or the aggregate effect of state misconduct before deciding whether that regime impermissibly impedes a protected right is not unique to abortion; it is common sense, and has been applied by the Supreme Court in various

"undue burden" suggests, the "feebler" the medical grounds offered in support of an abortion restriction justified on the basis of women's health, the "likelier the burden, even if slight, [is] to be 'undue' in the sense of disproportionate or gratuitous." *Van Hollen*, 738 F.3d at 798; *Planned Parenthood Se., Inc. v. Strange*, ___ F. Supp. 2d ___, 2014 WL 1320158 (M.D. Ala. Mar. 31, 2014).

As explained in Statement of the Case § B, *supra*, the Arizona law burdens women who are already "overburdened" by other medically unnecessary state restrictions. Specifically, it will have the effect of forcing many or all women who would have chosen a medication abortion (including those for whom it is medically indicated) to undergo unwanted surgery or forego their rights entirely. And even if the law allows medication abortion through seven weeks lmp, it imposes needless financial, logistical, and health burdens that make the procedure impossible for most women to obtain, and that will fall especially hard on young women, women who live in rural areas, low-income women, and victims of domestic violence. *See* Statement of the Case § B, *supra*; *see also* Order at 7, 13. (ER 007, 013.) For at least

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contexts. *E.g. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (*Bradey* challenges) *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (freedom of speech); *see also Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring) ("A panoply of [voting] regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms. . . .").

some of these women, these will mean that they will be unable to obtain an abortion at all. Statement of the Case § B, *supra*.

These effects will be magnified for Northern Arizona women. The law will probably force PPAZ Flagstaff to halt abortion services. *Id*. In that case, Northern Arizona women would have to travel anywhere from 300 to over 700 miles multiple times to obtain a safe and legal abortion by any method. *Id*. As a result, most Northern Arizona women who would have chosen medication abortion would no longer be able to do so, and some would be denied a legal abortion altogether, and be forced to carry an unwanted pregnancy to term or resort to attempting to self-induce an abortion. *Id.*; Otterstein Decl. ¶¶ 20-21; Howard Rebuttal Decl. ¶¶ 6-7.[9] (ER 024; ER 029.)

The district court recognized these burdens, *see* Statement of the Case § C, *supra*, and even recognized that they "may become substantial obstacles in the aggregate," but inexplicably held that "in and of themselves" they were not sufficient to satisfy Plaintiffs' burden on a motion for *preliminary* relief. Order at 13. (ER 013.) This reasoning ignores the very purpose of such relief—to preserve the status quo such that evidence can be fully developed and considered through a trial—as well as

[9] The Arizona law will have this effect on many Northern Arizona women even in the unlikely effect that it does not force the Flagstaff clinic to cease providing services. Specifically, Northern Arizona women who are past seven weeks lmp will have to travel these additional distances and undergo surgery.

Eden's and *McCormack*'s clear instruction that burdens be considered in the aggregate and in the context of other obstacles that women face. *See Eden*, 379 F.3d at 542-43 (instructing court on remand to consider broad range of effects in considering whether the law imposed an undue burden); *McCormack*, 694 F.3d at 1016 (considering law in the context of a woman's "already overburdened path" to an abortion).

At the very minimum, the Arizona law imposes a substantial obstacle because it fails to provide an exception for situations where a medication abortion is necessary to protect a woman's health. Grossman Decl. ¶ 21. (ER 050.) As the Ninth Circuit has twice held in recent years, "[a]n adequate health exception is a per se constitutional requirement. To preclude a woman from receiving a medically necessary abortion is to impose an unconstitutional burden." *Isaacson*, 716 F.3d at 1227 (internal punctuation omitted) (quoting *Wasden*, 376 F.3d at 922-23); *see also Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511-12, 514 (6th Cir. 2006) (affirming preliminary injunction in part because the FPL mandate "could pose a significant health risk to women with particular medical conditions" including many of the same ones the record addresses here).

