

1 **MARK BRNOVICH**  
2 **ATTORNEY GENERAL**  
(Firm State Bar No. 14000)

3  
4 Brunn (Beau) W. Roysden III (No. 28698)  
5 Michael S. Catlett (No. 25238)  
6 Kate B. Sawyer (No. 34264)  
7 Katlyn J. Divis (No. 35583)  
8 2005 N. Central Ave  
9 Phoenix, AZ 85004-1592  
10 Telephone: (602) 542-3333  
11 Michael.Catlett@azag.gov

12 *Attorneys for Defendant Mark Brnovich in*  
13 *his official capacity as Arizona Attorney*  
14 *General*

15 [Additional counsel and emails listed on  
16 signature page]

17 **UNITED STATES DISTRICT COURT**  
18 **DISTRICT OF ARIZONA**

19 Paul A. Isaacson, M.D., on behalf of  
20 himself and his patients, et al.,  
21 **Plaintiffs,**  
22 **v.**  
23 Mark Brnovich, Attorney General of  
24 Arizona, in his official capacity, et al.,  
25 **Defendants.**

Case No. 2:21-cv-01417-DLR

**STATE DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

**(ORAL ARGUMENT SCHEDULED  
FOR 9/22/21)**

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**INTRODUCTION**

In October 2017, Frank Stephens, who is a Special Olympian and advocate for individuals with disabilities and also has Down syndrome, told Congress that “I am a man with Down Syndrome and my life is worth living. Why do I feel the need to make that point? ... Because there are prenatal screens that will identify Down syndrome in the womb, and we can just terminate those pregnancies. ... I completely understand that the people pushing that particular ‘final solution’ are saying that people like me should not exist. They are saying that we have too little value to exist. That view is deeply prejudiced by an outdated idea of life with Down syndrome. Seriously, I have a great life. ... I don’t feel I should have to justify my existence.”<sup>1</sup> The State of Arizona agrees.

The State Defendants<sup>2</sup> respectfully request that the Court deny Plaintiffs’ motion to preliminarily enjoin a state law regulating discriminatory abortions. For over a decade, the Arizona Legislature has restricted discriminatory abortions based on an unborn child’s race or sex. *See* A.R.S. § 13-3603.02(A)(1). The rise in pre-natal genetic testing has, unfortunately, correlated to a rise in discriminatory abortions based on perceived genetic abnormality. For example, in the United States, between 61% and 91% of children diagnosed with Down syndrome are now aborted. The State unquestionably has a compelling interest in eliminating discriminatory abortions based on race or sex; the same is no less true with respect to discriminatory abortions based solely on genetic abnormality. Thus, during the 2021 legislative session, the Arizona Legislature added to the grounds for discriminatory abortion in A.R.S. § 13-3603.02 by including a new provision prohibiting a person from “knowingly” performing an abortion if that person knows “that the abortion is sought *solely* because of a genetic abnormality of the child.” S.B. 1457 § 2 (emphasis added) (together with §§ 10, 11, and 13, the “Non-Discrimination Provision”). In passing

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<sup>1</sup> Frank Stephens, Address before the U.S. House of Representatives Subcommittee on Labor, Health and Human Services, and Education (Oct. 25, 2017).

<sup>2</sup> Attorney General Mark Brnovich is designated as the single representative to coordinate arguments on behalf of all non-nominal Defendants, who are referenced in the below signature blocks. *See* Dkt. 36.

1 that legislation, the Legislature expressly found that the new provision “protects the  
2 integrity and ethics of the medical profession by preventing doctors from becoming witting  
3 participants in genetic-abnormality-selective abortions.” S.B. 1457 § 15.

4 The Arizona Legislature also added A.R.S. § 1-219 to further protect the rights of  
5 unborn children. Specifically, that provision now directs that “[t]he laws of this State shall  
6 be interpreted and construed to acknowledge, on behalf of an unborn child at every stage  
7 of development, all rights, privileges and immunities available to other persons, citizens  
8 and residents of this State, subject only to the Constitution of the United States and  
9 decisional interpretations thereof by the United States Supreme Court.” S.B. 1457 § 1 (the  
10 “Interpretation Policy”).

11 Plaintiffs ask the Court to preliminarily enjoin the Non-Discrimination Provision  
12 and the Interpretation Policy. In so doing, Plaintiffs repeatedly mischaracterize the nature  
13 of those provisions. For example, Plaintiffs consistently attempt to avoid acknowledging  
14 that the Non-Discrimination Provision applies only when a physician *knows* that an  
15 abortion is being sought *solely* because of a genetic abnormality. Whether a  
16 democratically-enacted law should be preliminarily enjoined does not turn on a plaintiff’s  
17 unilateral and self-interested interpretation of that law. Instead, state law should be  
18 presumed constitutional and only enjoined upon a clear showing that such relief is merited.  
19 Plaintiffs’ have not come close to making that showing here.

20 To begin, Plaintiffs argue that the Non-Discrimination Provision violates  
21 substantive due process because it is a ban on all pre-viability abortions. But that Provision  
22 is not aimed at stopping any pre-viability abortions; like the pre-existing restriction on race-  
23 and gender-based abortions, it is instead aimed at regulating the medical profession by  
24 preventing physicians from wittingly performing abortions solely for discriminatory  
25 reasons. Contrary to the Plaintiffs’ parade-of-horribles position, the Non-Discrimination  
26 Provision will have no application whatsoever in a myriad of situations where a woman  
27 seeks a pre-viability abortion. Even in those narrow circumstances where the Provision  
28 might apply, any woman seeking a pre-viability abortion is not banned from obtaining one.

1 Plaintiffs next assert that the Non-Discrimination Provision will somehow violate  
2 the unconstitutional conditions doctrine. That doctrine has no application here, where there  
3 is no governmental benefit being withheld from the Plaintiffs based on the Non-  
4 Discrimination Provision. Moreover, Plaintiffs lack standing to assert an unconstitutional  
5 conditions claim based on the First Amendment rights of hypothetical patients.

6 Finally, Plaintiffs facially challenge the Non-Discrimination Provision and the  
7 Interpretation Policy based on vagueness under the Due Process Clause. The Ninth Circuit  
8 has made clear, however, that a vagueness challenge under the Due Process Clause can  
9 only be asserted on an as-applied basis. Even overlooking that issue, Plaintiffs’ vagueness  
10 challenges would require the Court to speculate about all potential factual scenarios, to  
11 anticipate how the provisions at issue would be interpreted under state law, and then to  
12 apply the imagined interpretation to all of the imagined facts. Those claims, therefore, are  
13 not ripe. In any event, as described below, the Non-Discrimination Provision is not vague.

14 Plaintiffs also have not made any showing, let alone a strong showing, that the  
15 challenged Provisions will cause them irreparable harm or that the public interest supports  
16 issuance of a preliminary injunction. The Court should deny Plaintiffs’ Motion.

