No. 14-15624

IN THE 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
Civil Action No. 4:14-cv-01910-TUC-DCB
The Honorable David C. Bury, Senior Judge

**EMERGENCY MOTION UNDER 9TH CIR. R. 27-3**
**RELIEF REQUESTED IMMEDIATELY**

**CIRCUIT RULE 27-3 CERTIFICATE**

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(ii) The nature of the emergency is as follows:

This Court's emergency action is needed as quickly as possible. Immediate preliminary injunctive relief is necessary in order to prevent the state of Arizona from enforcing an unconstitutional law that has just gone into effect today and is irreparably harming women, including Plaintiffs-Appellants' ("Plaintiffs") patients, by effectively eliminating their access to the only method of non-surgical abortion available and thereby imposing significant health risks and other substantial obstacles to their fundamental right to choose an abortion. Plaintiffs

sought a temporary restraining order and preliminary injunction from the district court, and were denied relief. Order, ECF No. 32. March 31st, 2014 (attached hereto as relevant record).

(iii) Counsel for Defendant-Appellee ("Defendant") was notified of this emergency motion on April 1, 2014, by telephone call, and e-mail with copies of this motion and supporting documents attached.

(iv) All the grounds stated in this motion were raised before the district court in Plaintiffs' motion for a preliminary injunction or, in the alternative, temporary restraining order. Moving for a stay in the district court would be impracticable because of the urgent nature of this application and because the district court has already denied Plaintiffs' motion for both a temporary restraining order and a preliminary injunction.

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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## INTRODUCTION

The district court has ruled that the state of Arizona can ban the only method of non-surgical treatment available or force women to be subjected to medical treatment that is outdated, less effective, more burdensome, more expensive, and has more side effects, all because the medical treatment involved is abortion. The district court recognized that Defendant presented "no evidence" to support these restrictions on abortion, but concluded that no evidence was required, and that the state could endanger women's health based on no more than a bare assertion that its goal was to protect women's health.

In accepting the state's bare assertion, the district court ignored not only the expert evidence before it, but also the views of the nation's leading medical organizations, the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists ("ACOG"), which oppose these types of restrictions because they jeopardize women's health by denying women well-researched, safe, evidence-based medical care. Without emergency relief from this Court, beginning today, Arizona women have been turned away for scheduled medical appointments, which will result in some losing their access to abortion altogether; some being forced to obtain a surgical procedure when a safe, non-surgical option is available; and some being delayed in accessing abortion (which in and of itself will increase the health risks of abortion for those women). And even

women who have not been turned away are being told that to obtain a non-surgical abortion, they will have to follow an inferior, state-mandated regimen. All of this is occurring for no medical reason whatsoever.

The Arizona law (A.R.S. § 36-449.03(E)(6)) and regulation (A.A.C. R9-10-1508(G)) (collectively "the Arizona law") challenged in this case prohibit health care providers from providing medication abortion according to the most current standard of care – one recommended by the AMA and ACOG. Indeed, the district court acknowledged the Arizona law would require physicians to follow a regimen that would be less effective and impose a greater risk of required surgical follow-up. Order, ECF No. 32. March 31st, 2014 (attached hereto as relevant record) at 7.

Plaintiffs-Appellants ("Plaintiffs") presented substantial evidence of the immediate and significant burdens that the Arizona law would impose on their patients if allowed to go into effect on April 1. The district court summarized many of these effects and burdens as follows:

> [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. It also recognized that all of these burdens "may become substantial obstacles in the aggregate" to obtaining any abortion. *Id*. at 13. In contrast to this substantial evidence of harm to Plaintiffs' patients, Defendant-Appellee ("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. That is not surprising given that Defendant took nearly two years to implement this law after it was enacted.