The district court rejected even this claim, finding that Plaintiffs had failed to "expla[in]" the health risk involved, Order at 12. (ER 012.) But, as the district court itself acknowledged elsewhere in its opinion, *id*. at 11, Plaintiffs did in fact produce

extensive, unrebutted evidence as to why some women need a medication abortion for health reasons. (ER 011.) *See* Grossman Decl. ¶¶ 20-21; Richardson Decl. ¶¶ 13-14; Otterstein Decl. ¶¶ 5-6. (ER 049-50; ER 033-34; ER 020.) The district court also, incorrectly, concluded that Plaintiffs had failed to seek as-applied relief for women in these circumstances. Order at 12. (ER 012.) In fact, in addition to asking for facial invalidation of the Arizona law, Plaintiffs also sought alternative relief "as applied to women for whom a banned medication abortion is necessary, in appropriate medical judgment, to protect the life or health of the woman." Complaint at ¶ 95 (ER 115.) Thus, the district court erred in denying Plaintiffs even this limited relief.

C. Plaintiffs Are Likely to Succeed on Their Other Claims

Because the Arizona law serves no valid purpose, *see* Argument § B.1, *supra*, and significantly burdens women, *see* Argument § B.2, *supra*, Plaintiffs also are likely to succeed on their claims that it violates women's rights to bodily integrity as well as Plaintiffs' own equal protection rights.

1. Plaintiffs are likely to succeed on their bodily integrity claim

It is "long recognized" that the Fourteenth Amendment protects against unwarranted intrusions into one's body. *See*, *e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (bodily integrity is among "certain fundamental rights and liberty interests" given "heightened protection against government interference"). The Arizona law violates this right because it forces women (either entirely or after

seven weeks lmp) to have a surgical procedure in a clinic when they would prefer a private, non-invasive, and equally safe alternative at home with family and/or other loved ones. Even if it allows some women to choose a medication abortion, the law would force those women to follow an antiquated regimen that requires triple the necessary dose of mifepristone, comes with greater side effects, and exposes women to a greater chance of needing surgery to complete the procedure.

To assess Plaintiffs' bodily integrity claim, the district court should have balanced women's "liberty interests against the relevant state interests," *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990), considering both the nature of the intrusion and whether the intrusion is justified by the asserted state interests. A law that, for no reason, requires women to have surgery when they otherwise would not, fails this test. *See Rochin v. California*, 342 U.S. 165, 172-74 (1952). So too does requiring women to take excess, unnecessary medication. *See Washington v. Harper*, 494 U.S. 210, 221-22, 227 (1990). The Arizona law fails because it has both of these effects.

The district court ruled otherwise, finding that "there can be no separate constitutionally asserted violation[] . . . of the right to bodily integrity" because it is abortion that the Arizona law restricts. Order at 8. (ER 008.) This makes no sense. There can be no question that if Arizona tried to force women into a surgical alternative for any other form of health care, by taking away an equally-safe non-

surgical treatment option with no justification whatsoever, that would implicate their right to bodily integrity. Plaintiffs' patients do not lose this basic right as a patient to avoid unwarranted bodily intrusions merely because the health care they are seeking is abortion.[10]

2. Plaintiffs are likely to succeed on their equal protection claim

Finally, because the Arizona law does not serve any legitimate interest at all, Plaintiffs are likely to succeed on their claim that it violates the Equal Protection Clause. Even rational basis scrutiny requires that a law not be "discontinuous with the reasons offered for it," *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see also Van Hollen*, 738 F.3d at 790 (citing equal protection concern with medically-unsupported abortion restriction). The classifications the Arizona law imposes are irrational in at least two ways. First, the law singles out abortion clinics from other abortion providers, such as individual physician's offices and hospitals; its restrictions apply only to the former, while the rest can continue to offer women the superior, evidence-

[10] To the extent that the district court's bodily integrity ruling relied on *DeWine*, the Sixth Circuit there asked the wrong question—whether the available alternative to a medication abortion "is so undesirable as to make the woman choose to have no abortion at all." *DeWine*, 696 F.3d at 507. The proper inquiry is whether a woman who has chosen to exercise her fundamental right to abortion can be placed in the untenable position of either having to forgo that right or "consent" to a surgical procedure—especially when the state has no legitimate interest in the restriction. Placing a woman in this position, under the false guise of protecting her health, is every bit as coercive as subjecting her to involuntary medical treatment.

based regimen. *See* Statement of the Case § B, *supra*. But if mifepristone, or its evidence-based use, were truly dangerous, there would be no reason to allow individual physicians and hospitals to continue to endanger their patients.

