ARIZONA COURT OF APPEALS

DIVISION ONE

PAUL A. ISAACSON, M.D., on behalf of himself, his staff, and his patients; WILLIAM RICHARDSON, M.D., on behalf of himself, his staff, and his patients, and the ARIZONA MEDICAL ASSOCIATION, on behalf of itself, its members, and its members' patients, Plaintiffs/Appellees, v. STATE OF ARIZONA, a body politic, Defendant/Appellee, WARREN PETERSEN, President of the Arizona Senate; and STEVE MONTENEGRO, Speaker of the Arizona House of Representatives, Intervenor-Defendants/Appellants	No. 1 CA-CV 26-0240 Maricopa County Superior Court No. CV2025-017995

BRIEF OF AMICUS CURIAE ARIZONA RIGHT TO LIFE IN SUPPORT OF INTERVENOR-DEFENDANTS/APPELLANTS FILED WITH THE WRITTEN CONSENT OF ALL PARTIES

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INTEREST OF AMICUS CURIAE

Arizona Right to Life is an organization dedicated to protecting and defending the lives of all persons, born and pre-born. AZRTL advances this mission through public education, community engagement, and advocacy for life-affirming legislation. The organization works with legislators, medical professionals, legal experts, and advocates across Arizona to promote policies that recognize the dignity and value of every human life. Arizona Right to Life also works to ensure that Arizona's laws provide meaningful protections for pre-born children and support women and families facing difficult circumstances.

No one other than *amicus curiae* authored any portion of this brief, nor financed its preparation. Counsel for all parties provided written consent via e-mail to AZRTL's submission of this brief.

INTRODUCTION

In 2024, Arizona voters created a new "fundamental right to abortion," which is guaranteed to "every individual." Ariz. Const. art. II, § 8.1. Before fetal viability,[1] the State may not "deny, restrict, or interfere" with "that right" unless a law addresses

[1] The amendment separately protects "an abortion" after fetal viability when, in the good faith judgment of a treating health care professional, it is necessary to protect the pregnant individual's life or physical or mental health. Ariz. Const. art. II, § 8.1(A)(2). This appeal concerns the challenged laws' effects on the right to abortion previability. Op. at 2, 28–29.

a compelling state interest by the least restrictive means. *Id.* § 8.1(A)-(B). By defining "compelling state interest" extremely narrowly to require a limited patient-health purpose and preservation of autonomous decision making, Arizona now imposes a novel and demanding legal standard—a sort of "super-strict scrutiny"—to the abortion right alone, raising it above speech, above suffrage, and above any other fundamental right guaranteed in the Arizona Constitution.

Under Section 8.1(A)(1), constitutional review of the operation of abortion-related laws before fetal viability occurs in two steps. *Cf. Ctr. for Ariz. Pol'y, Inc. v. Ariz. Sec'y of State*, 592 P.3d 75, ¶ 106 (Ariz. 2026). *First*, a court must find that the challenged law "denies, restricts, or interferes" with the protected right to abortion. *Second*, and only after that first step is completed,[2] a court must determine if the law advances a compelling state interest (as narrowly defined in Section 8.1) by the least restrictive means. Ariz. Const. art. II, § 8.1(A)(1), (B)(1). Especially because very few statutes may survive this new abortion-only "super-strict scrutiny," a court errs if it omits the first analytical step. That error requires reversal where it is dispositive of the determination of the legality of a challenged provision.

[2] A measure outside Section 8.1's narrow scope is not subject to its special scrutiny. Absent another basis for heightened review, any measure that does not deny, restrict, or interfere with the right to abortion need only be "reasonably related to furthering a legitimate state purpose." *Cf. Coleman v. City of Mesa*, 230 Ariz. 352, 363 ¶ 43 (2012); *Gallardo v. State*, 236 Ariz. 84, 87–89 ¶¶ 9, 17 (2014).

In *Isaacson v. State*, the trial court reviewed a host of abortion-related legal measures under this new constitutional standard. Op. at 2, 4–5. Unfortunately, the court began with a constitutionally overbroad and unfounded premise: "virtually every regulation of abortion 'interferes' with a woman's right to seek an abortion." Op. at 5. That sweeping premise, unsupported by any record evidence, cannot substitute for a determination that each challenged requirement impairs the protected right. In effect, it collapses the threshold inquiry of the applicability of Section 8.1 into the justification inquiry, indiscriminately applying "super-strict scrutiny." The trial court made findings about cost, delay, and access, but those findings do not themselves establish that every distinct testing, disclosure, or anti-coercion requirement "denies, restricts, or interferes with" the right to abortion. The trial court needed to establish that threshold for each provision before it went on to subject it to "super-strict scrutiny."

