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22 PAGE

23 **IN THE UNITED STATES DISTRICT COURT**
24 **FOR THE DISTRICT OF ARIZONA**

25 Paul A. Isaacson, M.D., on behalf of
26 himself and his patients, et al.,

27 Plaintiffs,

28 v.

Mark Brnovich, Attorney General of
Arizona, in his official capacity; et al.,

Defendants.

Case No. 2:21-CV-1417-DLR

**PLAINTIFFS' EMERGENCY MOTION
FOR AN INJUNCTION OF
INTERPRETATION POLICY
PENDING APPEAL AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

**[EXPEDITED CONSIDERATION
REQUESTED]**

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1 Pursuant to Federal Rule of Civil Procedure 62(c)–(d) and Federal Rule of Appellate
2 Procedure 8(a)(1), Plaintiffs respectfully move for a limited emergency injunction of the
3 “Interpretation Policy,” A.R.S. § 1-219, incorporating A.R.S. § 36-2151(16), pending
4 appeal of the Court’s Order, entered on September 28, 2021. Preliminary Injunction Order,
5 ECF No. 52 (“PI Order”).

7 **I. INTRODUCTION**

8 The Supreme Court upended nearly 50 years of settled abortion jurisprudence in its
9 June 24 decision in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392
10 (“*JWHO*”). The dismantling of the long-held federal constitutional right to abortion has
11 unleashed chaos in Arizona, raising questions about whether the Interpretation Policy can
12 now be used in conjunction with other laws to prosecute abortion providers and their
13 patients even though dozens of Arizona laws expressly permit and regulate abortion care.
14 *See, e.g.*, Meg O’Connor, *Without Roe, Prosecutors Will Be the Abortion Police*, The
15 Appeal (June 1, 2022), <https://tinyurl.com/3dbakb4e> (Maricopa County Attorney Rachel
16 Mitchell “did not respond when asked if she would use the fetal personhood law to
17 prosecute people who provide or obtain abortions.”).

18 Indeed, in September 2021, the Court asked Defendants whether the Interpretation
19 Policy could be used to subject an abortion provider to criminal prosecution under several
20 Arizona statutory provisions. Defendants represented to the Court that “Supreme Court
21 precedent as it currently exists,” Oral Argument Transcript at 84–85, ECF No. 61 (“Oral
22 Arg. Tr.”), is the only thing preventing the Interpretation Policy from being used to
23 criminalize or otherwise penalize abortion in any of those contexts.
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1 Now that this limitation has been rendered meaningless by *JWHO*, it is entirely
2 unclear whether the Interpretation Policy’s requirement that all Arizona statutes be
3 “interpreted and construed” to “acknowledge” the rights of fertilized eggs, embryos, and
4 fetuses at any stage of development, A.R.S. § 1-219(A), can be used to criminalize abortion
5 care under several Arizona statutes. *See, e.g.*, A.R.S. §§ 13-1204 (aggravated assault), 13-
6 1203 (assault), 13-1201 (reckless endangerment), 13-3612(1) & 13-1613 (contributing to
7 delinquency of a child), 13-3619 (child endangerment), and 13-3623 (child abuse).
8 Exacerbating this lack of clarity is the host of Arizona laws heavily regulating how to
9 lawfully provide abortion care.
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11 Given the uncertainty and the threat of severe criminal, civil, and professional
12 penalties, Plaintiffs Dr. Reuss and Dr. Isaacson have accordingly stopped providing
13 abortion care in Arizona because they are afraid the Interpretation Policy will be used to
14 prosecute them and potentially their patients for the provision or receipt of *any* abortion
15 care. And, Drs. Isaacson and Reuss are not alone—eight out of nine licensed abortion
16 providers suspended abortion services as of yesterday. *See* Taylor Seely & Stephanie Innes,
17 *Fearing Criminal Charges, Clinics Across Arizona Have Stopped Providing Abortions*,
18 Ariz. Republic (June 24, 2022), <https://tinyurl.com/bdh9yap9>. These reactions threaten the
19 well-being of people throughout Arizona. Any delay in access to abortion care presents
20 real and serious threats to patients’ health and, because abortion care is time-sensitive,
21 jeopardizes their ability to access abortion care altogether.
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23 This Court invited Plaintiffs to seek relief “if a particular application of the
24 Interpretation Policy restricts Plaintiffs’ activities ‘in some concrete way.’” PI Order at 8.
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1 That concrete harm now unquestionably exists in the context of abortion care, and Plaintiffs
2 seek limited emergency relief from the Interpretation Policy so that abortion care can be
3 provided while their appeal of this Court’s PI Order is pending before the Ninth Circuit.¹
4