Yet, despite this clear balance of harms in Plaintiffs' favor, the district court denied Plaintiffs' motion for preliminary relief, based on what it deemed was a low chance of success on the merits. As explained below, the district court's analysis conflicts with decades of precedent from both this Court and the U.S. Supreme Court for two reasons. First, the Arizona law is an undue burden because it fails entirely to serve the state's purported interest in women's health. To the contrary, it harms women. Second, as can be seen from the district court's own findings, the Arizona law is an undue burden because it places a substantial obstacle in the path of women seeking abortion.

The district court also incorrectly reduced Plaintiffs' other, independent claims to the same undue burden test. When these other claims are considered separately, under the proper standards, they too are likely to succeed. The Arizona law both violates women's right to bodily integrity, by forcing them to have a surgical

procedure for no reason, and Plaintiffs' right to equal protection, by singling out abortion clinics and irrationally treating them differently from all other medical providers including other abortion providers.

Emergency relief is warranted here because: 1) Plaintiffs are likely to succeed on their claim that the Arizona law violates the constitutional rights of Plaintiffs and their patients; 2) Plaintiffs' patients will suffer irreparable harm if the Arizona law takes effect; 3) the balance of equities tips strongly in favor of Plaintiffs and their patients; and 4) the public interest will be served by an injunction.

## BACKGROUND

### A. Medication Abortion Background

Women seek abortions for a variety of medical, psychological, emotional, familial, economic, and personal reasons. Declaration of William Richardson, M.D., attached hereto as Exhibit 1 ("Richardson Decl.") ¶¶ 12-15. Approximately one in three women in the United States will have an abortion by age 45, and most who do so either already have children or are planning to raise a family when they are older, financially stable, and/or in a supportive relationship with a partner. Declaration of Daniel Grossman, M.D., attached hereto as Exhibit 2 ("Grossman Decl.") ¶ 5. Until today, Arizona women in the first nine weeks (63 days) of pregnancy as measured from the first day of their last menstrual period ("lmp") who sought abortion could choose between a surgical abortion or a procedure

using medications alone (medication abortion). *Id*. ¶¶ 10-15.

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. Richardson Decl. ¶ 11; Grossman Decl. ¶¶ 22-23. The procedure involves a combination of two prescription drugs: mifepristone and misoprostol. Richardson Decl. ¶ 11. 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.

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. Richardson Decl. ¶ 12; Grossman Decl. ¶ 19. 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. Richardson Decl. ¶ 14; Grossman Decl. ¶ 20. It allows some women with abusive partners to conceal an abortion, which may keep them safer. Rebuttal Declaration of Beth Otterstein, RN, BSN, attached hereto as Exhibit 5, ("Otterstein Decl.") ¶ 5. And for women with certain medical conditions, it is significantly safer than a surgical abortion. Richardson Decl. ¶¶ 13-15; Grossman Decl. ¶ 21. Medication abortion is

increasingly prevalent, chosen by a growing percentage of abortion patients each year. Grossman Decl. ¶ 17.

The U.S. Food and Drug Administration ("FDA") approved mifepristone, under the brand name Mifeprex, based on data from clinical trials showing that a particular regimen tested in the 1990s was safe and effective for women with gestational ages through 49 days lmp. Under that regimen, a woman takes 600 mg of mifepristone orally 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. That is the regimen outlined on Mifeprex's Final Printed Label ("FPL"), as produced by the manufacturer and approved by the FDA. Declaration of Lisa Rarick, M.D., attached hereto as Exhibit 3 ("Rarick Decl.") ¶ 10; Grossman Decl. ¶¶ 25-26.

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 through at least 63 days lmp. Grossman Decl. ¶ 27. From the start, therefore, most providers prescribed a regimen different from the FPL regimen. *Id*. Today, the overwhelming majority of abortion providers, Plaintiffs included, use a regimen in which the patient takes 200 mg of mifepristone orally 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 1-3 weeks later for a follow-up visit. Richardson Decl. ¶ 22; Grossman Decl. ¶ 28; Declaration of Bryan Howard, attached hereto as Exhibit 4 ("Howard Decl.") ¶¶ 5-7.

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. ACOG and the AMA have endorsed the evidence-based regimen used by Plaintiffs, recently stating that this regimen "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.