The court further erred by misunderstanding the autonomy the constitution protects and thus failing to distinguish *safeguards* of an individual's autonomy from *intrusions* upon it. Time for deliberation, accurate information, privacy, and support can strengthen autonomous decision making, whether or not a patient herself would request them, and particularly whether or not she ultimately chooses abortion. *Cf.* Ethics Comm. of the Am. Soc'y for Reprod. Med., *Informed Consent in Assisted Reproduction*, 119 Fertility & Sterility 948, 949–50 (2023); Am. Coll. of

Obstetricians & Gynecologists Comm. on Ethics, *Informed Consent and Shared Decision Making in Obstetrics and Gynecology: ACOG Committee Opinion No. 819*, 137 Obstet. & Gynecol. e34, e34–35, e38 (2021). But the trial court ignored that well-established empirical fact in favor of a blanket belief (without record evidence or published reasoning) that *any* measure that is mandatory, delays an abortion for any amount of time, or raises its cost automatically reduces autonomy. Even setting aside the trial court's factual error, it committed reversible legal error by refusing to do the hard but constitutionally required work of evaluating the real-world effect of each challenged measure on a patient's autonomous decision making.

ARGUMENT

I. The trial court failed to apply the unique text of Arizona's Section 8.1.

Arizona was not alone in constitutionalizing abortion as a fundamental right in 2024. Four other States did so with immediate effect, and a fifth passed subject to voter reapproval in the next election. *See* Nev. Sec'y of State, *Statewide Ballot Questions 2024*, at 50 (2024) (requiring reapproval in 2026). Every ballot proposal framed the abortion right differently. Deep-blue States tried to "shoot the moon": Maryland's language encompassed any measure that even *indirectly* denies, burdens, or abridges a right to abortion, and Colorado's extends to any denial, impediment, or discrimination against "exercise" of the abortion right. Md. Decl. of Rights art. 48; Colo. Const. art. II, § 32. Missouri's explicitly applied to measures that "delay[]"

the right. Mo. Const. art. I, § 36.3. Montana and Nevada broadly barred any measure "burdening" the new right. Mont. Const. art. II, § 36; Proposed Nev. Const. art. I, § 25, *reprinted in* Nev. Sec'y of State, *Statewide Ballot Questions 2024*, at 51 (2024).

Arizona in 2024 was a purple state, voting for Donald Trump for President but a Democrat for Senate, with a split congressional delegation. *See* Clerk of the U.S. House of Reps., *Statistics of the Presidential and Congressional Election of November 5, 2024*, at 4-5 (2025). Its own abortion amendment reflected that political moderation, creating a "fundamental right to abortion" formulated more narrowly than that proposed in States where abortion advocates had a stronger hand, and protecting "that right" against only laws that "deny, restrict, or interfere" with it. Ariz. Const. art. II, § 8.1(A)(1).

A. Ignoring the text of Section 8.1, the trial court failed to establish that the challenged provisions are subject to "super-strict scrutiny."

The trial court purported to apply "the plain language of Arizona's Constitutional Amendment," Op. at 4, but began by declaring without any textual anchor that "virtually every regulation of abortion 'interferes' with a woman's right to seek an abortion." *Id.* at 5. The court offered no reasoning to support that sweeping equivalence. No evidence. No data. It simply intuited *every* challenged law should be subject to the wood-chipper of Section 8.1's special heightened scrutiny. But the constitutional text disallows this collapse: Section 8.1 separates the threshold question of whether a law falls within its ambit from the follow-on question of

justification, and it applies each question to *each* measure under review. Subjecting every challenged measure to heightened scrutiny merely because it regulates abortion bypasses the first inquiry. The omission matters wherever the trial court invalidated a distinct provision without explaining how it affects the protected abortion right—that is, in its treatment of *almost every* challenged provision.

B. Arizona's amendment does not affect measures that simply delay abortions unless the delay "denies, restricts, or interferes with" an individual's "right to" abortion.

Section 8.1 was not ratified in a vacuum, and what Arizona voters chose *not* to say when they adopted the ballot proposal illuminates what they did say. Arizona added a constitutional right to abortion amid similar post-*Dobbs* activity across several States, whose proposals used materially different language. *Compare, e.g.*, Ariz. Const. art. II, § 8.1(A)(1), *with* Mo. Const. art. I, § 36.3, Md. Decl. of Rights art. 48, *and* Ohio Const. art. I, § 22(B). Maximalist formulations in some deep-blue States expressly reached all measures that even "delay" or "burden" abortion. Arizonans more modestly chose to subject laws to heightened scrutiny only when they "deny, restrict, or interfere with" the right to abortion. That textual difference counsels against treating "delay" as an independent trigger without asking whether it occasions denial, restriction, or interference with the protected right.

The constitutional language, simple and straightforward,[3] is reinforced by several canons of construction that disfavor a hidden, freestanding prohibition on all measures that "delay" abortion. Arizona's omission of the word "delay" stands in stark contrast to the inclusion of that term in other States' ballot proposals, which were put forward at the same time by the same national stakeholders. As such, the word "delay" is presumed to have been intentionally omitted. *Cf. State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 604 ¶¶ 62-63 (2017). That inference is bolstered by the negative-implication canon applied in *State v. Roscoe*, 185 Ariz. 68, 71-72 (1996), and by the *noscitur a sociis* canon, since surrounding terms concern only substantive restraints, not temporal ones. *Fann v. State*, 251 Ariz. 425, 435 ¶¶ 28-30 (2021). Just as telling is the dog that doesn't bark: *no* canon of construction counsels interpreting Section 8.1 to include measures that merely delay abortions.

