No. 09-17673

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TUCSON WOMEN'S CENTER, et al.,

Plaintiffs-Appellants,

v.

ARIZONA MEDICAL BOARD, et al.,

Defendants-Appellees,

ARIZONA CATHOLIC CONFERENCE and CRISIS PREGNANCY CENTERS OF GREATER PHOENIX,

Defendants-Intervenors-Appellees.

On Appeal from the District Court of Arizona, No. 09-01909

BRIEF OF *AMICI CURIAE* ARIZONA LEGISLATORS IN SUPPORT OF THE DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

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STATEMENT OF INTEREST[1]

Amici Curiae Senators Chuck Gray (C), Linda Gray[2] (C), Thayer Verschoor (P), and Russell Pearce (P), and Representatives Frank Antenori, Cecil Ash (P), Nancy Barto[3] (P), Andy Biggs (P), Judy Burges (P), Sam Crump (C), David Gowan (P), Laurin Hendrix (C), Debbie Lesko (P), Nancy McLain (C), Steve Montenegro (C), Warde Nichols (P), Doug Quelland (C), Carl Seel (C), David Stevens (C), and Steve Yarbrough (P) are legislators in the State of Arizona.[4] As stated by the U.S. Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Amici* have a strong interest in protecting the health and welfare of women in the state of Arizona.

To that end, *Amici* enacted ARIZ. REV. STAT. ANN. § 36-2153[5] in 2009, intended to protect the health and welfare of women by ensuring that women

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[1] According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

[2] Senator Gray originally attempted to intervene in this case, but her motion was denied by the district court.

[3] Representative Barto originally attempted to intervene in the case, but her motion was denied by the district court.

[4] (P) denotes a Principal sponsor of the bill, and (C) denotes a Co-sponsor of the bill.

[5] Subsection (D) provides that a person shall not "require or obtain payment for a service provided to a patient who has inquired about an abortion or scheduled an

considering abortion receive all information pertinent to making those decisions. *Amici* were also concerned that women not be coerced into unwanted abortions simply because they had already paid for those abortion services.

Amici also have an interest in ensuring that the constitutional laws they pass are affirmed by the courts and enforced in the State. *Amici Curiae* urge this court to affirm the decision of the district court below.

SUMMARY OF ARGUMENT

A bedrock principle in statutory interpretation is to look to the legislature's intent in framing a statute. It is a longstanding standard in the federal courts, as well as in the state courts of Arizona. "When construing statutes, [the court's] goal is 'to fulfill the intent of the legislature that wrote it.'" *Zamora v. Reinstein*, 915 P.2d 1227, 1230 (Ariz. 1996) (citation omitted). Legislative intent is determined by reading the statute as a whole and considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose. *Id.* Statutes are interpreted "in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question." *Id.* (citation omitted).

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abortion until the expiration of the twenty-four hour reflection period...." ARIZ. REV. STAT. ANN. § 36-2153(D).

The payment provision at issue here, § 36-2153(D), is tied directly to the 24-hour reflection period in the informed consent provisions—provisions with a legislative purpose repeatedly affirmed by the U.S. Supreme Court. It is in that context that the legislature's clear intent can be gleaned. The legislature intended to protect women from the harms of abortion, and in doing so protected them from having to pay for any potentially unwanted abortion services before receiving and considering all of the information necessary to making a fully-informed choice.

It is a pro-woman provision; a provision which places the woman's interest in health and prosperity above the abortionist's interest in prepayment for a procedure that may never occur. During a hearing before the Health and Human Services Committee (February 25, 2009), Representative Nancy Barto, one of the principal sponsors of the bill and Chairman of the committee, read the following into the record:

> **I am committed to protecting Arizonans' right to make informed decisions about their medical care. I will aggressively pursue any company that deceives consumers and puts profit ahead of patient well-being.**[6]

The intent of the legislature in protecting women is clear.

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[6] This statement was originally made by Arizona Attorney General Terry Goddard in regard to the drug company Bayer Corp., but was utilized by Representative Barto when she read it into the legislative record.

ARGUMENT

I. THE U.S. SUPREME COURT HAS CONTINUALLY AFFIRMED THE STATES' INTEREST IN PROTECTING WOMEN FROM THE HARMS OF ABORTION

The U.S. Supreme Court has repeatedly affirmed the states' interest in protecting women from the harms of abortion. *See generally, Gonzales v. Carhart*, 550 U.S. 124 (2007); *Casey*, 505 U.S. 833. "*Roe v. Wade* was express in its recognition of the State's 'important and legitimate interests in preserving and protecting the health of the pregnant woman....'" *Casey*, 505 U.S. at 875-76. "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878.