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 63 days lmp, which is important because many women do not detect their pregnancies until close to 49 days lmp. Third, by allowing a woman to take misoprostol at home, it reduces her need to travel, making it more likely that she will 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.

Indeed the district court acknowledged that the current regimen, which the Arizona law bans, is widely recognized 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.

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

The Arizona law requires 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 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, and those that fail to comply are 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. § R9-10-15-15.

At a minimum, the Arizona law restricts medication abortion to the mifepristone FPL ("FPL mandate"). The result of this is a flat out ban on this treatment for women between 50 and 63 days lmp, and for women through 49 days lmp, a set of burdens that amount to an effective ban in most cases. Specifically, to obtain a medication abortion, women 49 days lmp or less 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. 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 safe place. Grossman Decl. ¶ 56. Plaintiffs presented data from Ohio showing that these burdens are prohibitive for most women. Rebuttal Declaration of Timothy Kress, M.D., attached hereto as Exhibit 7 ("Kress Decl.") ¶¶ 4-6 (similar restrictions led to two-thirds reduction in medication abortion patients).

The burdens imposed by the Arizona law, moreover, come on top of onerous pre-existing state restrictions. Already, before having an abortion, 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. Although advanced practice clinicians can safely provide early abortions and had done so for years in Arizona, recent laws have prohibited this practice, thereby shrinking the network of licensed abortion clinics in the sixth-largest state from 16 to 10 (all concentrated in a few metropolitan areas). *Id*. ¶ 14. These laws burden and stigmatize abortion patients and their providers, and this new law will compound that effect. *Id*. ¶ 19.

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. Howard Decl. ¶ 18. 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. Without doubt, a large fraction of affected patients will be unable to choose, or afford, the inferior and more costly FPL regimen for medication abortion, which is likely to make it impossible for the Flagstaff clinic to continue offering abortion services. *Id*. ¶ 18; Otterstein Decl. ¶¶ 18-20; Kress Decl. ¶¶ 4-6. *See generally* Order at 13.

The next closest clinic in Arizona to Flagstaff is 134 miles away, in

Glendale. As a result, 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. Arizona's 24-hour waiting period, along with the law challenged here, will force them to make this trip multiple times or 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.

For many women, the additional travel time will be prohibitive. Rebuttal Declaration of Bryan Howard, attached hereto as Exhibit 7 ("Howard Rebuttal Decl.") ¶ 6-7 (explaining that, during a period whether PPAZ was forced to suspend medication abortion services in Flagstaff, 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); Otterstein Decl. ¶ 21.[1] In other cases, the added travel time will cause substantial delay, which itself

[1] This expected drop in Northern Arizona women's ability to obtain any kind of abortion is supported by data from Defendant's own website, which shows that in 2012, the first full calendar year in which PPAZ Flagstaff was closed, the number of residents of Arizona's three northeastern counties who were able to obtain an abortion – including Coconino County, where Flagstaff is located – fell 31% compared to 2010, the last full calendar year in which PPAZ Flagstaff was open.

increases medical risk. Grossman Decl. ¶¶ 6-7.

The Arizona law imposes all the above burdens on women, without improving their health or safety in any way.

**STANDARD OF REVIEW**

When deciding whether to issue a stay pending appeal, this Court considers whether: (1) the applicant has made a strong showing of likely success on the merits; (2) the applicant will be irreparably injured absent a stay; (3) the stay could substantially injure the other parties interested in the proceeding; and (4) the public interest favors the stay. *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-850 (9th Cir. 2009) *vacated other grds. sub nom. Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204 (U.S. 2012); *Humane Soc'y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (citation omitted).

Plaintiffs readily meet this burden. They are likely to succeed in showing that the Arizona law is unconstitutional, including that it violates the clear precedent of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004) that an abortion restriction that purports to advance women's health: 1) must actually

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*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).

serve that interest, and 2) cannot erect a substantial obstacle in the path of women seeking abortion. Moreover, Plaintiffs have demonstrated that the women of Arizona will suffer irreparable harm each day the Arizona law is in effect, and Defendant has conceded that an injunction would not injure him or harm the public interest. Thus, the district court denied preliminary relief only after applying the wrong legal standards, and this Court should enjoin the Arizona law pending Plaintiffs' appeal.