Putting aside whether any of the challenged measures is otherwise unconstitutional (which *amicus curiae* Arizona Right to Life denies), the text of

[3] As with any ballot initiative, the relevant language here needed to be transparent and easy to understand. *See* A.R.S. § 19-125(D). Here, the ballot language was reviewed for misleading or ambiguous language by Arizona's Secretary of State and subsequently and independently by the Arizona Supreme Court *twice*. The first time, the Supreme Court unanimously affirmed a lower decision that the ballot language was neither misleading nor "obscures the principal provisions' basic thrust.'" *Ariz. Right to Life v. Fontes*, No. CV-24-0180-AP/EL, at 2-4 (Ariz. Aug. 20, 2024) (decision order). The second time, it emphasized that *no one* even alleged the ballot language was ambiguous. *Ariz. for Abortion Access v. Montenegro*, No. CV-24-0167-AP/EL, ¶¶ 13-16, 56-57 (Ariz. Apr. 3, 2025).

Section 8.1 makes particularly clear that it does not subject to heightened scrutiny every measure that in any way delays an abortion. Only those measures that substantively limit (by denial, restriction, or interference) the right to abortion must meet the new abortion-specific standard of "super-strict scrutiny."[4]

C. Before fetal viability, Arizona protects only the *right to* abortion, not each abortion, nor the abortion business.

By treating virtually every abortion regulation as interference, the trial court also obscured another textual limitation Section 8.1(A)(1) applies before triggering "super-strict scrutiny." Namely, Section 8.1(A)(1) imposes "super-strict scrutiny" only on measures that "deny, restrict, or interfere with *that right*," referring to the just-enunciated "fundamental right to abortion." Ariz. Const. art. II, § 8.1(A)(1) (emphasis added). That formulation expressly does not include every measure that "denies, restricts, or interferes with" any of the following: "a woman's abortion," "an abortion,"[5] "abortion," "abortion access," "abortion demand," or "abortion supply."

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[4] All other measures are valid so long as the restriction survives typical rational basis review. *See Coleman*, 230 Ariz. at 363 ¶ 43; *Gallardo*, 236 Ariz. at 87–89 ¶¶ 9, 17. That includes all "Two-Trip" and Telemedicine measures the court invalidated, none of which substantively shrinks the scope of Arizona's abortion right, either facially or as applied to any woman in Arizona, and all of which are rationally related to Arizona's legitimate state interest in promoting women's health.

[5] The canon of "the presumption of consistent usage" should have guided the trial court in interpreting Section 8.1's distinctive provisions as having different effects. Long ago adopted by the Arizona Supreme Court in *Rochlin v. State*, 112 Ariz. 171, 176 (1975), and therefore available to the drafters of Section 8.1, this canon imputes

Once again, the language adopted in Arizona is materially distinct from that adopted by other States. Missouri protects decisions about a broad range of reproductive health care, and Maryland protects making and effectuating decisions about pregnancy. Mo. Const. art. I, § 36.2; Md. Decl. of Rights art. 48. Ohio expressly bars directly or indirectly burdening protected exercise, including making and carrying out reproductive decisions. Ohio Const. art. I, § 22(A)-(B). Before fetal viability, Arizona instead protects only "that right"—the fundamental right to abortion. Ariz. Const. art. II, § 8.1(A)(1).

An outright prohibition on abortions of certain types or in specific circumstances or for some women, for example, could meet the threshold of Section 8.1(A)(1), if such a measure would "deny" the right to abortion of some individuals.[6]

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from drafters' use of distinctive language that two constitutional provisions should have different meanings. *See id.* Thus, the fact that Section 8.1 protects "that right" in its subsection applying before fetal viability and "an abortion" in the immediately following subsection, which applies after fetal viability, supports the inference that the drafters were distinctively protecting the "right" to abortion before fetal viability, rather than each abortion or all abortions. *Compare* Ariz. Const. art. II, § 8.1(A)(1) (prohibiting measures that "deny, restrict, or interfere with that right" before fetal viability without satisfying "super-strict scrutiny") *with id.* § 8.1(A)(2) (prohibiting measures that, after fetal viability, "deny, restrict, or interfere with an abortion" that meets a physician-determined standard of protecting a woman's health); *see also Accursio v. Tree House Labs*, LLC, No. CV-25-0028-PR, slip op. at 22 ¶ 57 (Ariz. Sept. 10, 2026) (confirming presumption of consistent usage).

[6] Exclusion criteria, where they do not reflect supreme federal law (like the Reason Ban, *see* Intervenor-Appellants' Br. at 26-28), are one clear example, whether pertaining to certain women or to certain reasons for seeking an abortion. *See* Op. at 23–24, ¶¶ 88, 91–92.

However, most of the regulations relating to abortion do not operate directly to prohibit or deny women abortions. Instead, they have varying impacts on women: some increase a patient's autonomy by securing information and ensuring voluntariness, others theoretically could impede it. *Cf. Northland Fam. Plan. Ctr. v. Nessel*, No. 24-000011-MM, slip op. at 65–66, 69 (Mich. Ct. Cl. May 13, 2025). Unlike in some states with broader amendments, the test in Arizona for separating permissible from impermissible regulations is not whether a measure makes it harder in any way to get an abortion, but whether its operation denies, restricts, or interferes with the right to abortion.