17 **BACKGROUND**

18 **A. Discrimination Against Individuals With Disabilities**

19 Sadly, discrimination against individuals with disabilities has been pervasive in our  
20 country’s history. By the 1920s, eugenics courses were taught at 376 universities and  
21 colleges. *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1785 (2019) (Thomas,  
22 J. concurring). Eugenics did not remain an academic concept reserved for debate in the  
23 classroom. In 1907, Indiana was the first state to enact a eugenic sterilization law, and by  
24 1931, 28 States had followed Indiana’s lead and adopted eugenic sterilization laws. *Id.* at  
25 1786. The legitimacy of these laws was even upheld by the Supreme Court in its infamous  
26 opinion in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead  
27 of waiting to execute degenerate offspring for crime, or to let them starve for their  
28 imbecility, society can prevent those who are manifestly unfit from continuing their kind

1 .... Three generations of imbeciles are enough.”). As a result, “more than 60,000 people  
2 ... were involuntarily sterilized between 1907 and 1983.” *Box*, 139 S. Ct. at 1786 (Thomas,  
3 J., concurring).

4 This discrimination permeated society, with many municipalities going as far as  
5 “prohibiting certain individuals with disabilities from marrying, from voting, from  
6 attending public schools, and even from appearing in public.” *Tennessee v. Lane*, 541 U.S.  
7 509, 534 (2004) (Souter, J. concurring). These types of practices prevented a child with  
8 cerebral palsy from attending public school “lest he ‘produc[e] a depressing and nauseating  
9 effect’ upon others.” *Id.* at 535 (Souter, J. concurring) (discussing the history of disability  
10 discrimination in America) (quoting *State ex rel. Beattie v. Bd. of Educ. of Antigo*, 169  
11 Wis. 231 (1919)).

12 The Americans with Disabilities Act—arguably the broadest law protecting people  
13 with disabilities—was not passed until 1990 in an attempt to combat this pervasive history  
14 of discrimination. And while individuals living with disabilities today find protection in  
15 the law, States have recently sought to extend this protection to unborn children.

16 With the growing availability of medical testing for unborn children, discriminatory  
17 abortions due to a diagnosed disability have become globally pervasive. For example,  
18 unborn children receiving a diagnosis of Down syndrome have been a target of  
19 discriminatory abortions. In Iceland, nearly 100% of children with Down syndrome are  
20 aborted. *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring). The rates of discriminatory  
21 Down-syndrome-selective abortions is similarly high in other European countries: “98%  
22 in Denmark, 90% in the United Kingdom, and 77% in France.” *Id.* at 1790–91. And  
23 unfortunately, the United States is not far behind with between 61% and 91% of mothers  
24 choosing to abort their unborn child if the child is diagnosed with Down syndrome. S.B.  
25 1457 § 15. It is precisely this type of discrimination against our most vulnerable members  
26 of society that is now resulting in laws regulating discriminatory abortions.

27 “The use of abortion to achieve eugenic goals is not merely hypothetical”; “a  
28 growing body of evidence suggests that eugenic goals are already being realized through

1 abortion.” *Box*, 139 S. Ct. at 1783, 1787 (Thomas, J., concurring). Laws prohibiting  
2 discriminatory abortions thus promote a state’s “compelling interest in preventing abortion  
3 from becoming a tool of modern-day eugenics.” *Id.* at 1783.

#### 4 **B. S.B. 1457**

5 On April 22, 2021, the Arizona Legislature passed S.B. 1457 (the “Act”) to further  
6 the State’s interests in protecting the disabled community from discrimination. *See* 2021  
7 Ariz. Legis. Serv. Ch. 286. The Act becomes effective on September 29, 2021. *See* Ariz.  
8 Const. art. 4 pt. 1, § 1(3); *see also* *General Effective Dates*, Ariz. State Legislature,  
9 <https://www.azleg.gov/general-effective-dates/> (last visited Sept. 9, 2021). Plaintiffs have  
10 not asked the court to enjoin the entire Act, but rather have asked the court to enjoin only  
11 certain provisions. In particular, Plaintiffs ask the court to enjoin §§ 2, 10, 11, and 13—  
12 collectively the “Non-Discrimination Provision.” Plaintiffs also ask the court to enjoin  
13 § 1—the “Interpretation Policy.”

#### 14 **1. The Non-Discrimination Provision**

15 In 2011, the Arizona Legislature enacted A.R.S. § 13-3603.02 in order to combat  
16 discriminatory abortions. *See* 2011 Ariz. Legis. Serv. Ch. 9. Since that time, § 13-3603.02  
17 has prohibited persons from “knowingly” “perform[ing] an abortion knowing that the  
18 abortion is sought based on the sex or race of the child or the race of a parent of that child.”  
19 *See* A.R.S. § 13-3603.02(A)(1). In its findings, the Legislature stated that “[t]he purpose  
20 of [the statute] is to protect unborn children from prenatal discrimination in the form of  
21 being subjected to abortion based on the child’s sex or race by prohibiting sex-selection or  
22 race-selection abortions.” 2011 Ariz. Legis. Serv. Ch. 9, § 3.

23 In 2021, the Arizona Legislature bolstered that protection by promulgating S.B.  
24 1457, which includes several provisions intended to “protect[] the disability community  
25 from discriminatory abortions, including for example Down-syndrome-selective  
26 abortions.” S.B. 1457 § 15. In particular, Section 2 of the Act adds to the pre-existing  
27 A.R.S. § 13-3603.02 by including a provision prohibiting a person from performing an  
28 abortion if that person knows “that the abortion is sought *solely* because of a genetic  
abnormality of the child.” (emphasis added). The Act defines “genetic abnormality” as

1 “the presence or presumed presence of an abnormal gene expression in an unborn child,  
2 including a chromosomal disorder or morphological malformation occurring as the result  
3 of abnormal gene expression.” A.R.S. § 13-3603.02(G)(2).<sup>3</sup> The Act, however, provides  
4 two exceptions to this provision. *First*, a “genetic abnormality” for purposes of this section  
5 does not include “a lethal fetal condition,” which is “a fetal condition that is diagnosed  
6 before birth and that will result, with reasonable certainty, in the death of the unborn child  
7 within three months after birth.” *Id.*; A.R.S. § 36-2158(G)(1). *Second*, the Act adds a  
8 “medical emergency” exception that allows a physician to use “good faith clinical  
9 judgment” to terminate a woman’s pregnancy “to avert her death” or to protect her from  
10 “substantial and irreversible impairment of a major bodily function,” even if the abortion  
11 would otherwise be prohibited under the statute. *See* A.R.S. § 13-3603.02(A), (G)(3); § 36-  
12 2151(9). A knowing violation of this provision is a class 6 felony. A.R.S. § 13-  
13 3603.02(A). The statute explicitly exempts “[a] woman on whom ... an abortion because  
14 of a child’s genetic abnormality is performed” from all criminal or civil liability for  
15 violations of this section. A.R.S. § 13-3603.02(F).<sup>4</sup>

16 The Act also amends several related statutes. Section 10 amends A.R.S. § 36-2157,  
17 which requires a person to complete an affidavit prior to performing an abortion. The  
18 amendment requires that the affidavit include a statement that the person is not “aborting  
19 the child ... because of a genetic abnormality,” and that the person “has no knowledge” that  
20 the child is being aborted “because of a genetic abnormality.” A.R.S. § 36-2157(A)(1).  
21 Section 11 amends A.R.S. § 36-2158 by adding additional information a person must share  
22 with a woman when obtaining her informed consent to perform an abortion. Specifically,  
23 the Act adds that a person must also inform a woman seeking an abortion “[t]hat section  
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25 <sup>3</sup> Unless otherwise indicated, citations to statutes amended by S.B. 1457 reference the  
26 amended versions of the statutes.