## ARGUMENT

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

Plaintiffs have shown that they are likely to succeed on the merits of their claims that the Arizona law violates their patients' constitutional rights, as well as their own. 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 851; *Eden*, 379 F.3d at 539. 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 fails on both counts, and also violates the right to bodily integrity by forcing women to undergo unwanted and unnecessary surgery, Plaintiffs are likely to succeed on the merits of their patients' claims. Additionally, Plaintiffs themselves are

likely to succeed on the merits of their own claims that the Arizona law denies them equal protection of the laws.

### A. The Arizona Law Serves No Health Purpose.

The district court construed the Arizona law to be an FPL mandate rather than a complete ban on medication abortion. Plaintiffs disagree with this construction, which can only be reached by rewriting the plain text of the Arizona law. *See* Richardson Decl. ¶¶ 25-27. But regardless of whether the Arizona law is an FPL mandate or a ban, it serves no health purpose, and therefore violates Plaintiffs' patients' rights to abortion and bodily integrity.[2] "[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 (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).

To determine whether a restriction actually serves its purported health interest, courts review the medical evidence presented by the parties and their experts, and

[2] Moreover, as Plaintiffs demonstrated and Defendant did not contest, the real world result of the Arizona law will be a near complete ban on medication abortion, even if the law in theory allows medication abortion under the outdated FPL protocol.

evidence of the standard of care, as shown in physicians' practices and the statements of the nation's major medical organizations. *E.g., Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (finding regulations "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 anti-abortion regulation was "convincingly undercut[]" by "present medical knowledge," including that expressed in ACOG standards);[3] *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (state defending an abortion restriction justified on medical grounds must produce "evidence . . . that the medical grounds are legitimate"); *cf. McCormack v. Hiedeman*, 694 F.3d 1004, 1017 nn. 8, 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).

The district court ignored this clear precedent, instead focusing on the result in

[3] Although *Akron* and *Simopolous* were decided before *Casey*, they remain good law for the standard of review of abortion restrictions justified on the grounds of protecting women's health (as opposed to the state's interest in fetal life, which is not at issue here). *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").

*Gonzales v. Carhart*, 550 U.S. 124 (2007), and on the Fifth and Sixth Circuit decisions upholding medication abortion restrictions in whole or in part. Order at 4-8 (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*, No. 13-51008 (5th Cir. Mar. 27, 2014)). Yet, the decision in *Gonzales* was clearly based on the particular procedure at issue, and the Supreme 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 itself recognized, the Arizona legislature has asserted women's health, not potential life, as the concern underlying the Arizona law. Order at 3.

The district court reasoned that all Defendant needed do is *assert* that the Arizona law serves women's health for it to be constitutional. *Id*. 3-4 (finding that "the law reflects a legitimate purpose" because the legislature said so). But under this standard, *Casey*'s requirement that a law be "reasonably directed to" the asserted state interest, as well as this Court's instruction to "verify" if a law serves women's health, would be meaningless. *Gonzales*, moreover, 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.

The district court also relied on *Abbott* and *DeWine*, but neither court's analysis can be squared with the law of this Circuit, which requires that courts "[take] care to verify that the law could be reasonably understood to promote, in some legitimate fashion, the interest in maternal health," 379 F.3d at 540. The Sixth Circuit failed even to *consider* this question, and the Fifth Circuit expressly held that—contrary to the clear language of *Gonzales*—it is not a question that courts are even free to ask, *Abbott*, No. 13-51008, slip op. at 14-15 (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 clearly fails because, as the district court itself recognized, there is *no* evidence that it is reasonably directed at preserving maternal health and plentiful evidence that it in fact harms women. Order at 7. 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, for some women, it is the medically-indicated option to ensure their health or safety. *See* Order at 7, 11. 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. *Id*.