That is neither mere semantics nor a distinction without a difference. A *right* to obtain *X* is not the same as obtaining *X* itself, and it is hornbook law that government need not eliminate every hindrance or inconvenience to exercise of even a fundamental right. All have an "unalienable right" to pursue happiness, *see* Decl. of Independence para. 2 (U.S. 1776), but Arizona need not strike any statute that adds friction to that pursuit. All have a fundamental right to keep and bear firearms, *see District of Columbia v. Heller*, 554 U.S. 570, 592, 595 (2008), but that does not mean every procedural requirement precedent to exercise of that right impairs it. *See B&L Productions, Inc. v. Newsom*, 104 F.4th 108, 118–19 (9th Cir. 2024); *Yukutake v. Lopez*, No. 21-16756, slip op. at 20–22 (9th Cir. Sept. 22, 2026) (en banc). All Arizonans have a fundamental right to vote that may not be "interfered" with, *see*

Ariz. Const. art. II, § 21, but voter registration and election scheduling laws do not interfere with that right even though they delay its exercise, increase costs or inconvenience for some voters, or reduce how many votes are cast. *See State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021) (rejecting inference of impaired voting rights from lower turnout without identified voting barriers or unequal treatment).

So, too, a woman's *right to* abortion is not the same as her *abortion*, and Section 8.1(A)(1) protects the former.[7] Like Americans in 1791 vis-à-vis firearms, Arizonans in 2024 enshrined a fundamental substantive right without declaring every procedure related to its exercise invalid. Section 8.1 is a shield, not a skidder uprooting every potential, even minor, inconvenience in exercising the abortion right. Nor does Section 8.1 guarantee a particular statewide quota or geographical distribution of abortions at a certain price point, much less require Arizona to minimize abortionists' operating costs to maximize their profits. All that matters, constitutionally speaking, is whether it has been demonstrated that a measure denies, restricts, or interferes with an Arizonan's abortion right. The trial court offers no indication that it even looked for such evidence.

[7] Again, voters adopted different protection applicable after fetal viability, and there Section 8.1 uses the distinct phrase "an abortion." Ariz. Const. art. II, § 8.1(A)(2).

i. The laws grouped as the "Two-Trip Requirement" and the "Telemedicine Ban" require separate analysis and do not "deny, restrict, or interfere with" anyone's right to abortion.

Facilitating the court's collapsed analysis, Appellees strategically and misleadingly lump together as a "Two-Trip Requirement" several measures that, even combined, lack *any* impact on any Arizonan's abortion right. A required ultrasound (A.R.S. § 36-2156(A)(1)(a)), in-person Rh test (A.R.S. § 36-449.03(D)(3)(c); A.A.C. R9-10-1509(A)(3)(b)), and informed consent (A.R.S. § 36-2153(A)) do not themselves render or define categories of women ineligible for an abortion or prohibit abortion in any case or degree. They do no more than prescribe medically appropriate steps in providing care and ensure patient autonomy. Following those steps, every patient retains the same substantive abortion entitlement. These steps serve to protect women's health and to no degree deny, restrict, or interfere with the scope of any woman's right to abortion.

ii. Having jumped to "super-strict scrutiny," the court failed entirely to determine whether each challenged law "denies, restricts, or interferes with" the *right to* abortion.

The primary constitutional inquiry thus concerns the patient's right, not a provider's preferred throughput or profit margin. *Cf. Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 689–90 (9th Cir. 2017) (en banc). Nevertheless, having leaped past the primary constitutional question to applying "super-strict scrutiny" to each measure, the court's findings focused on logistical impacts on abortion access, such

as that mandatory delay reduces clinics' capacity to see patients and makes care harder to obtain. Op. at 11, ¶ 26. It also found high-complexity laboratory certification "prohibitively onerous and expensive" for a clinic, with outside Rh results creating additional delay. *Id.* ¶ 29. These findings may relate to a court's application of abortion-only "super-strict scrutiny," but they cannot, without more, subject a measure to "super-strict scrutiny" in the first place.

Instead, the court's economic and operational findings of fact trigger heightened scrutiny under Section 8.1 only if they amount to interference with a patient's protected right to have an abortion. Reduced capacity or higher provider expense is not itself constitutionally dispositive. The court must connect the burden, especially when it is on providers, to the individual's right to abortion, and to the particular requirement responsible for the interference. *See* Ariz. Const. art. II, § 8.1(A)(1); Reply Br. at 13–17.

To be sure, the court also found more serious effects regarding the effect of delay on some patients' abortions given travel burdens and gestational limits on legal abortion. Op. at 10, 12, ¶¶ 25, 35; *see also id.* at 26, ¶ 112. Those findings deserve consideration,[8] but Section 8.1 still requires a demonstrated nexus between a

[8] As does contrary evidence. *See, e.g.*, Caitlin Myers et al., *Predicted Changes in Abortion Access and Incidence in a Post-*Roe *World*, 100 Contraception 367, 368 tbl.1 (2019) (in 2019, mean travel distance of an Arizona woman of reproductive age to an abortion clinic was 17 miles).

particular requirement and those effects.[9] The trial court offers no indication it even tried to find such a showing in the record, and its concomitant failure to rigorously analyze whether any challenged measure does in fact "deny, restrict, or interfere with" exercise of *any* Arizonan's abortion right is reversible error.

a. The Ninth Circuit does not confuse the economic rights of providers with fundamental rights of individuals.