27 <sup>4</sup> Section 2 also amends A.R.S. § 13-3603.02 to prohibit a person from “knowingly” using  
28 or threatening force to coerce a woman to receive “an abortion because of a genetic  
abnormality of the child” and to prohibit a person from “knowingly” soliciting or accepting  
money to finance “an abortion because of a genetic abnormality of the child.” A knowing  
violation of these provisions is a class 3 felony.



1 13-3603.02 prohibits abortion because of the unborn child’s sex or race or because of a  
2 genetic abnormality of the child.” A.R.S. § 36-2158(d). Lastly, Section 13 amends the  
3 abortion reporting requirements of A.R.S. § 36-2161 to require a facility reporting the  
4 abortion to the Arizona Department of Health Services to also include “[w]hether any  
5 genetic abnormality of the unborn child was detected at or before the time of the abortion  
6 by [any form of] genetic testing.”

## 7 **2. The Interpretation Policy**

8 S.B. 1457, Section 1, also adds a new statute which establishes a general policy for  
9 the State that its laws be “interpreted and construed to acknowledge, on behalf of an unborn  
10 child at every stage of development, all rights, privileges and immunities available to other  
11 persons, citizens and residents of this state.” A.R.S. § 1-219(A). The statute provides that  
12 the policy “does not create a cause of action against” either (1) “a person who performs in  
13 vitro fertilization procedures as authorized” by state law, or (2) a woman who indirectly  
14 harms “her unborn child by failing to properly care for herself or by failing to follow any  
15 particular program of prenatal care.” A.R.S. § 1-219(B).

## 16 **3. The State’s Interests**

17 The Legislature made explicit findings in enacting S.B. 1457. Specifically, the  
18 Legislature found that “prohibiting persons from performing abortions knowing that the  
19 abortion is sought because of a genetic abnormality of the child advances at least three  
20 compelling state interests.” S.B. 1457 § 15. *First*, the Act “protects the disability  
21 community from discriminatory abortions, including for example Down-syndrome-  
22 selective abortions.” *Id.* *Second*, the Act protects Arizona citizens from coercive medical  
23 practices “that encourage selective abortions of persons with genetic abnormalities.” *Id.*  
24 *Finally*, the Act “protects the integrity and ethics of the medical profession by preventing  
25 doctors from becoming witting participants in genetic-abnormality-selective abortion.” *Id.*

## 26 **LEGAL STANDARD**

27 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear  
28 showing that the plaintiff is entitled to such relief,” and “never awarded as of right.” *Winter*  
*v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). Plaintiffs seeking a preliminary

1 injunction have the burden of proving: (1) that they are “likely to succeed on the merits;”  
2 (2) that they are “likely to suffer irreparable harm in the absence of preliminary relief;” (3)  
3 “that the balance of equities tips in [their] favor;” and (4) “that an injunction is in the public  
4 interest.” *Id.* at 20.

## 5 ARGUMENT

### 6 I. Plaintiffs Are Unlikely To Succeed On The Merits.

7 Plaintiffs have failed to meet the heavy burden of showing that there is a strong  
8 likelihood that they will succeed on the merits of any of their claims.

#### 9 A. The Non-Discrimination Provision Does Not Create An Unconstitutional 10 Ban On Pre-viability Abortions In Violation Of Substantive Due Process.

11 Contrary to Plaintiffs’ arguments (at 9–13), the Non-Discrimination Provision does  
12 not violate the Fourteenth Amendment. As an initial matter, the Non-Discrimination  
13 Provision does not violate any recognized constitutional right because there is no right to  
14 abort a child solely for discriminatory reasons. Plaintiffs ignore that *Planned Parenthood*  
15 *of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), “did not decide whether the  
16 Constitution requires States to allow eugenic abortions.” *Box*, 139 S. Ct. at 1792 (Thomas,  
17 J., concurring). Even *Roe v. Wade* acknowledged that a woman does *not* have a right to  
18 “to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason*  
19 *she alone chooses.*” 410 U.S. 113, 153 (1973) (emphasis added).<sup>5</sup>

20 But even so, the Non-Discrimination Provision, by its plain language, does not  
21 constitute a prohibition on pre-viability abortions. Even in those rare occasions when the  
22 Provision applies because a woman desires to obtain an abortion solely because of a genetic  
23 abnormality, the statute includes two broad exceptions. First, the Provision does not apply  
24 when a “medical emergency” exists, and an abortion is necessary “to avert [a woman’s]  
25 death” or to protect her from “substantial and irreversible impairment of a major bodily  
26 function.” A.R.S. § 13-3603.02(G)(3); § 36-2151. Second, the Provision also exempts

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28 <sup>5</sup> The U.S. Supreme Court has granted certiorari to consider “[w]hether all pre-viability  
prohibitions on elective abortions are unconstitutional.” *See Dobbs v. Jackson Women’s*  
*Health Org.*, No. 19-1392, 2021 WL 1951792 (May 17, 2021).

1 abortions performed after an unborn child is diagnosed with a “lethal fetal condition” “that  
2 will result, with reasonable certainty, in the death of the unborn child within three months  
3 after birth.” A.R.S. § 13-3603.02(G)(2)(b); § 36-2158.

4 Even without those exceptions, the Provision only prohibits an abortion when the  
5 person performing the abortion *knows* “that the abortion is sought *solely* because of a  
6 genetic abnormality of the child.” A.R.S. § 13-3603.02(A)(2) (emphasis added). A woman  
7 is still free to seek an abortion from any provider as long as that provider does not possess  
8 knowledge that the *sole* reason the woman seeks an abortion is because of the unborn  
9 child’s genetic abnormality. *See* A.R.S. § 13-3603.02(F). And nothing in the law compels  
10 a woman to disclose if that is the sole reason.<sup>6</sup> The Non-Discrimination Provision in no  
11 way amounts to a complete prohibition on a pre-viability abortion. *Accord Preterm-*  
12 *Cleveland v. McCloud*, 994 F.3d 512, 521 (6th Cir. 2021) (en banc) (“Even under the full  
13 force of [the challenged statute], a woman in Ohio who does not want a child with Down  
14 syndrome may lawfully obtain an abortion solely for that reason.”).