5 An injunction pending appeal is warranted here. First, there is a likelihood of
6 success on the merits. Ample evidence shows that the Interpretation Policy should be struck
7 down as unconstitutionally vague as applied to abortion. While the Interpretation Policy
8 mandates that hundreds of civil and criminal provisions be “interpreted and construed” to
9 “acknowledge” the rights of fertilized eggs, embryos, and fetuses at any stage of
10 development, A.R.S. § 1-219(A), it provides no guidance on what that means in the
11 abortion context (or, indeed, in any context). Nor does it provide any standards to guide
12 law enforcement officials or other state actors in applying any newly-created criminal
13 penalty, civil liability, or heightened legal duty in the abortion context . Put simply, the
14 vagueness doctrine prohibits the State from forcing Plaintiffs, their members, and their
15 patients to guess whether or not the Interpretation Policy can be used to criminalize the
16 receipt and provision of abortion care. Yet that is exactly what the State is doing.
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20 Next, Plaintiffs are already being harmed by the concrete and significant threat that
21 the Interpretation Policy could now be construed to impose criminal, civil, and disciplinary
22 sanctions for the provision or receipt of abortion care. Due to this uncertainty, Plaintiffs
23 Dr. Isaacson and Dr. Reuss have no choice but to cease providing abortion care
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26 ¹ Plaintiffs cross-appealed the Court’s denial of preliminary injunctive relief, ECF No. 65.
27 Until yesterday, oral argument had been scheduled for July 27, 2022, however, in light of
28 *JWHO*, the Ninth Circuit requested supplemental briefing and took the appeal off the
calendar. Order, *Isaacson v. Brnovich*, Nos. 16645, 16711 (9th Cir. June 24, 2022), Dkt.
No. 84.

1 immediately, to the detriment of their patients.

2 The stakes have clearly changed. And this “particular application of the
3 Interpretation Policy” was not presented to the Court through Plaintiffs’ original facial
4 vagueness claim for injunctive relief, which this Court held was not ripe. PI Order at 8.
5 This as-applied vagueness claim is ripe for this Court’s review, likely to succeed on the
6 merits, and seeks limited emergency injunctive relief pending Plaintiffs’ appeal so that
7 abortion care can be provided without the threat of prosecution—an interest that far
8 outweighs the State’s in not enforcing a law while the courts assess its constitutionality.
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11 **II. FACTUAL BACKGROUND**

12 **A. The Interpretation Policy.**

13 The Interpretation Policy establishes a new statutory construction requirement that
14 applies to the entire Arizona Revised Statutes. This application creates vast uncertainty for
15 Plaintiffs, their members, and their patients in Arizona about whether they could be subject
16 to criminal, civil, and other penalties for providing or receiving abortion care that would
17 otherwise be legal under Arizona law. The Interpretation Policy provides:
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19 The laws of this State shall be interpreted and construed to acknowledge, on
20 behalf of an unborn child at every stage of development, all rights, privileges
21 and immunities available to other persons, citizens and residents of this state,
22 subject only to the Constitution of the United States and decisional
23 interpretations thereof by the United States Supreme Court.