Among the factors the trial court considered in finding the challenged laws burdensome, perhaps the least relevant or appropriate was the costs certain measures imposed on abortion providers. Op. at 11 ¶¶ 26, 29. The Ninth Circuit has expressly distinguished a provider's commercial interests from the patient's protected right. In *Teixeira*, the en banc court rejected an independent constitutional right to sell firearms, then drew an abortion analogy: absent a burden on the woman's right, providers could not claim a freestanding right to perform the service for

[9] For example, although it is possible for delay over key days to narrow the scope of abortions available to a woman, it must first be determined whether that narrowing of abortion access results directly or primarily from the requirements of the challenged laws. The reality of women seeking abortions near or upon (or just after) cutoff points in abortion access is an unavoidable consequence of laws becoming more restrictive as fetal development advances. Such cutoffs will always exist, and moving them one or two days will not necessarily result in a greater number of ill-timed inquiries. Nor, in any one of such difficult cases, is it likely that a last few days' wait related to health and safety requirements, rather than factors affecting the weeks prior to that point, is the *primary cause* of a gestational-age-triggered limitation on a woman's access to an abortion. *See* Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 Contraception 334, 335 tbl.1 (2006) (only 2% of surveyed women who would have preferred to have their abortion earlier delayed at all by a statutory waiting period).

compensation. 873 F.3d at 682, 689–90. *B&L* later applied the acquisition analysis after *Bruen* and upheld sales-location restrictions where customers retained nearby access. 104 F.4th at 118–19. Those decisions direct the court's attention to the effect of the challenged laws on the woman seeking an abortion, rather than the impact of provisions on the Plaintiffs' business arrangements. If the trial court had properly considered the primary question of whether each challenged law "denies, restricts, or interferes with" the "right to abortion," it could not have found such interference simply because of the economic costs imposed on abortion providers like Plaintiffs.

b. **Other fundamental-right decisions distinguish regulation of a means from impairment of a right.**

Moreover, objective procedures may coexist with a fundamental right despite requiring time and effort. *Bruen* expressly preserved nonabusive shall-issue licensing, including background checks and safety courses. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 38 n.9 (2022). Applying that guidance, *McRorey* rejected a preliminary-injunction challenge to background-check processing that could delay firearm transfers for up to ten business days. *McRorey v. Garland*, 99 F.4th 831, 836–40 (5th Cir. 2024). *Yukutake* likewise upheld a thirty-day deadline for using an issued purchase permit and a police-station inspection requirement as modest procedural burdens. No. 21-16756, slip op. at 20–22. By contrast, *Nguyen* invalidated a one-gun-per-thirty-days quota, distinguishing processing for a presumptively valid background check from delay imposed to meter the right's

exercise. *Nguyen v. Bonta*, 140 F.4th 1237, 1241–43 (9th Cir. 2025). Put simply, since some procedural burdens may permissibly coexist with a fundamental right, a trial court must make further findings before concluding those burdens truly amount to "denial, restriction, or interference with" a woman's "right to abortion."[10]

c. The trial court's findings do not meet the high bar for heightened scrutiny under Section 8.1.

The court's dispositive textual failure is that it concluded nothing establishing each challenged measure's impact on the *right to* abortion. Instead, it found only costs, delays, short-term reduced capacity, and—in some margin cases—an inability to obtain an abortion, a natural consequence of a shift in abortion's equilibrium price.[11] At most, these are impacts on Arizona women's *access* to abortions, some of

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[10] *Cf. People of State of New York ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360, 371 (N.D.N.Y. 2001) (finding no violation of federal Freedom of Access to Clinic Entrances Act where patient "did not encounter any significant or unreasonable delay"); *New York by Underwood v. Griepp*, No. 17-CV-3706 (CBA), 2018 WL 3518527, at *44 (E.D.N.Y. July 20, 2018) (same), *aff'd*, 11 F.4th 174 (2d Cir. 2021). To be sure, *Bruen* cautioned that *excessive* fees or wait times could effectively deny the right to bear arms, *see* 597 U.S. at 38 n.9, but that fact only further strengthens a conclusion that the trial court committed reversible error by not in any way examining in its decision whether delays or cost increases (if any) caused by the challenged measures rise to the level of interfering with the right to abortion.