By preventing most or all women from having a medication abortion, the Arizona law harms their health by reducing their ability to access abortion, Grossman

Decl. ¶¶ 5-9, and forces any who do to use an outdated, less effective regimen that requires three times more mifepristone than necessary and that entails a greater risk of side effects and failure, *see supra* at Background § A, *see also* Order at 7, 11-13. The record is undisputed on all of these points.

Indeed, the Arizona law is not only "poorly drafted" but also "a pretext for anti-abortion regulation," *Eden*, 379 F.3d at 540. The findings purportedly supporting the law 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, *available at* http://www.aul.org/wpcontent/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).

Because the record clearly establishes the Arizona law does nothing to actually further women's health, Plaintiffs are substantially likely to succeed on their claim that it violates their patients' right to abortion. The lack of any valid rationale for the Arizona law also is the reason it fails the balancing test for laws infringing on bodily integrity, *see Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 279 (1990). A law that, for no reason, requires women to have surgery when they otherwise would

not, clearly fails this test. *See Rochin v. Cal.*, 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, 221-222, 227 (1990).

Finally, because the Arizona law does not serve any legitimate interest at all, it also fails any level of Equal Protection scrutiny. 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-based regimen. 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) & 20-2326(A)) (protecting access to off-label cancer treatments).

Rather than addressing the equal protection and bodily integrity problems with the Arizona law, the district court, relying only on *DeWine*, 696 F.3d 490, held that

those claims are "part and parcel" of the undue-burden framework. Order at 8. But the Sixth Circuit 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 an invasive 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.

Moreover, 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; *see also Stuart v. Loomis*, No. 1:11-CV-804, 2014, WL 186310 (M.D.N.C. Jan. 17, 2014) (applying First Amendment analysis separately from an undue burden analysis). And while this Court has not considered a bodily integrity claim, these claims cannot be reduced to the undue burden standard; they arise, not from a woman's right to reproductive autonomy, but from her basic right as a patient to avoid unwarranted bodily intrusions. It cannot be the law that women merit *less* protection from bodily intrusion when the medical care at issue is abortion.

### B. The Arizona Law Imposes a Substantial Obstacle

The Arizona law also violates Plaintiffs' patients' right to abortion because it has the "effect of imposing a substantial obstacle in the path of a woman seeking an abortion." *Eden*, 379 F.3d at 539 (quoting *Casey*, 505 U.S. at 877). In assessing whether an allegedly health-based restriction creates such an 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 or the supply of abortion providers and clinics," 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).

This court also held in *McCormack*, 694 F.3d at 1016-17, that the effect of a law must be considered within the context of pre-existing restrictions (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."). Additionally, as *Casey*'s use of the term

"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 Southeast, Inc. v. Strange*, No. 2:13-cv-405 (M.D. Ala. Mar. 31, 2014), *available at* http://docs.justia.com/cases/federal/districtcourts/alabama/almdce/2:2013cv00405/50843/146.[4]

Here, 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 49 days 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); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 78 (1978); *cf. Gonzales v. Carhart*, 550 U.S. 124, 135, 156 (2007) (federal ban on "partial-birth abortion" upheld because it would not "prohibit the vast majority of" "the usual abortion method" in the second trimester). This is all the more true where,

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[4] The Fifth and Sixth Circuits applied an extremely narrow "substantial obstacle" test in *Abbott* and *DeWine*, asking only whether women would be prevented entirely from having an abortion. But that is not the test applied by this Court. *See Eden*, at 379 F.3d 541-43 (considering burdens regardless of whether they were shown to prevent women from obtaining an abortion); *McCormack*, 694 F.3d at 1015-18 (same). Therefore, those courts' conclusions have no application in this Circuit. At any rate, Plaintiffs *have* put in evidence showing that the Arizona law will prevent women from obtaining an abortion altogether. *See supra* Background § B; *see also* Howard Rebuttal Decl.; Kress Decl.; Otterstein Decl. ¶¶ 4, 21.

as here, the method banned is so qualitatively different from the remaining alternative. *See* Otterstein Decl. ¶ 4-5; Richardson Decl. ¶¶ 12-15.