15 Plaintiffs argue (at 12) that the Non-Discrimination Provision will function as a ban  
16 because “it will be impossible for the abortion provider to avoid knowledge that a patient  
17 is seeking an abortion for the prohibited reason, regardless of whether the patient directly  
18 discloses that information.” This ignores reality.

19 There is a myriad of situations where the Non-Discrimination Provision will have  
20 no application whatsoever to a pre-viability abortion, including in the following situations:

- 21 • A pregnant woman decides not to undergo pre-viability genetic testing. Neither she  
22 nor her doctor will know whether any genetic abnormality exists and, therefore, will  
23 not be subject to the Non-Discrimination Provision.
- 24 • A pregnant woman undergoes a pre-viability genetic test but the test results show  
25 no genetic abnormality or are inconclusive. Tellingly, the Arizona Abortion Report  
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27 <sup>6</sup> Notably, the reporting requirements in A.R.S. § 36-2161 do not require that a woman  
28 express her reason for the abortion. The woman may choose several of the reasons listed,  
or may simply decline to give a reason. The amended statute also removes Trisomy 18,  
Trisomy 21, or Triploidy as reasons listed on the abortion reporting form.

1 compiled by the Arizona Department of Health for 2019 showed that out of  
2 approximately 13,000 abortions reported in Arizona that year, only 161 women  
3 “reported that their primary<sup>7</sup> reason for obtaining an abortion was due to fetal  
4 health/medical considerations.” *See* Ex. A, Decl. of Steven Robert Bailey ¶ 10. An  
5 additional 30 women who reported “other” as their primary reason, included  
6 “genetic risk/fetal abnormality” as a detailed reason. *Id.* The Non-Discrimination  
7 Provision will have no application to most abortions.

- 8 • A pregnant woman undergoes a pre-viability genetic test and the test results show a  
9 genetic abnormality but that has no bearing on her decision to obtain an abortion.  
10 The Non-Discrimination Provision will have no application.
- 11 • A pregnant woman undergoes a pre-viability genetic test and the test results show a  
12 genetic abnormality but that is only one of several reasons why the woman decides  
13 to obtain an abortion. The Non-Discrimination Provision will have no application.  
14 *See* Mot., Ex. 1, Decl. of Eric M. Reuss, M.D., M.P.H. ¶ 47 (“In my experience,  
15 patients seek abortion for a wide range of personal reasons, including familial,  
16 medical, and financial, and often do not specifically delineate each one.”); *see also*  
17 Mot., Ex. 3, Decl. of Paul A. Isaacson, M.D. ¶ 13.
- 18 • A pregnant woman undergoes a pre-viability genetic test and the test results show a  
19 genetic abnormality and that is the sole reason why the woman decides to obtain an  
20 abortion, but she does not share that with the physician actually performing her  
21 abortion. Even when a woman desires to obtain an abortion solely because of a  
22 genetic abnormality, this is the most likely situation because the State’s informed  
23 consent statute will require a physician performing an abortion to inform the patient  
24 that she cannot do so based on a genetic abnormality. A.R.S. § 36-2158(A)(2)(d).  
25 The Non-Discrimination Provision will have no application here. *See* Mot., Ex. 3,  
26 Decl. of Paul A. Isaacson, M.D. ¶ 13 (“But only the patient can ultimately know all  
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<sup>7</sup> “[S]ome women provided more than one primary reason for obtaining an abortion.” Ex. A, Decl. of Steven Robert Bailey ¶ 10.

1 of the reasons why they decided to have an abortion, or whether there was a ‘sole’  
2 reason as opposed to several concurrent reasons.”).

- 3 • A pregnant woman undergoes pre-viability testing that shows a morphological  
4 malformation that is not the result of an abnormal gene expression. The Non-  
5 Discrimination Provision will have no application.

6 It is only in those rare circumstances where a doctor knows—most likely because  
7 they are told—that the *sole* reason for an abortion is a genetic abnormality, and neither of  
8 the broad exceptions apply, that the Non-Discrimination Provision will be applicable *to the*  
9 *doctor* (again, the Provision never imposes civil or criminal liability on an expectant  
10 mother). Even then, a pregnant woman can still obtain an abortion from another doctor  
11 who lacks the knowledge of discrimination. The Non-Discrimination Provision is not a  
12 ban on pre-viability abortion and it does not violate substantive due process. *See Casey*,  
13 505 U.S. at 873 (“[N]ot every law which makes a right more difficult to exercise is, *ipso*  
14 *facto*, an infringement of that right.”).

15 Plaintiffs rely primarily on a single case, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir.  
16 2013) (“*Isaacson I*”), to erroneously assert (at 9) that the Non-Discrimination Provision is  
17 a ban. Based on that single case, Plaintiffs argue that the Ninth Circuit recognizes a ban  
18 on a women’s right to a pre-viability abortion when the challenged “law does not allow for  
19 abortions ‘in cases of fetal anomaly[.]’” But Plaintiffs’ reliance on *Isaacson I* is misplaced.  
20 *Isaacson I* concerned an Arizona law that expressly banned all abortions beginning at  
21 twenty weeks gestation. 716 F.3d at 1226 (“[T]he stated purpose of H.B.2036 is to  
22 ‘[p]rohibit’ a woman from electing abortion once the fetus reaches twenty weeks  
23 gestational age.”). The law’s *only* exception was for a medical emergency. The Ninth  
24 Circuit held that “while a health exception is necessary to save an *otherwise constitutional*  
25 post-viability abortion ban from challenge, it cannot save an *unconstitutional prohibition*  
26 on the exercise of a woman’s right to choose to terminate her pregnancy before viability.”  
27 *Id.* at 1228 (emphases added). The court reasoned that the medical emergency exception  
28 would not cover all women seeking pre-viability abortions—*e.g.*, it would not cover “cases

1 of fetal anomaly or pregnancy failure.” Therefore, because the law prohibited nearly all  
2 abortions prior to viability, the court held that a medical emergency exception was not  
3 enough to save it. The court acknowledged, however, that the Arizona Legislature  
4 remained free to “set[] standards for the manner and means through which abortions are to  
5 be provided.” *Id.* at 1229.

