

**No. 14-15624**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

No. 4:14-cv-01910-TUC-DCB

**MOTION TO STAY THE MANDATE PENDING FILING OF A PETITION  
FOR A WRIT OF CERTIORARI**

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## INTRODUCTION

Pursuant to 28 U.S.C. § 2101(f) and Federal Rule of Appellate Procedure 41(d)(2), Appellee Will Humble, Director of the Arizona Department of Health Services (“Director Humble”), moves this Court for an Order Staying the Mandate in this case for 90 days pending his filing of a Petition for a Writ of Certiorari with the United States Supreme Court. The Court should stay the mandate because the certiorari petition will present a substantial question and there is good cause for a stay. *See* FRAP 41(d)(2)(A). The certiorari petition will not be frivolous and will not be filed for purposes of delay.

## BACKGROUND

Appellants filed suit in federal district court to enjoin the statute, A.R.S. § 36-449.03(E)(6), and the implementing rules adopted by the Arizona Department of Health Services (collectively, “the Arizona law”) that regulate medication (non-surgical) abortion procedures on the grounds that they are unconstitutional. Appellants moved for a preliminary injunction to prevent enforcement of the Arizona law, which the district court denied.

Appellants then noticed an interlocutory appeal and sought to stay implementation of the Arizona law pending their appeal. This Court granted their “emergency motion for an injunction pending appeal” and set an expedited briefing schedule. After hearing argument on May 13, 2014, this Court issued its opinion

on June 3, 2014, reversing the district court's denial of Appellants' preliminary injunction motion. The emergency preliminary injunction Appellants sought is in effect and the Arizona statute they seek to enjoin is unenforceable unless and until the preliminary injunction is dissolved

### LEGAL STANDARD

Under Federal Rule of Appellate Procedure 41(d)(2), the mandate may be stayed "pending the filing of a petition for a writ of certiorari in the Supreme Court" when the certiorari petition "present[s] a substantial question and . . . there is good cause for a stay." When assessing whether a substantial question and good cause exist, the courts use a three-part test to determine whether there is (1) "a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed."

*Barefoot v. Estelle*, 463 U.S. 880, 895-96, 103 S. Ct. 3383, 3396, (1983) (quoting *White v. Florida*, 458 U.S. 1301, 1302, 103 S. Ct. 1, 1 (1982) (Powell, J., in chambers) (quoting *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305, 95 S. Ct. 1, 4 (1974) (Powell, J., in chambers))), *superseded on other grounds by statute*, 28 U.S.C. § 2253(c)(2).

A motion to stay the mandate pending a certiorari petition will often be granted. *United States v. Pete*, 525 F.3d 844, 851 (9th Cir. 2008) (stating that it is “often the case” that mandates are stayed while seeking certiorari from the Supreme Court). A party need not demonstrate exceptional circumstances to justify a stay. *Id.* (quoting *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989) (“Ordinarily, . . . a party seeking a stay of the mandate following this court’s judgment need not demonstrate that exceptional circumstances justify a stay.”)). Rather, a stay is merited unless “the petition for certiorari would be frivolous or filed merely for delay.” 9th Cir. R. App. P. 41-1.

### **THE STAY SHOULD BE GRANTED**

The Supreme Court will consider granting a petition for a writ of certiorari when, among other reasons, (1) “a United States court of appeals has entered decision in conflict with the decision of another United States court of appeals on the same important matter or (2) “a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decision of th[e] Supreme] Court.” Sup. Ct. R. 10(a), (c).

“‘[T]he ‘single most important’ factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below.’” *Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 746 (11th Cir. 2004) (quoting Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to*

*Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L. Rev. 717, 726 (1993) (quoting H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)); see also Robert L. Stern et al., *Supreme Court Practice* 231-32 (8th ed. 2002) (stating that a conflict between decisions of courts of appeals “is frequently sufficient to obtain review” and that “this remains the most important basis for review”).

Here, the Supreme Court is likely to grant Director Humble’s petition for a writ of certiorari. Thus, the certiorari petition will present a substantial question. Accordingly, there is good cause for a stay.