24 A.R.S. § 1-219. The Interpretation Policy incorporates the statutory definition of “unborn
25 child” set forth in A.R.S. § 36-2151(16), which provides that an “unborn child” is “the
26 offspring of human beings from conception until birth,” where conception is statutorily
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1 defined as “the fusion of a human spermatozoon with a human ovum.”² Accordingly, under
2 the Interpretation Policy, each time “person,” “child,” or similar words appear in the
3 Arizona Revised Statutes, they must be read to “acknowledge” comparable rights for
4 fetuses, embryos, and fertilized eggs at any stage of development.³

6 **B. The *JWHO* Decision Changes How Plaintiffs Provide Care.**

7 The Supreme Court’s decision in *JWHO* stripped the right to abortion from the U.S.
8 Constitution. *JWHO*, No. 19-1392, slip op. at 1 (U.S. June 24, 2022). This created an
9 immediate, real, and present threat that the Interpretation Policy could be construed to
10 impose criminal and civil liability on those who provide and receive abortion care in
11 Arizona. Because of this threat, Plaintiffs Dr. Reuss and Dr. Isaacson have stopped
12 providing all abortion care in Arizona as of June 24, 2022. Exhibit A, Declaration of Eric
13 M. Reuss, M.D., M.P.H. (“Reuss Decl.”) ¶¶ 13, 15; Exhibit B, Declaration of Paul A.
14 Isaacson, M.D. (“Isaacson Decl.”) ¶¶ 12–13, 15–16. The majority of other providers have
15 done the same. *See Seely & Innes, supra* at 2. Dr. Isaacson’s and Dr. Reuss’s decision to
16 stop providing care stems directly from their inability to ascertain how the Interpretation
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21 ² Pregnancy does not begin until a fertilized egg implants in the uterus, “occurring about
22 six days after fertilization.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 563 (1989)
23 (Stevens, J., concurring in part and dissenting in part). The statutory definition of “unborn
24 child,” therefore, applies before pregnancy and incorporates fertilized eggs that have not
25 implanted in the uterus.

26
27 ³ The Interpretation Policy contains two exceptions. It “does not create a cause of action
28 against” (1) a “person who performs in vitro fertilization procedures as authorized” under
Arizona law; or (2) a “woman for indirectly harming her unborn child by failing to properly
care for herself or by failing to follow any particular program of prenatal care.” A.R.S. § 1-
219(B). Plaintiffs’ challenge also extends to this portion of the law. But it is not directly
implicated by this emergency request for relief relating to abortion care. Plaintiffs maintain
their arguments in their original preliminary injunction motion and their appeal.

1 Policy applies in the abortion context and their fears that a wrong guess could result in
2 criminal penalties for them, their staff, and potentially their patients. Isaacson Decl. ¶¶ 10,
3 12–15; Reuss Decl. ¶¶ 11–13, 15. The harm resulting to Dr. Reuss and Dr. Isaacson’s
4 patients cannot be understated; abortion is a time-sensitive medical procedure and many
5 patients will undoubtedly suffer as a result of even a temporary cessation of abortion care.
6 For example, even if the Interpretation Policy is enjoined in a few weeks or months, and
7 abortions resume, patients may be at greater risk of medical complications or may lose
8 access to abortion altogether as a result of the delay. Reuss Decl. ¶ 15. The fact that eight
9 out of the nine licensed providers in the state have ceased offering care only inflames these
10 harms. *See* Seely & Innes, *supra* at 2.

13 **III. ARGUMENT**

14 In deciding whether to grant an injunction pending appeal, “the court considers
15 (1) whether the [injunction] applicant has made a strong showing that he is likely to
16 succeed on the merits; (2) whether the applicant will be irreparably injured absent a[n
17 injunction]; (3) whether issuance of the [injunction] will substantially injure the other
18 parties interested in the proceeding; and (4) where the public interest lies.” *Humane Soc’y*
19 *of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (internal quotations and citation
20 omitted) (evaluating motion for injunction pending appeal under same standard as motion
21 for stay pending appeal). When there are “serious questions going to the merits” along
22 with “a balance of hardships that tips sharply towards the plaintiff,” the issuance of an
23 injunction can be warranted, “so long as the plaintiff also shows that there is a likelihood
24 of irreparable injury and that the injunction is in the public interest.” *All. for the Wild*
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1 *Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, Plaintiffs meet all four
2 requirements and the balance of hardships tips strongly in their favor.