Second, the law irrationally singles out medications used for abortion, as opposed to other, more risky drugs that are prescribed differently from their original label. In fact, in other contexts Arizona law actually protects off-label access, *see, e.g.,* A.R.S. § 20-1057(V) (protecting access to off-label cancer treatments). As the Seventh Circuit recently explained in upholding a preliminary injunction against a different abortion "safety" restriction, "the lack of any demonstrable medical benefit" from a restriction, and the legislature's failure to similarly restrict other, riskier procedures than abortion, are "certainly evidence that [the] Legislature's only *purpose* in its enactment was to restrict the availability of safe, legal abortion in this State." *Van Hollen*, 738 F.3d at 790 (quoting district court with approval); *see also Cline*, 313 P.3d at 262 (Okla. 2013) (finding medication abortion ban "**so completely at odds with the standard that governs the practice of medicine** that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do").

Rather than addressing the equal protection problems with the Arizona law, the district court, relying only on *DeWine*, 696 F.3d 490, held that this claim (like the bodily integrity claim) was "part and parcel" of the undue-burden framework. Order

at 8. (ER 008.) As an initial matter, *DeWine* did not involve an equal protection claim. But, more importantly, this Court has recognized that "doctors who perform abortions have rights, separate and apart from the rights of their patients, to be free from discrimination," which must be analyzed accordingly. *Eden*, 379 F.3d at 545. And as a district court recently observed in reaching a similar conclusion with respect to physicians' First Amendment claims, it would be unprecedented, and contrary to the "values memorialized" in the Constitution, to allow the state to violate a physician's rights simply because the violation did not also have the effect of violating "a different constitutional right belonging to a different person" (i.e., his patients). *Stuart v. Loomis*, ___ F.Supp.2d ___, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014). Plaintiffs, therefore, are also likely to succeed on their equal protection claims.

II. Plaintiffs Have Made a Strong Showing of Irreparable Harm

As the motions panel properly recognized, Plaintiffs have met the second factor for injunctive relief "because [their patients] will immediately lose access to a common abortion procedure as soon as the law takes effect." Emergency Order at 2. Plaintiffs' patients will also be irreparably harmed absent an injunction because, in addition to depriving them of their constitutional rights, the Arizona law threatens their health. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Stormans,*

Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009); *Planned Parenthood of Idaho v. Wasden*, 376 F. Supp. 2d 1012, 1021-22 (D. Idaho 2005) (finding irreparable harm where "provisions of the Act, in combination with certain circumstances, will likely threaten the health of minors seeking abortions"). The Arizona law irreparably harms Plaintiffs as well because it places them in the untenable position of choosing between providing critical care in a demonstrably inferior way or ceasing to provide that care altogether.

III. The Balance of Equities and the Public Interest Favor Injunctive Relief

The motions panel also correctly found that the balance of equities and public interest favored injunctive relief. As to the balance of equities, Defendant did not even argue below that he would suffer any harm from a temporary preservation of the status quo. Nor could he, as he would only be delayed in his ability to enforce the Arizona law while serious constitutional issues are resolved. Defendant obviously felt no urgency to enforce the law, as he waited almost two years to implement it. And, if the legislature had thought the problem was so pressing, it would have required Defendant to implement the Act by a certain date and more importantly, it would have made the Act apply to all patients. Thus, Plaintiffs' have demonstrated that the balance of harms tips sharply in their favor. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2012) (Where a plaintiff is threatened with "irreparabl[e] los[s]," the "the balance of hardships between the parties tips sharply in

favor of [the plaintiff]" and an injunction is warranted).

Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d 990 at 1002 (citations omitted) (reviewing cases). It is also in the public interest to prevent harms to women's health. *See Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 887 (D. Ariz. 2012).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's Order denying Plaintiffs' Motion for a Preliminary Injunction, and remand this case for further proceedings.

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2014 .

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