**I. The Certiorari Petition Will Present a Substantial Question Based on a Circuit Split.**

Director Humble’s certiorari petition will present a substantial question because this Court explicitly acknowledged that its opinion reversing the district court’s denial of Appellants’ preliminary injunction motion created a circuit split.

In assessing Appellants’ likelihood of success on the merits, this Court assumed without deciding that the Arizona law satisfied rational basis review. Slip op. at 20. It therefore addressed only the undue burden analysis (i.e., whether the Arizona law created a substantial obstacle to a woman’s fourteenth amendment right to choose to have an abortion). *Id.* And while the opinion recited the applicable rule set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992) (“[I]n order to show an undue burden, plaintiffs

must show that, in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”), *id.* (internal citations and quotation marks omitted), it went on to apply a weighing test, “compar[ing] the extent of the burden a law imposes on a woman’s right to abortion with the strength of the state’s justification for the law,” *id.* at 16. The opinion expressly acknowledged that by applying a weighing test, it brought this Court’s analysis into conflict with the recent Fifth and Sixth Circuit decisions in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014) and *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012).

In applying the undue burden test, the Fifth and Sixth Circuits consider the state’s justification only for the very limited purpose of applying rational-basis review. Once an abortion regulation survives rational-basis review, these circuits pay no attention to whether the regulation has been shown actually to advance the state’s legitimate interests. In *Abbott*, the Fifth Circuit held that courts may not consider the strength of the state’s justification, stating that an abortion regulation need only be supported by “rational speculation.” In *DeWine*, the Sixth Circuit analyzed whether an Ohio abortion regulation was an undue burden without considering the strength of the state’s justification for the regulation.

We conclude that *Abbott* and *DeWine* are inconsistent with the undue burden test as articulated and applied in *Casey* and *Gonzales*. The Fifth and Sixth Circuits’ approach fails to recognize that the undue burden test is context-specific, and that both the severity

of a burden and the strength of the state's justification can vary depending on the circumstances. We adhere to the approach in *Eden* and *Van Hollen*, which requires us to weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation.

Slip op. at 19-20 (internal citations omitted).

As indicated in the opinion, the circuits have not merely split on the facial validity of medication abortion regulations; they have split on the more fundamental question of how a reviewing court determines whether *any* rational abortion regulation creates, on its face, a substantial obstacle under *Casey*.

The significance of the split is already apparent from the divergent results reached in the Fifth, Sixth, and Ninth Circuits. Because of this, there is a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious for the grant of certiorari and there is a significant possibility that the Supreme Court will reverse the decision. *See Barefoot*, 463 U.S. at 895-96, 103 S. Ct. at 3396. Thus, the circuit split raises a substantial question. *See Fed. R. App. P. 41(d)(2)(A)*.

## **II. There is Good Cause for a Stay.**

Irreparable harm may ensue if the mandate is not stayed pending Director Humble's filing of a certiorari petition. It is not in the best interest of the district court or the parties to begin litigating this matter pursuant to this Court's mandate

before determining whether the Supreme Court will grant Director Humble's certiorari petition.

Given the substantial question posed by the certiorari petition, it would be unreasonable to begin litigation under a theory of law that could be overturned. Trial litigation under this cloud of uncertainty is inadvisable as it may waste judicial and party resources. There is a significant possibility that the Supreme Court could vacate this Court's opinion and remand the matter to the district court for a subsequent trial.

The unnecessary expenditure of resources by the courts and the parties would result in irreparable harm. Therefore, good cause exists to stay the mandate pending Director Humble's filing of a petition for a writ of certiorari.

### **CONCLUSION**

For the foregoing reasons, Director Humble's petition for certiorari would not be frivolous or filed for purposes of delay. *See* 9th Cir. R. App. P. 41-1. Accordingly, this Court should grant this Motion to Stay the Mandate Pending Filing of a Petition for a Writ of Certiorari.



Respectfully submitted this 21st day of July, 2014.

Thomas C. Horne  
Attorney General

s/ Robert L. Ellman

Robert L. Ellman  
Solicitor General

Attorney for Defendant-Appellee Will  
Humble, Director of the Arizona  
Department of Health Services

### **CERTIFICATE OF SERVICE**

I certify that on July 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: s/ Elizabeth Gordon

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