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4 **C. Plaintiffs’ Vagueness Challenge As Applied to Abortion Care Raises Serious
Questions of Law on Which Plaintiffs Are Likely to Prevail.**

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6 **1. Plaintiffs’ Vagueness Claim as Applied to Abortion Care Is Ripe.**

7 In denying Plaintiffs’ request for preliminary injunctive relief, this Court found
8 Plaintiffs’ pre-enforcement facial vagueness challenge unlikely to be ripe under the Court’s
9 reading of *Webster*. PI Order at 8. However, the Court made clear that “federal courts stand
10 ready to address any constitutional challenges as to [a] specific application,” “if a particular
11 application of the Interpretation Policy restricts Plaintiffs’ activities ‘in some concrete
12 way.’” *Id.* In light of the Supreme Court’s decision in *JWHO*, Plaintiffs’ vagueness
13 challenge to the Interpretation Policy as applied specifically to abortion care is now ripe
14 under any reading of *Webster*.

15
16 Within this context, the Interpretation Policy’s failure to delineate what it means to
17 “acknowledge” the rights of a fertilized egg, embryo, or fetus, and the attendant risk of
18 arbitrary enforcement of the Interpretation Policy, is now forcing providers in Arizona to
19 cease providing all abortion care immediately, notwithstanding that this care is and has
20 been permitted under Arizona law, because the uncertain yet more concrete risk of
21 prosecution under the Interpretation Policy is simply too great. This risk is not an “abstract
22 proposition.” *See* PI Order at 8. As Defendants stated to this Court, they “believe” that the
23 only thing preventing the Interpretation Policy from being used to prosecute abortion is
24 “Supreme Court precedent as it currently exists.” Oral Arg. Tr. at 84–85. That precedent
25 has been overruled. *JWHO*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (“We hold that
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1 *Roe* and *Casey* must be overruled.”).

2 In the absence of a federal right to abortion, the Interpretation Policy’s
3 “acknowledgment” mandate—as applied to abortion—poses an immediate threat to
4 Plaintiffs, their members, and their patients. Just as the Supreme Court in *Webster* stated
5 that a federal court could address the Missouri preamble “should it be applied to restrict
6 the activities” of the plaintiffs “in some concrete way,” 492 U.S. at 506, this Court should
7 act to prevent the ongoing harms the Interpretation Policy poses to abortion care in Arizona.
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10 **2. Plaintiffs’ Vagueness Claim as Applied to Abortion Care Is Likely to Succeed.**

11 The void-for-vagueness doctrine guarantees that ordinary people have “fair notice”
12 of the conduct a statute prescribes. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018)
13 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)). Additionally,
14 “the doctrine guards against arbitrary or discriminatory law enforcement by insisting that
15 a statute provide standards to govern the actions of police officers, prosecutors, juries, and
16 judges.” *Id.* A law may be void for vagueness under either theory: lack of notice or lack of
17 standards. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). In the context
18 of abortion care, the Interpretation Policy fails on both counts.
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21 **a. The Most Stringent Standard of Review Is Warranted.**

22 As a threshold matter, the vagueness test is not applied mechanically. The “degree
23 of vagueness that the Constitution tolerates . . . depends in part on the nature of the
24 enactment.” *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997)
25 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498
26 (1982)). And in making this assessment, laws subject to vagueness challenges must be
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1 considered in their context, and within the overall statutory scheme. *See, e.g., In re Consol.*
2 *Freightways Corp. of Del.*, 564 F.3d 1161, 1165 (9th Cir. 2009); *Manning v. Caldwell for*
3 *City of Roanoke*, 930 F.3d 264, 273 (4th Cir. 2019). The Supreme Court has held that both
4 civil and criminal statutes directing the way other laws are to be interpreted can be struck
5 down on vagueness grounds. *Johnson v. United States*, 576 U.S. 591, 600 (2015); *Dimaya*,
6 138 S. Ct. at 1223.

