

IN THE
Supreme Court of the United States

MARK BRNOVICH, in his official capacity as Attorney General of Arizona,

Applicant,

v.

PAUL A. ISAACSON, M.D.; ERIC M. REUSS, M.D., M.P.H.; ARIZONA MEDICAL
ASSOCIATION; NATIONAL COUNCIL OF JEWISH WOMEN (ARIZONA SECTION), INC.;
and ARIZONA NATIONAL ORGANIZATION FOR WOMEN,

Respondents.

**APPENDIX TO
RESPONSE IN OPPOSITION TO APPLICATION FOR PARTIAL STAY**

**To the Honorable Elena Kagan, Associate Justice and
Circuit Justice for the Ninth Circuit**

Jessica Sklarsky
Counsel of Record
Gail Deady
Catherine Coquillette
Center For Reproductive Rights
199 Water Street
New York, NY 10038
Telephone: (917) 637-3600
jsklarsky@reprorights.org

Jen Samantha D. Rasay
Center For Reproductive Rights
1634 Eye Street, NW, Suite 600
Washington, DC 20006

Alexa Kolbi-Molinas
Rebecca Chan
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004

David Cole
American Civil Liberties Union
Foundation
915 15th Street, NW
Washington, DC 20005

[Additional on Next Page]

Counsel for Respondents

Victoria Lopez
American Civil Liberties Union
Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Paul A Isaacson, et al.,

No. CV-21-01417-PHX-DLR

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Plaintiffs,

ORDER

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v.

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Mark Brnovich, et al.,

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Defendants.

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Defendants move for a stay of the Court’s September 28, 2021 preliminary injunction order (Doc. 52), but only to the extent it preliminarily enjoins § 2 of the Act. (Doc. 57.)

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A stay pending appeal is not a right, it is a case-by-case exercise of judicial discretion guided by four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The first two are the most critical. *Id.* at 434. Regarding the first factor, a movant need only show that there is a substantial case for relief on appeal. *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). As for the second, the movant must show more than some possibility of irreparable injury; it must establish that there is a probability of irreparable injury if a stay is not granted. *Id.* at

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1 1214.

2 Even assuming Defendants can make out a substantial case for relief on the merits
3 of their appeal, a stay pending appeal is unwarranted because Defendants have not
4 established a probability of irreparable injury in the absence of a stay, and a stay likely
5 would substantially injure other parties interested in the proceeding. Defendants argue
6 that they will be irreparably harmed absent a stay because the Court's preliminary
7 injunction order will preclude Arizona from carrying out the laws passed by its
8 democratic process. (Doc. 57 at 13); *but see Marbury v Madison*, 5 U.S. 137 (1803)
9 (establishing principle of judicial review, which necessarily authorizes courts to preclude
10 the enforcement of laws enacted through the democratic process when courts determine
11 that those laws violate the Constitution). Defendants further argue that "Plaintiffs and
12 their patients, by contrast, will suffer no irreparable harm in the absence of preliminary
13 relief. As the Court concluded, the Reason Regulation will not prohibit any woman from
14 obtaining an abortion. And Plaintiffs cannot manufacture harm to their patients by
15 refusing to provide abortions based on speculative and unreasonable fears about the
16 potential reach of the law." (Doc. 64 at 8.) Defendants' argument overstates the injury to
17 Arizona and minimizes the harms to Plaintiffs and their patients by misconstruing the
18 Court's preliminary injunction order.

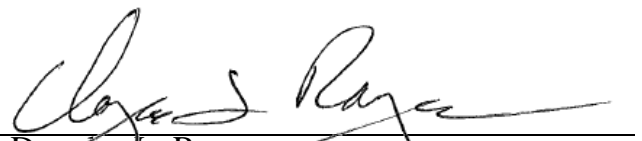
19 Beginning with the harm to Arizona, even though "a state may suffer an abstract
20 form of harm whenever one of its acts is enjoined," that "is not dispositive of the balance
21 of harms analysis. If it were, then the rule requiring balance of competing claims of
22 injury would be eviscerated." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572
23 F.3d 644, 658 (9th Cir. 2009) (internal quotation and citation omitted), *vacated and*
24 *remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565
25 U.S. 606 (2012); *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) ("Individual
26 justices, in orders issued from chambers, have expressed the view that a state suffers
27 irreparable injury when one of its laws is enjoined. No opinion for the Court adopts this
28 view." (internal citations omitted)). Indeed, this Court has previously explained that

1 “[a]lthough a state suffers a form of irreparable injury whenever it is enjoined from
2 implementing its laws, that injury alone does not support a stay when balanced against
3 the harms a stay would impose on others.” *Arizona Democratic Party v. Hobbs*, No. 20-
4 01143-PHX-DLR, 2020 WL 6555219, at *1 (D. Ariz. Sept. 18, 2020) (internal citation
5 omitted).

6 Such is the case here. Defendants argue otherwise only because they misread the
7 Court’s order. Although the Court found that the plain language of § 2 did not outright
8 ban pre-viability abortions because of a fetal genetic abnormality, the Court nonetheless
9 found that enforcement of the Reason Regulations likely would make it substantially
10 more difficult for women seeking to terminate their pre-viability pregnancies because of a
11 genetic fetal abnormality to receive constitutionally protected care. The Court also found
12 Plaintiffs’ fears about the potential reach of the law to be reasonable and supported by the
13 evidence, the plain language of the law, and common sense. Under these circumstances,
14 Defendants’ abstract injury is outweighed by the real-world harms a stay would visit
15 upon the provider Plaintiffs and their patients.¹

16 **IT IS ORDERED** that Defendants’ motion for a stay pending appeal (Doc. 57) is
17 **DENIED**.

18 Dated this 18th day of October, 2021.

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22 Douglas L. Rayes
23 United States District Judge
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27 ¹ Moreover, Defendants’ argument about the harms to a state whenever it is
28 enjoined from enforcing a democratically enacted law is undermined by their decision to
appeal only a portion of the Court’s preliminary injunction order—evidently this harm is
tolerable as it pertains to the other enjoined portions of the Act.