6 Contrary to Plaintiffs’ arguments, *Isaacson I* does not support that the Non-  
7 Discrimination Provision creates a ban on pre-viability abortions. Unlike in *Isaacson I*,  
8 not only does the Non-Discrimination Provision contain a broad exception for the life or  
9 health of the mother, it also allows any woman to obtain a pre-viability abortion solely  
10 because of a genetic abnormality where the fetus is reasonably certain not to survive for  
11 more than three months after birth (which obviously also applies in the case of a pregnancy  
12 failure). Thus, those exceptions the Ninth Circuit thought necessary in *Isaacson I* are  
13 present here. Even where those exceptions do not apply, the Non-Discrimination Provision  
14 is not an outright ban on any woman’s choice to have a pre-viability abortion; as explained  
15 above, there are numerous situations where the Provision does not apply at all. And in  
16 those rare situations where the Provision does apply, it merely regulates the medical  
17 profession by restricting a physician from *knowingly* performing discriminatory abortions  
18 solely based on genetic abnormality. The Provision does not “ban” pre-viability abortions  
19 any more than the State’s existing regulation of abortions based on race or sex. *See* A.R.S.  
20 § 13-3603.02(A)(1). The Non-Discrimination Provision, therefore, constitutes an  
21 incremental and permissible regulation on the manner in which the medical profession  
22 conducts pre-viability abortions. *See Casey*, 505 U.S. at 874 (“The fact that a law which  
23 serves a valid purpose, one not designed to strike at the right itself, has the incidental effect  
24 of making it more difficult or more expensive to procure an abortion cannot be enough to  
25 invalidate it.”) *see also Preterm-Cleveland*, 994 F.3d at 521.

26 Neither the amendments to the State’s abortion reporting requirements nor to the  
27 affidavit provision change this analysis. *See Mot.* at 12. Under A.R.S. § 36-2161(A)(25),  
28 a hospital’s report must now include “whether any genetic abnormality of the unborn child

1 was detected at or before the time of the abortion[.]” Plaintiffs feebly attempt to convince  
2 the Court that this mere reporting requirement somehow makes it impossible for a  
3 physician to perform a non-discriminatory pre-viability abortion. In reality, it has no  
4 impact whatsoever on any woman’s ability to obtain a pre-viability abortion. As explained  
5 above, any woman who merely obtains a pre-viability genetic test can still obtain an  
6 abortion, even where the sole reason for doing so is the existence of a genetic abnormality.  
7 That the hospital where an abortion is performed has to report whether genetic testing was  
8 performed has no impact on that analysis. This is particularly true because the reporting  
9 statute, A.R.S. § 36-2161, states that a woman may refuse to answer why she obtained an  
10 abortion, *see* A.R.S. § 36-2161(A)(12)(j), and it clearly provides that “[t]he report shall not  
11 identify the individual patient by name or include any other information or identifier that  
12 would make it possible to identify, in any manner or under any circumstances, a woman  
13 who has obtained or sought to obtain an abortion.” A.R.S. § 36-2161(A).

14 As to the affidavit requirement in A.R.S. § 36-2157, existing state law already  
15 requires a physician to state that the physician “is not aborting the child because of the  
16 child’s sex or race.” Adding “or because of a genetic abnormality of the child” does not  
17 suddenly create a ban on pre-viability abortions; it merely institutes the State’s incremental  
18 regulation of abortion by merely conditioning them on being, at least in part, non-  
19 discriminatory.

20 Plaintiffs argue only that the Non-Discrimination Provision is a complete ban in  
21 violation of substantive due process. *See* Mot. at 9–13. They purposefully fail to argue  
22 that the Non-Discrimination Provision does not serve a valid purpose or, if it is not a  
23 complete ban, that the Non-Discrimination Provision creates an undue burden in violation  
24 of *Casey* or *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).<sup>8</sup> As explained,  
25 Plaintiffs’ argument that the Non-Discrimination Provision is a complete ban on all pre-

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26 <sup>8</sup> Having failed to make those arguments, Plaintiffs have waived them (and should not be  
27 permitted to make them for the first time in reply). In any event, as explained herein, the  
28 Non-Discrimination Provision furthers government interests that are legitimate,  
substantial, and compelling, and it does not pose a substantial obstacle to abortion access  
for a large fraction of women seeking pre-viability abortions.

1 viability abortions is legally and factually incorrect. Thus, Plaintiffs are not entitled to  
2 injunctive relief.

3 **B. Plaintiffs Cannot Satisfy The Standard For An “Unconstitutional**  
4 **Condition,” and Plaintiffs Lack Standing to Assert Their Patients’ First**  
5 **Amendment Rights.**

6 The unconstitutional conditions doctrine has no application to abortion, which is not  
7 a governmental benefit but a medical procedure performed by a private physician (and  
8 therefore lacking state action). In any event, the right Plaintiffs’ attempt to assert is the  
9 alleged right for a woman to tell her abortion physician that she is obtaining an abortion  
10 solely because of a genetic abnormality. Plaintiffs lack standing to attempt to vindicate  
11 that alleged right.

12 Plaintiffs awkwardly argue (at 13–14) that the Non-Discrimination Provision  
13 creates an “unconstitutional condition.” They claim (at 14) that “a patient seeking an  
14 abortion because of a fetal diagnosis must *either* give up their right to communicate about  
15 that information with their medical providers *or* give up their right to an abortion.”  
16 (emphasis in original). But that allegation does not implicate the unconstitutional  
17 conditions doctrine. The unconstitutional conditions doctrine provides only that *the*  
18 *government* “may not deny a *benefit* to a person on a basis that infringes his constitutionally  
19 protected interests—especially, his interest in freedom of speech.” *Perry v. Sindermann*,  
20 408 U.S. 593, 597 (1972) (emphasis added). To invoke the doctrine, *the government* must  
21 be withholding a *benefit*, which is “[v]irtually” always “a gratuitous governmental benefit  
22 of some kind.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013).  
23 There is no benefit being withheld by the government here. Even in the narrow  
24 circumstances where the Non-Discrimination Provision applies, a private physician, and  
25 not the government, is forced to withhold an abortion, which is not a government benefit.  
26 Thus, the unconstitutional conditions doctrine is not even triggered, let alone satisfied.<sup>9</sup>

27 Plaintiffs also lack standing to assert the First Amendment rights of future patients.

28 <sup>9</sup> The only authority Plaintiffs cite for application of the unconstitutional conditions doctrine to abortion is a dissenting opinion, which does not even address the doctrine. *See* Mot. at 13 (citing only the dissenting opinion in *Preterm-Cleveland*).