7
8 Here, where criminal penalties are at stake, a stringent standard of review is
9 appropriate. *See Hoffman Ests.*, 455 U.S. at 499 (finding a “relatively strict” test is required
10 where “criminal penalties are at stake”); *McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th
11 Cir. 2015) (“If a statute subjects violators to criminal penalties,” the due process need for
12 definite standards “is even more exacting.”). Defendants concede that the Interpretation
13 Policy may be used to interpret “criminal provisions” within the Arizona Revised Statutes,
14 Oral Arg. Tr. 83:13–24, and has never claimed that the Interpretation Policy is precatory.
15 Yet it is entirely unclear how the Interpretation Policy may be used to interpret Arizona’s
16 criminal laws in the abortion context without the backstop of *Roe*.
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20 Additionally, stringent vagueness review is not limited to criminal statutes; it also
21 applies to “quasi-criminal” laws, *Hoffman Ests.*, 455 U.S. at 499. Even if the Interpretation
22 Policy is not itself a penal statute, it is at minimum quasi-criminal in nature. *See id.* at 499–
23 500 & n.16 (classifying local ordinance intended to discourage use of drug paraphernalia
24 as “quasi-criminal”). Indeed, if Plaintiffs, their members, or their patients fail to predict
25 how prosecutors may apply the Interpretation Policy to interpret “criminal provisions” in
26 the abortion context, the consequences include prison sentences and loss of professional
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1 licensure. *See id.* at 498–99 (noting that less stringent vagueness review applies to
2 economic regulations and civil enactments where “the consequences of imprecision are
3 qualitatively less severe”). Thus, the most stringent vagueness review is warranted here.
4

5 **b. The Interpretation Policy as Applied to Abortion Fails to Provide Fair**
6 **Notice.**

7 The Interpretation Policy fails to give constitutionally adequate notice of which
8 actions are permitted in the abortion context and which are not. To survive a vagueness
9 challenge, a law must provide a “person of ordinary intelligence a reasonable opportunity
10 to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*,
11 408 U.S. 104, 108 (1972). Under any standard of review, the Interpretation Policy fails.
12

13 First, the Interpretation Policy does not provide any guidance as to what it means to
14 “acknowledge” the equal rights of a fertilized egg, embryo, or fetus in the abortion context.
15 *Cf. Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1019–20 (9th Cir. 2013) (holding phrase
16 “in violation of a criminal offense . . . unintelligible and therefore . . . void for vagueness”
17 because the common usage of the term “offense” means an action and “one cannot violate,
18 or be in violation of, an action”); *Forbes v. Napolitano*, 236 F.3d 1009, 1012 (9th Cir.
19 2000) (finding terms such as “investigation” and “routine” examination, which were
20 undefined and had no independent medical meaning, to be inherently ambiguous in the
21 abortion context); *In re Adoption of B.B.*, 2017 UT 59, ¶ 50, 417 P.3d 1, 19 (“We conclude
22 that the plain meaning of the terms [‘acknowledge’ and ‘establish’] is so broad that it offers
23 little guidance . . .”). It is unclear whether “acknowledging” that a fetus and a pregnant
24 person have equal rights means that a person who has decided to terminate a pregnancy
25 may still do so, or whether a physician may still provide that person an abortion. The
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1 Interpretation Policy is also devoid of any instructions for what it requires should the rights
2 of an “unborn child” and a pregnant person conflict.

3
4 There are numerous other laws that could be interpreted to criminalize abortion care
5 under the Interpretation Policy’s “acknowledgment” mandate, including A.R.S. §§ 13-
6 1204 (aggravated assault), 13-1203 (assault), 13-1201 (reckless endangerment),
7 13-3612(1) & 13-1613 (contributing to delinquency of a child), 13-3619 (child
8 endangerment), and 13-3623 (child abuse). In these statutes, and potentially many others,
9 it is entirely unclear whether the Interpretation Policy’s mandate that they be “interpreted
10 and construed” to “acknowledge” that a fertilized egg, embryo, or fetus has the same rights
11 as a “person” or “child” criminalizes the provision or receipt of abortion care.
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14 To illustrate, a person commits aggravated assault when “[i]ntentionally, knowingly
15 or recklessly causing any physical injury to another person,” A.R.S. § 13-1203(1), if “the
16 person is eighteen years of age or older and commits the assault on a minor under fifteen
17 years of age,” *id.* § 13-1204(A)(6). Arizona has represented to the Court that the
18 Interpretation Policy “is triggered” in this instance, Oral Arg. Tr. at 83, and because the
19 term “person” is used, a prosecutor has several choices: they may now construe the
20 Interpretation Policy to render abortion an aggravated assault, require some other action by
21 the physician and patient not already required by Arizona law in order for the abortion to
22 be lawful, or do nothing at all. Plaintiffs cannot know which option the prosecutor will
23 select. This is the very definition of an unconstitutionally vague law.⁴
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28 ⁴ Further adding to the confusion, Arizona’s homicide statutes include exceptions for
abortion care and other medical treatment, *see* A.R.S. §§ 13-1102–05. While the homicide