[11] It is nonsense, as a microeconomic matter, to automatically ascribe that price effect to the measures themselves. Economic incidence of a government regulation is never fixed, so abortion suppliers are free to sacrifice some economic rent to internalize delay costs and thus keep patients' out-of-pocket costs from rising. That seems especially possible here given Plaintiffs' claimed concern for their patients and the customarily enormous profit margin extracted for abortion procedures. *See, e.g.,* Choix, Inc., *Annual Report (Form C-AR)*, at ii (May 1, 2023) (65% gross profit margin for major national medication abortion provider); David Barstow, *An*

which operate only indirectly as by reducing the *supply* of abortions by raising the costs of the procedure to Plaintiffs and other abortionists. *See* Op. at 10–13, 15, 23, ¶¶ 23–29, 34–40, 48–49, 84 (describing costs, delays, capacity limits, and access effects); *but see id.* at 10, 12, 26, ¶¶ 25, 35, 112 (also finding that some patients could not obtain abortions). Even the trial court recognized that these burdens simply increase the cost of abortions to women and to doctors; they do not limit women's *right to* an abortion in any way. A gun regulation such as a background check that increases the cost of exercising the Second Amendment right does not unconstitutionally interfere with the right even as it squeezes out the price-sensitive marginal consumer by shifting equilibrium price, supply, and demand. Just so, where Arizona's laws do not "deny, restrict, or interfere with" an individual's "*right to* abortion," Section 8.1 does not subject them to "super-strict scrutiny."

II. Applying "super-strict scrutiny," the trial court further erred by adopting an impoverished understanding of autonomy.

Applying Section 8.1's second step of "super-strict scrutiny" to each of the challenged laws, the trial court found that they universally infringe on "patients'

Abortion Battle, Fought to the Death, N.Y. Times, July 26, 2009 (38% profit on late-gestational-age surgical abortions).

Furthermore, cost alone does not establish impairment of a fundamental right. Gun cases yet again provide an analogue. Two federal courts of appeals recently held increased provider costs are not automatically sufficient to show infringement of customers' Second Amendment right. *Gazzola v. Hochul*, 88 F.4th 186, 195-98 (2d Cir. 2023); *B&L*, 104 F.4th at 118-19. The Ninth Circuit has justified this rule for gun suppliers by parallel to the abortion context. *Teixeira*, 873 F.3d at 689-90.

decision-making autonomy." *See, e.g.*, Op. at 12-13, ¶ 34-40; 15, ¶ 48; 24–26, ¶¶ 98–99, 103–04, 108–09, 114–15. Like the threshold question addressed above, Section 8.1's provision guarding autonomous decision making requires the court to attend to each requirement's operation and determine its particular effect on patients. However, the court again took a shortcut, finding an infringement of autonomy effectively wherever a measure imposed any mandatory requirement. Op. at 12–13, ¶¶ 34 (citing Plaintiffs' expert conclusion finding "coercive" anything that "forces someone to do something they don't want"), 36 (citing patient objections to testing), 37 (citing patient wish not to hear mandatory information).

The trial court offered no positive definition of "autonomy," but its reasoning indicates autonomy consists in patients' ability to refuse unwanted interventions and information while obtaining an abortion as quickly and inexpensively as possible. *See* Op. at 12-13, ¶¶ 34-40; 11, ¶¶ 26, 29. The court's implicit standard that autonomy requires accommodating patients' preference for abortion as completely and efficiently as possible does not reflect peer-reviewed literature, scholarship in medical ethics, or accepted medical practice. *See, e.g.*, Am. Med. Ass'n, *Code of Medical Ethics*: *Opinion 2.1.1—Informed Consent* (2024) (subsection (b)(iii) instructing that physicians, without exception should at minimum disclose burdens and risks of a medical procedure).

Instead, reason and research agree that autonomy concerns *how* a patient chooses, not what decision she makes or how efficiently. Intervenor-Defendants offered expert testimony on the topic of autonomy from Dr. Kristin Collier of the University of Michigan Medical School. Expert Report of Kristin M. Collier, M.D. (Sept. 19, 2025) (ID-240) ("Collier Report"). Citing longstanding principles of medical ethics, Dr. Collier identifies as "autonomous" a decision that is marked by intentionality, understanding, and freedom from coercion. Collier Report ¶ 10. Resources that support those characteristics support a patient's autonomy, even if the patient would not choose them herself, if they might upset or disconcert the patient, or if the patient may become less certain in a particular decision.[12] *Id.* ¶¶ 27, 30.

For example, informed consent requirements safeguard autonomy throughout medical care. They ensure that a patient has material information about the intervention, its risks, and alternatives, including declining treatment. Collier Report ¶¶ 11–17. Arizona's common law links informed consent to understanding the

[12] Autonomy does not correspond to a patient's certainty or wane if a particular intervention changes or confirms her decision. Information may improve deliberation even when a patient does not initially want to receive it and ultimately makes the same choice. Collier Report ¶ 30; *see generally* Paul Kinnersley et al., *Interventions to Promote Informed Consent for Patients Undergoing Surgical and Other Invasive Healthcare Procedures*, 2013 Cochrane Database Syst. Revs., art. CD009445, Abstract, Main Results (July 6, 2013) (review of 65 randomized trials found improved knowledge after consent interventions). The constitutional inquiry therefore cannot depend on a patient's preference or ultimate decision; it must consider whether a requirement supports a patient's autonomous decision making or limits it.

nature, risks, benefits, and alternatives of treatment and choosing voluntarily; it also protects the patient's decision to forgo treatment. *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 216 (1987); *Hales v. Pittman*, 118 Ariz. 305, 308–09 (1978). As Dr. Collier explains, the same principles apply to abortion. Collier Report ¶ 17. A patient who *voluntarily* declines or chooses abortion after receiving accurate, material information exercises improved autonomy over her less-informed self, regardless of whether she reverses her original preference. *See id.* ¶ 30; Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 Cornell J.L. & Pub. Pol'y 1, 25–28 (2011).