The Court has specifically held that informed consent provisions such as those found in § 36-2153 are an integral part of protecting women's health and welfare. Recognizing in *Casey* that abortion is a "unique act" and "fraught with consequences... for the woman who must live with the implications of her decision," the Court held that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.* at 852, 873.

The Court explicitly concluded that the "State may enact regulations to further the health or safety of a woman seeking abortion," and that "[t]he idea that important decisions will be more informed and deliberate if they follow some

period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id.* at 878, 885.

The Court was particularly concerned for women's mental health, stating:

> It cannot be questioned that psychological well-being is a facet of health.... In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Id. at 882.

In *Gonzales v. Carhart*, the Court again explicitly acknowledged that abortion can have devastating consequences, stating, "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." *Gonzales*, 550 U.S. at 159 (citation omitted). The Court specifically held that a state has an interest in ensuring that "so grave a choice is well informed." *Id.*

Thus, the Court has held firm to its decision that informed consent provisions facilitate the "wise exercise" of the abortion decision, and thus cannot be classified as an interference with *Roe*. *Casey*, 505 U.S. at 887. Furthermore, the Court has conclusively stated that a state can distinguish between abortion and "other medical procedures" because "abortion is inherently different" and that "no

other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

This constitutional jurisprudence formed the framework of § 36-2153. The intent is clear, as it is in the other 32 states[7] maintaining informed consent requirements: To protect women from the harms of abortion by providing them with all the information pertinent to making the decision, and to ensure that women are not pressured into unwanted abortions.

II. IN LIGHT OF THE STATE'S AFFIRMED INTERESTS, THE LEGISLATURE'S INTENT IS CLEAR AND § 36-2153 IS NOT VAGUE

When considered in light of the aforementioned Court-affirmed interests, it is clear that the legislature's intent in enacting the payment provision in § ARIZ. REV. STAT. ANN. § 36-2153 was to protect women considering abortion and ensure that they have received all pertinent information before obtaining an abortion. Forcing women to pay for abortion services before they have fully contemplated all of the pertinent information can serve only to push some women into abortions that they otherwise would have decided against.

Medical studies have revealed that the majority of women feel pressured into abortion. For example, in a study published in a major international journal, 64 percent of American women reported feeling pressured by others to have an

[7] Twenty-four of these states also require one-day reflection periods.

abortion.[8] This feeling of helplessness and coercion can only be exacerbated by requiring women to pay for abortion services before they have fully considered all of the state-prepared information and materials. A woman may feel inclined to choose childbirth over abortion after reviewing the information, but feel trapped because she has already paid for the abortion services up front.[9] If the woman is already being pressured by outside sources, she may not be able to overcome the added coercion of having already paid for the abortion services.[10]

It was to protect against this potential coercion caused by payment requirements at abortion clinics that § 36-2153(D) was enacted. Allowing Plaintiffs to require payment up front for abortion services that may never occur

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[8] Vincent M. Rue et al., *Induced abortion and traumatic stress: A preliminary comparison of American and Russian women*, MED. SCI. MONIT. 10(10):SR5-16 (2004). The study compared American and Russian women.

[9] If she so chooses, a woman will be forced into the often embarrassing position of going back to the abortion clinic and attempting to get her money back. Not many woman will choose to do so, finding the encounter entirely too daunting.

[10] In an effort to support their motion for preliminary injunction, Plaintiffs submitted 92 methodologically-flawed "declarations" of post-abortive women, attempting to show how the 24-hour reflection period would affect the women. What is glaringly lacking from these "declarations" are questions asking women whether the women have been pressured to choose abortion, or whether prepaying for an abortion would push her to go through with an abortion she may be unsure about after that 24-hour reflection period. However, in a hearing before the Committee on Health and Human Services (February 25, 2009), witness and post-abortive woman Victoria Lactash (phonetic) testified that the attitude she met at the abortion clinic was "**give me your money**."

undermines the very purpose of informed consent and a time of unbiased reflection by the woman. As the district court stated, this Act "regulates abortion and nothing more.... No other kind of health care is regulated." *Tucson Women's Center v. Arizona Medical Board*, 2009 U.S. Dist. LEXIS 95275, **46, 47 (D. Ariz. Sept. 30, 2009). The context and legislative intent of a payment provision tied to a Supreme Court-affirmed informed consent statute could not be any clearer.