1 Next, it is entirely unclear how Plaintiffs are to reconcile the Interpretation Policy
2 with Arizona’s existing law permitting abortion up until viability, A.R.S. § 36-2301.01,⁵
3 or the host of Arizona laws that recognize and regulate the provision of legal abortion. *See*,
4 *e.g.*, A.R.S. §§ 36-2155, 36-2153(E), 32-2531(B), 36-449.03(C)(3)(a)–(b) & Ariz. Admin.
5 Code §§ R9-10-1501(1), R9-10-1507(B)(2)–(3) (licensing and credentialing requirements
6 for abortion providers); A.R.S. §§ 36-449.02, 36-449.03 & Ariz. Admin. Code §§ R9-10-
7 1513, R9-10-1515 (abortion clinic licensure requirements); A.R.S. §§ 36-2153 & 36-2156
8 (abortion informed consent requirements); A.R.S. §§ 36-449.03(I), 36-2161–62 & Ariz.
9 Admin. Code § R9-10-1505(A) (abortion statistical and demographic data reporting
10 requirements); A.R.S. § 13-3603.01 (second trimester abortion method restriction); A.R.S.
11 § 13-3603.02(A) (ban on abortion for reasons of race or sex); A.R.S. § 36-2152 (consent
12 requirements for minors); A.R.S. § 36-3604 (restrictions on telemedicine for abortion
13 care). Because of the confusion and risk of liability unleashed by the Interpretation Policy,
14 abortion providers do not know if they will be protected from criminal, civil, or
15 professional liability if they conform their conduct to these laws.⁶

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21 statutes’ exceptions suggest a legislative intent to permit abortion, the aforementioned
22 statutes do not contain similar carve-outs.

23 ⁵ Even S.B. 1164—signed into law earlier this spring, but not expected to take effect until
24 early fall—will not prohibit all abortion care as the Interpretation Policy threatens to do.
25 Rather, S.B. 1164 *permits* abortion care up to 15 weeks from a pregnant person’s last
26 menstrual period, and even after that point in cases of medical emergency. S.B. 1164, 55th
27 Leg., 2d Reg. Sess. (Ariz. 2022).

28 ⁶ Just as the Interpretation Policy could outlaw all abortion in Arizona, it could just as easily
have no substantive effect. Indeed, such a reading could “harmonize[]” the Interpretation
Policy with Arizona’s existing extensive regulatory scheme governing abortion care by

1 “It is a basic principle of due process that an enactment is void for vagueness if its
2 prohibitions are not clearly defined.” *Grayned*, 408 U.S. at 108. As evidenced by the
3 significant confusion and uncertainty detailed above, the Interpretation Policy, by its terms,
4 provides no insight into how Plaintiffs must conform their behavior in the abortion context
5 to “acknowledge” that fertilized eggs, fetuses, and embryos have “equal rights” to people.
6 For this reason alone, it is unconstitutionally vague.
7

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9 **c. The Interpretation Policy Invites Arbitrary and Discriminatory
10 Enforcement in the Abortion Context.**