Consider a fictional law granting each pregnant woman $10,000 for reproductive health care and related support. Improved financial security would support the freedom from coercion (an aspect of autonomy) of any decision: It might put a desired abortion and recovery within reach. It might also give an expectant mother sufficient financial security to enable her to choose life for a child she fears she otherwise could not afford (40% of abortion-minded women identified financial reasons for seeking abortion). M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health, art. 29, at 4–6 & tbl.2 (2013).) Such a law could reduce the number of abortions in Arizona. If so, voluntary reconsideration and the resulting decrease in aggregate demand would reflect increased, rather than decreased, autonomy.

This example demonstrates that autonomy cannot be measured by the speed with which a woman inquiring about abortion can obtain one, nor by whether a measure facilitates abortions by lowering their cost or making them more widely available, nor yet by increased abortion rates. In short, minimizing the costs (economic and otherwise) of obtaining an abortion does not necessarily maximize autonomy.[13] The Arizona Constitution protects the individual's right to choose abortion and her autonomy; it does not set forth a preference for abortion or measure the scope of a woman's right or her autonomy by how quickly she can obtain an abortion. *See* Ariz. Const. art. II, § 8.1(A)(1), (B)(1)(b); *cf.* Diana Greene Foster, *The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—an Abortion* 279 (2021) (study the trial court found credible defining "reproductive justice" to include choice to carry a pregnancy to term as much as choice to obtain an abortion).

Indeed, long before there was Section 8.1, Arizona made its commitment to women's autonomous decision making concrete with the same mandatory disclosure provisions the trial court now finds coercive. These provisions address assistance for

[13] A mixed-methods study of Wisconsin's ultrasound-display law illustrates the distinction. Most interviewees reported no change in their abortion decision; some reported greater certainty about abortion, and two reported that viewing helped resolve uncertainty toward continuing pregnancy. Ushma D. Upadhyay et al., *Evaluating the Impact of a Mandatory Pre-Abortion Ultrasound Viewing Law: A Mixed Methods Study*, 12 PLoS ONE e0178871, at 16–19 (2017). A procedure count alone cannot distinguish voluntary from impaired choice. *See id.* at 4, 20.

prenatal care and childbirth, support services, freedom from coercion, and withdrawal of consent without forfeiting future care or available benefits. A.R.S. § 36-2153(A)(2)(a)–(e). They also require a private, individual discussion with the patient's provider directed to the patient's circumstances, with an opportunity to ask questions. *Id.* § 36-2153(A)(3); *see* 2009 Ariz. Sess. Laws ch. 172, § 4(A)(2)(a)–(e), (A)(3). If it is not obvious, Dr. Collier explains why alternatives and support resources can be material to a patient's decision whether to have an abortion.[14] Collier Report ¶¶ 13, 22–23. The information Arizona law requires doctors to share with pregnant women supports their autonomous decision making by assuring that they do not make profound and permanent decisions without the "information" that is a defining criterion for autonomy. *See id.* ¶¶ 20, 22-23.

Arizona requires comparable disclosures elsewhere in medicine. Its hospital and surgical-center rules prohibit coercion and require that patients be informed about alternatives, risks, and possible complications, all while preserving consent, refusal, and withdrawal. A.A.C. R9-10-212(B)(2)(d), (3)(a)–(c)(i); *id.* R9-10-909(B)(2)(d), (3)(a)–(c). That requirement specially extends to reproductive services

[14] Dr. Collier also notes that the provisions specify categories of information while leaving clinicians discretion to explain them clearly and with the least avoidable discomfort. Collier Report ¶ 29. She further explains that appropriate informed consent advances patient health because autonomy is a component of health. *Id.* ¶ 16. And truthful, material disclosure does not undermine autonomy merely because it is upsetting. *Id.* ¶¶ 15, 25.

other than abortion, even to midwifery, A.A.C. R9-16-108(C)(1)-(2), (D); *id.* R9-16-109(A); R9-16-110, and holds equally for telemedicine. A.R.S. § 36-3602(A), (G).

In every case, these mandatory disclosures for other medical procedures coexist with and support a patient's autonomy. So, too, Arizona's abortion informed consent law merely requires similar information about a medical procedure and risks and alternatives a reasonable patient would consider material. *Id.* § 36-2153(A)(1)(b)–(d). Such accurate disclosures perform the familiar informed-consent function of helping a patient decide whether to authorize treatment. *See* Collier Report ¶¶ 13, 17, 19–20. Inadequate disclosure sounds in medical negligence, *see Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 310-11, ¶¶ 13-20, 313-14 ¶¶ 31-34 (2003), and can even constitute medical malpractice, *Francisco v. Affiliated Urologists Ltd.*, 258 Ariz. 95, ¶¶ 22-31 & n.5 (2024).