1 Plaintiffs argue that the Non-Discrimination Provision violates the unconstitutional  
2 conditions doctrine because “a patient seeking an abortion because of a fetal diagnosis must  
3 *either* give up their right to communicate about that information with their medical  
4 providers *or* give up their right to an abortion.”<sup>10</sup> Mot. at 14 (underlined emphasis added).  
5 Thus, Plaintiffs, through the unconstitutional conditions doctrine, seek to assert the First  
6 Amendment rights of women seeking an abortion. But Plaintiffs do not have standing to  
7 bring that claim. While courts have recognized physician standing in certain  
8 circumstances to bring Fourteenth Amendment challenges on behalf of a woman seeking  
9 an abortion, *see Singleton v. Wulff*, 428 U.S. 106, 117 (1976), courts have not extended that  
10 principle to First Amendment free speech claims in this context, *see Foti v. City of Menlo*  
11 *Park*, 146 F.3d 629, 635 (9th Cir. 1998) (explaining that where a plaintiff argues that a law  
12 is facially invalid because it could never be applied in a valid manner because it  
13 impermissibly restricts a protected activity, “the litigant has standing to vindicate his own  
14 constitutional rights”). The injury Plaintiffs allege in their motion—the potential inability  
15 of a hypothetical future patient to speak freely with her physician—injures only that  
16 hypothetical future patient, and not Plaintiffs. Plaintiffs lack standing to assert an  
17 unconstitutional conditions claim premised on others’ First Amendment rights.

18 Finally, even if the unconstitutional conditions doctrine applies and Plaintiffs can  
19 assert their future patients’ First Amendment rights, they have not and cannot establish that  
20 the Non-Discrimination Provision, on its own or in conjunction with any other provision(s)  
21 in S.B. 1457, violates the unconstitutional conditions doctrine in all circumstances. As  
22 explained, the Provision has no application in a large number of situations even where  
23 genetic testing has revealed a genetic abnormality. A facial challenge under the First  
24 Amendment requires unconstitutionality in all situations; Plaintiffs cannot show  
25 unconstitutionality in even some situations. Plaintiffs are not entitled to an injunction  
26 based on a novel and incorrect challenge under the unconstitutional conditions doctrine.

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27 <sup>10</sup> Plaintiffs also argue (at 13) that even if the Non-Discrimination Provision “allowed  
28 some *patients* to access abortion by avoiding speech and other communication with their  
providers, it would still violate *those patients’* constitutional rights[.]” (emphasis added).

1           **C. Plaintiffs’ Vagueness Challenges Fail On Several Grounds.**

2                   **1. The Ninth Circuit Has Rejected The Existence Of A Facial**  
3                   **Vagueness Claim Under The Due Process Clause.**

4           Plaintiffs attempt to use a facial challenge for vagueness under the Due Process  
5           Clause to challenge the constitutionality of the Non-Discrimination Provision and the  
6           Interpretation Policy. “Where a law at issue ‘does not implicate First Amendment rights,  
7           it may be challenged for vagueness only as applied,’ unless the enactment is ‘impermissibly  
8           vague in all of its applications.’” *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d  
9           1486, 1493 (9th Cir. 1996) (internal citation omitted); *see also United States v. Doremus*,  
10           888 F.2d 630, 634 (9th Cir. 1989) (statute facially vague only if it specifies “no standard  
11           of conduct at all”); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th  
12           Cir. 1996) (“[B]ecause the Crime Control Act does not implicate First Amendment rights,  
13           it may be challenged for vagueness only as applied.”).

14           Plaintiffs do not attempt to show that either the Non-Discrimination Provision or  
15           the Interpretive Policy are vague in all of their applications. Neither could they if they  
16           tried. It is not difficult from the plain language of the Non-Discrimination Provision to  
17           easily glean an obvious circumstance when it would apply. For example, a patient  
18           approaches a physician and expressly says that she recently discovered that her unborn  
19           child has a third copy of chromosome 21, that she presumes the unborn child will therefore  
20           have Down syndrome, and that for that reason, and that reason alone, she desires to  
21           terminate the pregnancy. The Non-Discrimination Provision would clearly apply to  
22           prevent that *particular physician* from performing the desired abortion, and any ordinary  
23           physician reading the statute would know it.

24           As to the Interpretation Policy, Plaintiffs purport to describe myriad situations  
25           where they claim that Policy would clearly apply, even if not to them, including under  
26           A.R.S. § 13-3623 when one “causes a child ... to suffer physical injury[.]” Mot. at 18. If  
27           the Policy obviously applies, even if in situations not involving Plaintiffs, then their facial  
28           vagueness claim fails. Plaintiffs tacitly admit such situations exist, and have certainly not  
          established that there are absolutely no situations imaginable where the Interpretation

1 Policy clearly applies, and therefore their facial claim fails. *Easyriders Freedom*  
2 *F.I.G.H.T.*, 92 F.3d at 1494 (rejecting a facial vagueness challenge where “the statute does  
3 define generally what conduct is prohibited, and does establish guidelines”).

## 4 **2. The Plaintiffs’ Vagueness Challenges Are Not Ripe.**

5 Plaintiffs would otherwise have the Court decide their vagueness challenges on a  
6 pre-enforcement basis and in a vacuum. Plaintiffs seem to believe that if they can conjure  
7 enough hypothetical questions about when the Non-Discrimination Provision or the  
8 Interpretation Policy might apply, then they have shown unlawful vagueness. That  
9 approach gets the standard backward—a due process vagueness challenge fails if a statute  
10 is clear in even one application and does not succeed merely because its application is  
11 unclear in other situations. The approach also demonstrates that Plaintiffs’ vagueness  
12 challenges are not yet ripe.

13 As the Ninth Circuit has explained, “[i]nsofar as the complaint seeks an injunction  
14 against future enforcement of [a] law based on the possible vague application of the law to  
15 the individual plaintiffs, such a claim is not ripe for review.” *Id.* at 1495. Where a  
16 vagueness challenge requires a court to engage in speculation about future facts based on  
17 ambiguous information, the claim is not ripe under Article III. *Id.* (“Where there are  
18 insufficient facts to determine the vagueness of a law as applied, the issue is not ripe for  
19 adjudication.”); *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849  
20 (9th Cir. 2007) (“[A] party bringing a preenforcement challenge must nonetheless present  
21 a concrete factual situation to delineate the boundaries of what conduct the government  
22 may or may not regulate without running afoul of the Constitution.”) (internal punctuation  
23 omitted); *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1132 (rejecting a vagueness  
24 challenge because “a decision on the merits of plaintiffs’ constitutional claims would be  
25 devoid of any factual context whatsoever”). One primary reason for the reticence to engage  
26 in such factual speculation is that state courts, not federal courts, should have the first  
27 opportunity to construe and apply state law. *See Renne v. Geary*, 501 U.S. 312, 323 (1991)  
28 (postponing consideration “has the advantage of permitting the state courts further

1 opportunity to construe [the challenged law], and perhaps in the process to ‘materially alter  
2 the question to be decided’’).