11 The Interpretation Policy not only fails to give constitutionally adequate notice of
12 how abortion care can be penalized, it also invites arbitrary and discriminatory enforcement
13 of criminal, civil, and professional penalties. The vagueness doctrine “guards against
14 arbitrary or discriminatory law enforcement by insisting that a statute provide standards to
15 govern the actions of police, prosecutors, juries, and judges.” *Dimaya*, 138 S. Ct. at 1212.
16 Although the vagueness doctrine “focuses both on actual notice to citizens and arbitrary
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20 “giv[ing] effect to both.” See *Kenai Peninsula Borough v. Alaska*, 612 F.2d 1210, 1214
21 (9th Cir. 1980), *aff’d sub nom. Watt v. Alaska*, 451 U.S. 259 (1981). It would also prevent
22 conflict with the rest of the omnibus bill in which it was passed, which clearly contemplated
23 continued legal abortion care. See S.B. 1457 §7(F) (creating rules for disposal of fetal tissue
24 after abortion care) and § 2 (prohibiting abortion based on a patient’s reason for seeking
25 care). See *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir.
26 2002) (“It is a well-established principle of statutory construction that ‘legislative
27 enactments should not be construed to render their provisions mere surplusage.’” (citation
28 omitted)). Regardless, providers, like Drs. Isaacson and Reuss, need not risk their liberty
and professional licenses to discover which reading of the Interpretation Policy prevails. A
plaintiff “does not have to await the consummation of threatened injury to obtain
preventive relief. If the injury is certainly impending, that is enough.” *Babbitt v. United
Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (citation omitted). Nor must a
plaintiff violate an allegedly unconstitutional law to challenge its constitutionality. See,
e.g., MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007).

1 enforcement,” the Supreme Court has explained that “the more important aspect of
2 vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to
3 govern law enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Where the
4 “legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a
5 standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal
6 predilections.’” *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). That is
7 precisely what the Interpretation Policy does here.
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10 The Interpretation Policy provides no standards to guide the discretion of local
11 prosecutors, police officers, and other state enforcement officials in determining what the
12 law means and how it is to be applied. By its own terms, the Interpretation Policy’s sole
13 function is to create an “interpretive rule” that applies across the entire Arizona Revised
14 Statutes, but it lacks any explicit standards or “generally applicable test” that would clarify
15 its application in the abortion context. *Johnson*, 576 U.S. at 600. And, because of the
16 Supreme Court’s decision in *JWHO* overturning *Roe* and *Casey*, there are no longer
17 “decisional interpretations . . . by the United States Supreme Court,” A.R.S. § 1-219, that
18 could protect Drs. Isaacson and Reuss in the event a prosecutor decides to utilize the
19 Interpretation Policy to criminalize their provision of abortion care.⁷
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22 Without sufficient standards in the law to guide them, the Interpretation Policy
23 ultimately leaves enforcement to the unlimited discretion of individual police officers,
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26 ⁷ Drs. Isaacson and Reuss have similar fears in the event state licensing officials, such as
27 members of Defendant Arizona Medical Board, decide that the provision of abortion care
28 warrants disciplinary action under the Interpretation Policy. Isaacson Decl. ¶¶ 13, 15;
Reuss Decl. ¶ 11.

1 prosecutors, or licensing officials, who may differ significantly in their interpretation of
2 the law and how it is to be applied to abortion. Indeed, given that there are 15 County
3 Attorneys in Arizona, whether and how the Interpretation Policy applies to abortion care
4 could well be determined by a provider's or patient's zip code. Laws like the Interpretation
5 Policy that leave "statutory gaps so large" that "police officers, prosecutors, and judges are
6 essentially defining crimes and fixing penalties" are unconstitutionally vague. *Knox v.*
7 *Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018) (internal quotations and citations omitted).
8 Legislators "may not 'abdicate their responsibilities for setting the standards of the criminal
9 law'" in this way. *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (quoting *Smith*,
10 415 U.S. at 575); *see also id.* at 1228 (legislative power emphatically does not belong with
11 courts, police, and prosecutors). Where, as here, the statute does not provide sufficient
12 standards to govern its enforcement, it is void for vagueness.
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16 **D. Plaintiffs Continue to Suffer Irreparable Harm Absent Injunctive Relief.**