Moreover, even if the law allows medication abortions through 49 days lmp, it would impose needless financial, logistical, and health burdens that make the procedure difficult or impossible to obtain, and which will fall especially hard on young women, women who live in rural areas, low-income women, and victims of domestic violence. *See* Background § B; *see also* Order at 7, 13; Grossman Decl. ¶¶ 45, 56, 67; Howard Decl. ¶¶ 10, 18; Kress Decl. ¶¶ 2-6. For at least some of these women, these will mean that they will be unable to obtain an abortion at all. Otterstein Decl. ¶ 4 (some Arizona women have been compelled to carry an unwanted pregnancy to term when denied a non-surgical abortion option).

Furthermore, these effects will be magnified for Northern Arizona women. The law will probably force PPAZ Flagstaff to halt abortion services. Otterstein Decl. ¶¶ 17-20 (Flagstaff clinic could not continue to provide abortion services with severely reduced patient volume); Kress Decl ¶¶ 2-6. 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. Howard Decl. ¶ 18. 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. *Supra* Background § B; Otterstein Decl. ¶¶ 20-21; Howard Rebuttal Decl. ¶¶ 6-7.

The district court recognized these burdens, *see supra* Introduction, 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. 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 *Eden*'s and *McCormack*'s clear instruction that burdens be considered *in* the aggregate and in the context of other obstacles they 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 a 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. 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 v. Horne*, 716 F.3d 1213, 1227 (9th Cir. 2013) (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908,

922-3 (9th Cir. 2004)) (internal punctuation omitted); *see also Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511-12, 514 (6th Cir. 2006) (affirming in part preliminary injunction because the FPL mandate "could pose a significant health risk to women with particular medical conditions" including many of the same ones the record here addresses).

The district court denied even this relief, finding that Plaintiffs had failed to "explain[]" the health risk involved, Order at 12. But Plaintiffs in fact produced extensive, unrebutted evidence as to why some women need a medication abortion for health reasons. *See* Richardson Decl. ¶¶13-14; Grossman Decl. ¶¶ 20-21; Otterstein Decl. ¶¶ 5-6. The court also, incorrectly, concluded that Plaintiffs had failed to seek as-applied relief for women in these circumstances. 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." Compl., ECF No. 1, Mar. 4, 2014 at ¶ 95. Thus, the district court erred in denying Plaintiffs even this limited relief.

## II. Plaintiffs Have Made a Strong Showing of Irreparable Harm

The Arizona law's enforcement will cause irreparable harm to Plaintiffs and their patients every day it is in effect, as Defendant effectively conceded below by failing to argue otherwise, *see Martinez–Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th

Cir. 1996). The loss of constitutional rights is a *per se* irreparable harm. *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)); *accord Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). Patients have already had their appointments canceled this week, and patients will continue to be denied medication abortion unless this Court grants this motion. These patients' loss of opportunity to have a medication abortion – and, for some of them, notably at PPAZ's Flagstaff clinic, any abortion at all – is certainly irreparable. *See Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (affirming district court's finding of irreparable harm based on threat to women's constitutional right to abortion).

Plaintiffs' patients will also be irreparably harmed absent a stay because, in addition to depriving them of their constitutional rights, the Arizona law threatens their health. *See 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"). Finally, the Arizona law irreparably harms Plaintiffs 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.

## III. The Balance Of Equities And The Public Interest Favor Injunctive Relief

As Defendant also conceded below, both the balance of the equities and the public interest favor temporary relief. In contrast to the harm Plaintiffs have demonstrated, Defendant did not even argue below that he would suffer any harm from a temporary preservation of the status quo. *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 (punctuation 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, this Court should grant Plaintiffs' Motion for Emergency Injunction Pending Appeal.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit.

I further certify that I have sent the foregoing document by email to the following participants:

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