3 Here, Plaintiffs’ vagueness challenges, even as applied to just them, would require  
4 the Court to speculate about unending future factual scenarios. Plaintiffs’ hypothetical  
5 questions about the potential application of the Non-Discrimination Provision and the  
6 Interpretation Policy demonstrate this reality. Answering those hypotheticals would  
7 require the Court to speculate about all potential factual scenarios, to anticipate how the  
8 provisions at issue would be interpreted under state law, and then to apply the imagined  
9 interpretation to all of the imagined facts. Federal courts are not designed to operate in this  
10 fashion. Instead, Arizona state courts should first be permitted to apply the Non-  
11 Discrimination Provision or the Interpretation Policy in concrete factual situations. Facing  
12 a concrete factual context, Plaintiffs could then assert a due process challenge if S.B. 1457  
13 did not put them on adequate notice that the law would be enforced in the particular manner  
14 at issue. *See San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1133. Until then, the Court  
15 should stay its hand.

16 The U.S. Supreme Court took that very approach to a pre-enforcement challenge to  
17 a Missouri statute that is materially similar to the Interpretation Policy. In *Webster v.*  
18 *Reproductive Health Services*, the Court considered a challenge to the preamble to a  
19 Missouri abortion law which, similar to the Interpretation Policy, mandated that Missouri  
20 law be interpreted to provide unborn children with “all the rights, privileges, and  
21 immunities available to other persons, citizens, and residents of this state,” subject to the  
22 U.S. Constitution and the decisions of the Court. 492 U.S. 490, 504 (1989). Those  
23 challenging the preamble argued that “the preamble’s definition of life may prevent  
24 physicians ... from dispensing certain forms of contraceptives, such as the intrauterine  
25 device.” *Id.* at 505–06. The Court refused to consider the constitutional challenge: “We  
26 think the extent to which the preamble’s language might be used to interpret other state  
27 statutes or regulations is something that only the courts of Missouri can definitively  
28 decide.” *Id.* at 506. The issue was not justiciable because the Court was “[I]acking any

1 authoritative construction of the statute by the state courts ... and with a record which  
2 presents no concrete set of facts to which the statute is to be applied.” *Id.* Under *Webster*,  
3 which remains binding precedent, the Court should refuse to address Plaintiffs’  
4 constitutional vagueness challenge to the Interpretation Policy. Similarly, the principles  
5 reflected in *Webster* should compel the Court to reject Plaintiffs’ vagueness challenge to  
6 the remainder of S.B. 1457. Under no circumstances should the Court issue injunctive  
7 relief based on those challenges.

### 8                   3.     **The Non-Discrimination Provision is Not Vague**

9           The Non-Discrimination Provision regulates physicians by prohibiting them from  
10 “knowingly” performing an abortion that is being obtained “solely because of” a genetic  
11 abnormality. Despite the clarity of that language, Plaintiffs complain that “it is not clear  
12 which previability abortion care is prohibited under the [Provision] and how physicians are  
13 to draw the requisite lines for their conduct.” Mot. at 18. Inclusion of the terms  
14 “knowingly” and “solely” renders the Non-Discrimination Provision more than sufficiently  
15 clear. As the Supreme Court recently explained, the term “solely” in conjunction with the  
16 term “because of” indicates “that actions taken ‘because of’ the confluence of multiple  
17 factors do not violate the law.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).  
18 Thus, the Non-Discrimination Provision applies only where the sole factor for an abortion  
19 is a genetic abnormality.<sup>11</sup>

20           Moreover, that the Non-Discrimination Provision includes a “knowing” scienter  
21 requirement vitiates Plaintiffs’ vagueness argument. *Gonzales v. Carhart*, 550 U.S. 120,  
22 149 (2007) (explaining that “scienter requirements alleviate vagueness concerns”).  
23 “Knowing” is a well-defined term in Arizona law, meaning “that a person is aware or  
24 believes that the person’s conduct is of that nature or that the circumstance exists.” A.R.S.

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25  
26 <sup>11</sup> That other portions of the Act use the term “because of” without “solely” does not render  
27 the Non-Discrimination Provision vague. There are many federal and Arizona statutes that  
28 use the term “because of,” including several groundbreaking anti-discrimination laws like  
Title VII. Moreover, the provision that Plaintiffs identify that uses “because of” to restrict  
soliciting or funding a race- or sex-based abortion has already been on the books for years.  
*See* A.R.S. § 13-3603.02(b)(2). Plaintiffs do not point to a single instance of arbitrary  
enforcement of that provision.

1 § 13-105(10)(b). And, contrary to Plaintiffs’ argument, it cannot possibly be that statutes  
2 are rendered unconstitutionally vague when scienter can be proven through circumstantial  
3 evidence. Thus, for the Non-Discrimination Provision to apply, a physician must be  
4 “aware” that the abortion is being sought solely because of a genetic abnormality, and not  
5 because of any other factor.

6 Finally, Plaintiffs argue that the definition of “genetic abnormality” is vague. S.B.  
7 1457 defines that term, with one exception, as “the presence or presumed presence of an  
8 abnormal gene expression in an unborn child, including a chromosomal disorder or  
9 morphological malformation occurring as the result of abnormal gene expression.” A.R.S.  
10 § 13-3603.02(G)(2)(a). There is nothing vague about that provision. The normal human  
11 genome is well known by now. If genetic test results show a gene expression different  
12 from the normal genome, or if one presumes the presence of one or more abnormal genes  
13 based on those results, then there exists a “genetic abnormality.” Plaintiffs also claim that  
14 the exception for a “lethal fetal condition” is vague. But the definition for that term is  
15 located in A.R.S. § 26-2158, the general informed consent statute for abortion, and has  
16 been in effect since 2012. During that time, Plaintiffs do not identify a single instance  
17 where that definition has been applied in an arbitrary manner.

## 18 **II. Plaintiffs Have Not Demonstrated That Irreparable Harm Is Likely.**

19 To obtain a preliminary injunction, a plaintiff must prove “that irreparable injury is  
20 *likely* in the absence of an injunction” as opposed to merely speculative. *See Winter*, 555  
21 U.S. at 22–23. “Issuing a preliminary injunction based only on a possibility of irreparable  
22 harm is inconsistent with [the Court’s] characterization of injunctive relief as an  
23 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is  
24 entitled to such relief.” *Id.* at 22.

25 Plaintiffs’ assertion (at 22) that the Non-Discrimination Provision and Interpretation  
26 Policy “expose Plaintiffs to uncertain legal obligations and arbitrary prosecution as soon  
27 as the law goes into effect” is too speculative to warrant the extraordinary relief they  
28 request. The future potential for uncertain legal obligations depending on whether or how

1 a state court chooses to interpret its laws is precisely the type of potential future injury that  
2 is too speculative to warrant injunctive relief.