17 The Interpretation Policy's vagueness violates the due process rights of Plaintiffs,
18 their members, and their patients by creating uncertain legal obligations and threatening
19 them with arbitrary prosecutions in the abortion context. This continuing constitutional
20 violation alone constitutes irreparable harm sufficient to justify injunctive relief. *Planned*
21 *Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) ("[T]he deprivation
22 of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting
23 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012))); *see also Valle del Sol*, 732 F.3d
24 at 1029 (credible threat of prosecution under statute challenged as void for vagueness
25 established likelihood of irreparable harm).
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1 As applied to abortion, the Interpretation Policy’s harms are especially acute.⁸ Given
2 the Interpretation Policy’s vagueness, Drs. Isaacson and Reuss credibly fear prosecution
3 and therefore have ceased providing any abortion care in Arizona. Isaacson Decl. ¶¶ 12–
4 13, 15–16; Reuss Decl. ¶¶ 13, 15. Without injunctive relief, the Interpretation Policy will
5 at minimum delay—but more likely deprive—Arizonans of access to abortion care. And,
6 because abortion care is time-sensitive medical care that “simply cannot be postponed,”
7 *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), the presumption of irreparable harm applies
8 with particular force here, *see Humble*, 753 F.3d at 911. *See also, e.g., Harris v. Bd. of*
9 *Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (establishing likelihood of irreparable harm
10 upon showing that plaintiffs would experience pain, complications, and other adverse
11 effects from delayed medical treatment).

12 **E. Balance of Equities Strongly Tips in Plaintiffs’ Favor.**

13 While Plaintiffs, their members, and their patients stand to suffer real and
14 irreparable harm if the Interpretation Policy is not enjoined as applied to abortion care,
15 Defendants only stand to lose their ability to enforce the Interpretation Policy until such
16 time as the courts assess the constitutionality of that enforcement. *See Latta v. Otter*, 771
17 F.3d 496, 500 n.1 (9th Cir. 2014) (“No opinion for the Court adopts [the] view” that “a
18 state suffers irreparable injury when one of its laws is enjoined.”). And to the extent the
19 Interpretation Policy is merely precatory—a fact that was central to the Supreme Court’s
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26 ⁸ While Plaintiffs at this time seek emergency relief from the Interpretation Policy because
27 of the immediate harms it poses to abortion care specifically, all other harms previously
28 identified by Plaintiffs remain ongoing. *See Compl.*, ECF No. 1; *Mot. for Prelim. Inj.*, ECF
No. 10.

1 decision in *Webster* but contrary to the facts here—a preliminary injunction causes the
2 State even less harm, as the law need not be “effectuat[ed]” to serve its purpose. *Cf. New*
3 *Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977).

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5 Further, a grant of the limited relief requested here would merely preserve the status
6 quo for the state of abortion care pending Plaintiffs’ cross-appeal. *See Nat. Res. Def.*
7 *Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (modification of
8 order appropriate pending appeal in order to preserve the status quo); *see also Marlyn*
9 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)
10 (the status quo is “the last, uncontested status which preceded the pending controversy”).

11
12 Finally, granting injunctive relief “is always in the public interest,” where—as
13 here—it “prevent[s] the violation of a party’s constitutional rights.” *See Melendres*, 695
14 F.3d at 1002. The balance of hardships thus tips sharply toward Plaintiffs.

15 16 **IV. CONCLUSION**

17 Plaintiffs respectfully request that the Court issue an injunction of the Interpretation
18 Policy as applied to abortion care pending resolution of Plaintiffs’ cross-appeal before the
19 Ninth Circuit. In the alternative, Plaintiffs request that the Court issue an even more limited
20 injunction of the Interpretation Policy as applied to abortion to allow Plaintiffs to seek relief
21 from the Ninth Circuit under Federal Rule of Appellate Procedure 8(a)(2). Finally, in view
22 of the significant, ongoing harms currently inflicted on Plaintiffs, their members, and their
23 patients, Plaintiffs further request that the Court expedite the briefing schedule for this
24 motion, *see* LRCiv 7.2, and expedite the decision on Plaintiffs’ request.
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1 Dated: June 25, 2022

2 By: /s/ Jessica Sklarsky

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2022, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing. All counsel of record are registrants and are therefore served via this filing and transmittal.

/s/ Jessica Sklarsky