The clinical literature also distinguishes facilitating informed deliberation from simply facilitating a completed abortion. For instance, the National Academies describes understandable information, opportunities for questions, decision support, and confirmation of voluntary consent as elements of abortion care. *See* Nat'l Acads. of Scis., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States* 46–48 (2018). Again, it is not self-evident that any measure that imposes any delay

of abortion access (even if it results in reducing abortion rates) diminishes a patient's autonomous decision making.[15]

Consider again the $10,000 law, subjected to the analysis proposed by the trial court. Skipping the initial empirical assessment as to whether a law "interferes with" the right to abortion, the court would subject this, like all "regulations of abortion" to the wood-chipper of "super-strict scrutiny." *See supra* Section I. Once under "super-strict scrutiny," the trial court below would very likely strike this law for the same reason that it invalidated the laws making up the Two-Trip Requirement and the Telemedicine Ban: it delays a woman's acquisition of an abortion without a health-related reason that meets the standards of Ariz. Const. art. II, § 8.1(B)(1)(a). Per the trial court, this alone suffices to violate autonomy. *See, e.g.*, Op. at 12, ¶ 34.

However, this example demonstrates several realities that the trial court does not consider: that many women, if truly autonomous, would choose against aborting their children. Moreover, many women's decisions to have an abortion do not come down to considerations of pure physical health. *See* Biggs et al., 13 BMC Women's Health, art. 29, at 4–6 & tbl. 2; Foster, *supra*, at 34-35 tbl.1 (in survey of 954 abortion

[15] Indeed, in a study the trial court deemed credible, a section the court did not cite reported that sixty percent of women who were denied an abortion because they just missed a state's gestational-age cutoff were *happy* that they were still pregnant when interviewed a week later. Foster, *supra*, The *Turnaway Study* at 121. If anything, that is likely an underestimate given the likelihood of selection bias in the Turnaway Study's design due to abortion-clinic staff choosing which patients would be asked to participate in its surveys. *See id.* at 10-17.

patients hand-selected by abortion clinic staff, only 4% actively did not want their child, while 5% were pressured into their abortion); *see also id* at 10-17 (describing survey methodology). And, finally, that delay, even where it results in a change in a woman's decision about abortion, is not a *per se* threat to women's autonomy.

Instead, as Intervenor-Defendants argued before the trial court, where "delay" is for the purpose of providing support for women who are considering abortion, whether or not that support is sought, time for meaningful deliberation can *promote* and *increase* autonomy. *See* Intervenor-Defs.' Prehearing Br. 12–13 (citing ID-242 ¶¶ 35–40; ID-240 ¶¶ 32–37; ID-241 ¶¶ 30–36, and arguing that a waiting period promotes an informed, considered decision).[16] The best available RCT data from

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[16] The trial court put heavy weight on—and appears to have credited without verifying—Appellee expert witness M. Antonia Biggs's characterization that the Turnaway Study shows that delay or effective denial of an abortion causes patients mental harm. *See* Op. at 14 ¶ 44. That is not in fact what the study found. As its pro-choice lead researcher writes in reference to women denied an abortion they wanted, "once the pregnancy was announced, the baby born, and the unknown fears and expectations realized or overcome, the trajectory of mental health symptoms seems to return to what it would have been if the woman had received an abortion. I admit I was surprised about this finding. I expected that raising a child one wasn't planning to have might be associated with depression or anxiety. But this is not what we found over the long run. **Carrying an unwanted pregnancy to term was not associated with mental health harm.** Women are resilient to the experience of giving birth following an unwanted pregnancy, at least in terms of their mental health…. Mental health outcomes improved among all groups of women over time." Diana Greene Foster, *The Turnaway Study* at 108 (emphasis added).

Appellees' trial expert knew or should have known she mischaracterized the Turnaway Study because the study accurately cited that expert's own previous research to further support that conclusion. *See id.* at 108 fig. 2 (adapted from M.

across healthcare amply demonstrates that, like financial security, both time and information are enhancers of autonomy. *See, e.g.*, Paul Kinnersley et al., *Interventions to Promote Informed Consent, supra* note 13, 2013 Cochrane Database Syst. Revs., art. CD009445. The trial court was wrong to ignore such evidence here to consider instead the economic factors raised by Plaintiffs that principally implicate only abortion providers' bottom lines.

CONCLUSION

For all the above reasons, and for the sake of protecting the genuine autonomy of Arizona women, *amicus curiae* Arizona Right to Life urges this Court to reverse the judgment of the Superior Court.

October 15, 2026 Respectfully submitted,

Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74(2) JAMA Psychiatry 169 (2017)).

Curiously omitted from pro-choice messaging about The Turnaway Study, that study finds (and collects peer-reviewed research from pro-choice researchers also finding) that being denied an abortion does not correlate with any of several manifestations of mental health either. *Id.* at 113 & fig.3. Or have any impact on a woman's ability to achieve her aspirations, any lasting impact on earnings, or any impact at all on a woman's economic opportunity or educational achievement. *Id.* at 168, 179-80.

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ARIZONA COURT OF APPEALS

DIVISION ONE

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