3 Additionally, Plaintiffs' assertion (at 21) that women will be harmed if the law goes  
4 into effect, is unsupported and also speculative. Plaintiffs have failed to identify any such  
5 women, let alone quantify how many will seek an abortion solely for the prohibited  
6 discriminatory reason. In all of 2019, only approximately 30 women identified "genetic  
7 risk/fetal abnormality" as *one* of the reasons for obtaining an abortion. *See supra* at 9–10.  
8 With the lack of evidence provided, Plaintiffs fail to show that either provision poses any  
9 risk to their patients, let alone that the risk is likely. Even if the Court denies Plaintiffs'  
10 motion, individual women who believe that any of the challenged provisions in S.B. 1457  
11 pose an unconstitutional impediment to an abortion may still seek injunctive relief on an  
12 as-applied basis. Plaintiffs' complained of injuries are too speculative to warrant the  
13 extraordinary relief of preliminarily enjoining all applications of the challenged provisions.

### 14 **III. The Balance Of Equities And The Public Interest Favor The State Defendants.**

15 When the government is a party to the litigation, the balance of the equities and the  
16 public interest factors merge. *Roman v. Wolf*, 977 F.3d 935, 940–41 (9th Cir. 2020).  
17 Legislation "is in itself a declaration of public interest." *Virginian Ry. Co. v. Sys. Fed'n*  
18 *No. 40*, 300 U.S. 515, 552 (1937). And Arizona has a public interest in enforcing its duly  
19 enacted laws. "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable  
20 harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

21 More specifically, the Arizona Legislature enacted the Non-Discrimination  
22 Provision based on detailed findings. The Legislature sought to protect the "disability  
23 community from discriminatory abortions," including Down-syndrome-selective  
24 abortions, and "send an unambiguous message that children with genetic abnormalities,  
25 whether born or unborn, are equal in dignity and value to their peers without genetic  
26 abnormalities, born or unborn." S.B. 1457 § 15. For example, the Legislature recognized  
27 the pervasion of Down-syndrome-selective abortions, noting that between 61% and 91%  
28 of women in the United States choose to abort their child if Down syndrome is detected in

1 prenatal testing. *Id.*; *see also* *Box*, 139 S. Ct. at 1790–91 (Thomas, J. concurring). The  
2 State has a long-recognized interest in preventing discrimination. *See, e.g., N.Y. State Club*  
3 *Ass’n, Inc. v. City of New York*, 487 U.S. 1, 14 n.5 (1988). Discrimination based on  
4 disability should not be more accepted in the abortion context.

5 Not only does the Act protect the disability community from discriminatory  
6 abortions, but it also “protects against coercive health care practices that encourage  
7 selective abortions of persons with genetic abnormalities.” S.B. 1457 § 15. The  
8 Legislature recognized the recent Sixth Circuit finding “that empirical reports from parents  
9 of children with Down syndrome attest that their doctors explicitly encourage abortion or  
10 emphasized the challenges of raising children with Down syndrome.” *Id.*; *see also* *Preterm-*  
11 *Cleveland*, 994 F.3d at 518.

12 Similarly, by protecting patients from coercive health care practices, the Act also  
13 “protects the integrity and ethics of the medical profession by preventing doctors from  
14 becoming witting participants in genetic-abnormality-selective abortions.” S.B. 1457 § 15.  
15 This is key, as “an industry that is associated with the view that some lives or potential  
16 lives are worth more than others is less likely to earn or retain the public’s trust.” *Id.* When  
17 abortion providers actively participate in aborting a child solely because of the child’s  
18 genetic abnormality, the physician directly contributes to “negative and inaccurate  
19 stereotypes” and “societal indifference” toward individuals with disabilities. *See*  
20 *Washington v. Glucksberg*, 521 U.S. 702, 732 (1997). By prohibiting this conduct, the Act  
21 directly furthers the State’s interest in protecting the integrity of the medical profession and  
22 affirms the inherent dignity and worth of every individual.

23 “[A] court sitting in equity cannot ‘ignore the judgment of [the legislature],  
24 deliberately expressed in legislation.’” *United States v. Oakland Cannabis Buyers’ Co-*  
25 *op.*, 532 U.S. 483, 497 (2001). The public interest does not support injunctive relief.

## 26 CONCLUSION

27 The State Defendants respectfully request that the Court deny Plaintiffs’ Motion for  
28 Preliminary Injunction.



1  
2 RESPECTFULLY SUBMITTED this 9th day of September, 2021.

3 **MARK BRNOVICH**  
4 **ATTORNEY GENERAL**

5 By /s/ Michael S. Catlett  
6 Brunn W. Roysden III (No. 28698)  
7 Michael S. Catlett (No. 25238)  
8 Kate B. Sawyer (No. 34264)  
9 Katlyn Divis (No. 35583)  
10 Office of the Arizona Attorney General  
11 2005 N. Central Ave.  
12 Phoenix, Arizona 85004  
13 Telephone: (602) 542-3333  
14 Fax: (602) 542-8308  
15 Beau.Roysden@azag.gov  
16 Michael.Catlett@azag.gov  
17 Kate.Sawyer@azag.gov  
18 Katlyn.Divis@azag.gov

19 *Attorneys for Defendant Mark Brnovich in his*  
20 *official capacity as Arizona Attorney General*

21 **MARK BRNOVICH**  
22 **ATTORNEY GENERAL**

23 Kevin Ray (No. 007485)  
24 Aubrey Joy Corcoran (No. 025423)  
25 Office of the Arizona Attorney General  
26 15 S. 15th Ave  
27 Phoenix, AZ 85007  
28 Telephone: (602) 542-8328  
Fax: (602) 364-0700  
Kevin.Ray@azag.gov  
AubreyJoy.Corcoran@azag.gov

*Attorneys for Defendants Arizona Department of*  
*Health Services and the Director of the Arizona*  
*Department of Health Services in their official*  
*capacity*

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**MARK BRNOVICH  
ATTORNEY GENERAL**

Mary D. Williams (No. 013201)  
Office of the Arizona Attorney General  
15 S. 15th Ave  
Phoenix, AZ 85007  
Telephone: (602) 542-7992  
Fax: (602) 364-3202  
MaryD.Williams@azag.gov

*Attorney for Defendants Arizona Medical Board,  
Patricia McSorley, in her official capacity as  
Executive Director of the Arizona Medical Board;  
R. Screven Farmer, M.D.; James M. Gillard, M.D.;  
Jodi A. Bain, M.A., J.D.; Bruce Bethancourt, M.D.;  
Eileen M. Oswald, M.P.H.; Laura Dorrell, M.S.N.,  
R.N.; Pamela E. Jones; and Lois Krahn, M.D., in  
their official capacities as members of the Arizona  
Medical Board*

**BERGIN, FRAKES, SMALLEY &  
OBERHOLTZER, PLLC**

Brian McCormack Bergin (No. 016375)  
4343 E. Camelback Road, Suite 210  
Phoenix, AZ 85018  
Telephone: (602) 888-7858  
Fax: (602) 888-7856  
bbergin@bfsolaw.com

*Attorneys for Defendants Gary R. Figge, M.D. and  
David Beyer, M.D., in their official capacities as  
members of the Arizona Medical Board*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of September, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ Michael S. Catlett