III. THE WOMAN'S INTEREST IN FULLY INFORMED CONSENT OUTWEIGHS THE ABORTIONISTS' INTEREST IN PREPAYMENT

The Plaintiffs in this case have shown their true colors. Providing abortions is all about monetary gain—not women's health.

The Declaration of William Richardson is telling.[11] In paragraph 21, he stated, "[T]he Act requires me and my staff to schedule appointments ... during which I must provide the patient with state-mandated information.... The Act then prohibits me from charging my patient for the time I and my staff have spent with her, and for any services I provide during the course of that visit, until 24-hours later.... [S]ome patients will never return to my office, and I will therefore never be paid for some of the state-mandated counseling visits." In other words, Dr.

[11] Plainitffs' Motion for Preliminary Injunction, Exhibit 1 (Dist. Ariz. Docket No. 5, Attachment 1).

Richardson is worried (unduly so, as is evidenced below) that he might not be paid for counseling in which the woman received truthful information about abortion that causes her to change her mind. He is more concerned about being paid for this counseling, as opposed to being concerned that the woman receive all of the pertinent information and make the choice that is best for her.

It is clear from the Appellants' brief that their main concern is getting paid—not in providing the best care to women. Plaintiffs claim that they provide abortions only after their patients have been "counseled" about the procedure—on the same day and right before the abortion. Appellant Brief, at 8. However, Plaintiffs also state that patients who are not using insurance to pay for their abortions are required to pay for their services "***up-front***." *Id.* at 8-9. In other words, under Plaintiffs' current system, women pay for abortion services up front, before receiving any kind of information about abortion. It is this kind of coercive business practice that § 36-2153(D) was enacted to guard against. And it is this kind of coercive business practice that undermines the clear, court-affirmed intent of informed consent statutes.

What the Plaintiffs disingenuously argue in their Appellant Brief is that Plaintiffs will never be paid under § 36-2153(D). That interpretation itself is contrary to the clear language of the provision. For example, Plaintiffs make the ridiculous claim that "every time an obstetrician has a patient who inquires about

an abortion early in her pregnancy, the physician will be forced to choose between forgoing payment for all prenatal services over the course of her pregnancy," or risking suspension or revocation of his license. Appellant Brief at 23. This is a blatant attempt to mislead the Court as to the clear language of § 36-2153.

Under the statute, there is nothing preventing a physician from charging the woman for services already rendered, 24 hours after the physician has provided the necessary informed consent information and materials. It is simply not true that the physicians will never get paid. There is nothing in the statute preventing the Plaintiffs from billing at a later time, or billing prior to an abortion as long as it is 24 hours after the informed consent materials were given to the woman. The statute only regulates when the physician gets paid—not whether he gets paid.

Plaintiffs' request for relief also sheds light on their monetary priorities. Plaintiffs have argued for an injunction of the entire payment provision—and not just the "inquired about" language they allege is ambiguous—which is contrary to the Supreme Court's guidance in *Ayotte v. Planned Parenthood* to vacate an injunction because the lower court enjoined all aspects of the law—and not just the allegedly unconstitutional aspects. 546 U.S. 320 (2006).[12] Again, the abortionists'

[12] The Court also acknowledged that the "touchstone" for any decision about remedy is legislative intent—and as demonstrated here and understood by the district court below, that intent was to protect women from paying for abortion services they may end up wanting to avoid. *Ayotte*, 546 U.S. at 330.

true aim is clear: to obliterate the payment provision altogether—and not just that portion they allegedly do not (but in reality do) understand.

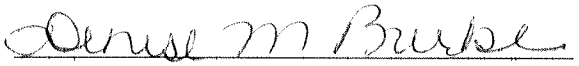
The payment provision protects women. The legislature's intent is clear from the face of the statute that women must not be forced to pay for potentially unwanted abortion services until after the expiration of the 24-hour reflection period. The Plaintiffs are challenging this portion of the law, not because they are concerned for their patients, but because they want to gain financially. Conversely, the State has protected the consumer—the woman—from paying for a service that is potentially unwanted. The Plaintiffs know what is required of them—they simply do not want to abide by it.

In order to fully protect women and ensure that their decisions to abort are informed and free from any form of monetary coercion, this Court must uphold the decision of the court below.

CONCLUSION

The judgment of the District Court Arizona must be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2,570 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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PROOF OF SERVICE

I hereby certify that on 2/02/2010, I served two paper copies of the foregoing Brief of *Amici Curiae* to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid:

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